WORLD TRADE ORGANIZATION CASE REVIEW 2015[1]

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[1] This *WTO Case Review* is the 16th in our annual series on substantive international trade adjudications issued by the Appellate Body of the World Trade Organization. Each Review explains and comments on Appellate Body reports adopted by the WTO Dispute Settlement Body during the preceding calendar year (1 January through 31 December), excluding decisions on compliance with recommendations contained in previously adopted reports. Our preceding Reviews are:

- *WTO Case Review 2014*, 32 ARIZ. J. INT'L & COMP. L. 497-646 (2015).
- *WTO Case Review 2013*, 31 ARIZ. J. INT'L & COMP. L. 475-510 (2014).
- *WTO Case Review 2012*, 30 ARIZ. J. INT'L & COMP. L. 207-419 (2013).
- *WTO Case Review 2011*, 29 ARIZ. J. INT'L & COMP. L. 287-476 (2012).
- *WTO Case Review 2010*, 28 ARIZ. J. INT'L & COMP. L. 239-360 (2011).
- *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. 83-190 (2010).
- *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113-228 (2009).
- *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75-155 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299-387 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107-345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99-249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317-439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143-289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457-642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001).

We are 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.

The WTO reports we discuss are available on the web site of the WTO, at https://www.wto.org/english/tratop_e/dispu_e/dispu_e.htm. The texts of the WTO agreements we discuss are available on the WTO web site, http://www.wto.org/english/docs_e/legal_e/legal_e.htm. Those texts also are published on the University of Kansas School of Law Library Research and Study Guide Web Page on International Trade Law, http://guides.law.ku.edu/intltrade, from which they may be freely downloaded.

We endeavor to minimize footnotes and, toward that end, provide citations to indicate sources from which various portions of our discussion are drawn.

Finally, in researching and writing the *WTO Case Reviews* over many years, it is apparent to us the Appellate Body has developed a large *corpus* of decisional law that it applies, as would courts, in many domestic legal settings with their own jurisprudence. Where appropriate, we point out the key "precedents" the Appellate Body cites, and/or refer to our prior *WTO Case Reviews* or books. Doing so highlights the emergence and force of a "common law" of international trade, and allows readers to trace back a remarkable evolution in the history of the international rule of law.

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Relations, Royal Society for Asian Affairs, and Fellowship of Catholic Scholars. Author of INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK (LexisNexis, 4th ed., 2 vols., 2015), MODERN GATT LAW (Thomson: Sweet & Maxwell, 2nd ed., 2 vols., 2013), TPP OBJECTIVELY (Carolina Academic Press, 2016), TRADE, DEVELOPMENT, AND SOCIAL JUSTICE (Carolina Academic Press 2003), DICTIONARY OF INTERNATIONAL TRADE LAW (LexisNexis, 3rd ed., 2015), and UNDERSTANDING ISLAMIC LAW (SHARĪ'A) (Carolina Academic Press, 2nd ed., 2016). The discussion of the cases herein may appear in modified form in the INTERNATIONAL TRADE LAW textbook and/or MODERN GATT LAW treatise. *See also Raj Bhala*, WIKIPEDIA, http://en.wikipedia.org/wiki/Raj_Bhala (last visited Apr. 21, 2016).

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I. INTRODUCTION

In November 2015, the WTO's dispute settlement system recorded its 500th request for consultations, for an average of 50 requests for consultation per year.[6] This compares to 300 disputes brought under the General Agreement on Tariffs and Trade during the 47 years in which the GATT was in force.[7] WTO Director Roberto Azevedo, while recognizing that the system has served the WTO membership "extremely well," has also recognized along with many others that the "high demand is testing our capacity."[8] As our recent annual WTO case review confirms, the cases in addition to being numerous are also becoming increasingly more complex.[9]

That being said, the number of Appellate Body Reports adopted each year since 1996[10] has fluctuated, from a low of one in 2013 to a high of eleven in 2000.[11] During 2015, the Dispute Settlement Body adopted six regular and two Article 21.5 Appellate Body Reports.[12] Thus, 2015, like 2014, was "one of the busiest years in the history of the WTO dispute settlement system,"[13] as reflected in this WTO Case Review. It addresses the six regular Appellate Body reports that were approved by the Dispute Settlement Body (DSB) during 2015.

Just as the complexity of the cases has increased, so has their length. For example, in the 1981 GATT case, *Spain—Tariff Treatment of Unroasted Coffee*, the panel report required only eight pages. The 2014 case, *China—Rare Earths,*

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[6] *WTO Disputes Reach 500 Mark,* WTO SECRETARIAT, (Nov. 10, 2015), https://www.wto.org/english/news_e/news15_e/ds500rfc_10nov15_e.htm.

[7] *Id.*

[8] *Id.*

[9] *See id.*

[10] While the WTO's Dispute Settlement Understanding entered into force January 1, 1995, the 9-12 months or more for the panel process to be completed meant that the first appeals were not filed until 1996.

[11] *See* Kara Leitner & Simon Lester, *WTO Dispute Settlement 1995-2014—A Statistical Analysis,* 18 J. INT'L ECON. L. 203, 209 (2015).

[12] *See DSCs for WTO Panel/Appellate Body Reports*, WORLDTRADELAW.NET, http://www.worldtradelaw.net.ezproxy.law.arizona.edu/static.php?type=dsc&page=dscpage (last visited Dec. 28, 2015) (listing all panel and appellate body reports chronologically from 1995, with dates of adoption by the DSB). The WTO Case Reviews address the Appellate Body reports (excluding the 2.15 reports relating to disagreements among the Parties as to whether compliance with an earlier report has been achieved) adopted by the DSB each calendar year.

[13] *See* Fernando De Mateo [General Council President], *WTO Dispute Settlement Body—Developments in 2014,* WORLD TRADE ORG., (Mar. 24, 2015), https://www.wto.org/english/tratop_e/dispu_e/fmateo_14_e.htm (reporting on developments in dispute settlement for 2014).

required 257 pages not including the annexes.[14] The Appellate Body secretariat has taken steps in recent years to reduce the length of the reports. An example is relegating what had been a lengthy recitation of the arguments raised by the Parties and Third Participants to annexes. This has reduced, although not eliminated, redundancies and repetitive statements in the reports. The Members also bear considerable responsibility in some proceedings for bringing issues before the Appellate Body on appeal that either have little chance of success or even if successful will have little impact on the final result, as with several of China's issues on appeal in *China—HP-SSST*, as discussed in Part V below, where the three principal Parties (Japan, the EU, and China) raised a total of 20 issues on appeal.[15] It is thus no surprise that the Appellate Body in many of its cases is simply unable to meet the 90-day maximum authorized period from the date of the appeal to the date the report is issued.[16] To take a single recent example relating to a relatively straightforward case, *China—HP-SSST,* the Parties filed the Notices of Appeal by May 20 and May 26, 2015, and circulated the Appellate Body Reports on October 14, 2015, 141 days later.[17] In 2014, the Appellate Body found it necessary to request from the DSB extensions of time beyond the 90-day limit in four of the seven cases before it that year and all were granted.[18]

Little likelihood of speeding up the Appellate Body (and panel) process exists. As Director-General Azevedo explained to the DSB, the delays are attributable to budgetary limitations, the difficulty of recruiting and retaining qualified and experienced lawyers to work in the dispute settlement divisions at the WTO, and the fact that there are only seven members of the Appellate Body.[19] Temporary measures, such as reassigning other lawyers in the secretariat to dispute settlement and hiring additional attorneys on temporary contracts, have been implemented.[20]

In the absence of a decision by the membership to increase the size of the Appellate Body from seven to nine or ten members, or to provide the members with full-time rather than part-time positions—either of which would require amendment of the Dispute Settlement Understanding (DSU)—or also to

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[14] *Id.*

[15] Appellate Body Report*, China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SSST) from Japan*, WT/DS454/AB/R (*adopted* Oct. 28, 2015); *WTO Appellate Body Report, China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes (HP-SST) from the European Union*, WT/DS460/AB/R (*adopted* Oct. 28, 2015) [hereinafter Appellate Body Report, *China—HP-SSST*].

[16] *See Understanding on Rules and Procedures Governing the Settlement of Disputes*, WORLD TRADE ORG., https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm#17 (last visited April 15, 2016). Realistically, once a report is completed the secretariat requires about two weeks to translate it from English into French and Spanish.

[17] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶¶ 1.22, 1.23, cover.

[18] *See* De Mateo, *supra* note 13 (noting that extensions had been requested and granted in four cases).

[19] *See id.* (reporting on the Director-General's comments).

[20] *Id.*

substantially increase the budget allocated to the dispute settlement secretariats, delays are likely to remain the norm rather than the exception. In any given year, the members of the Appellate Body must travel to Geneva a minimum of six to eight times. With six of the seven members—those from China, India, Korea, Mauritius, Mexico and the United States—required to spend at least a day in transit in each direction between their country of residence and Geneva, the efficiency of the Appellate Body could be greatly increased if the members were asked to reside in Geneva and were compensated accordingly. In other words, if WTO Members are sufficiently concerned about the delays in the issuance of panel and Appellate Body reports, it is well within their power to correct the situation.

II. DISCUSSION OF THE 2015 CASE LAW FROM THE APPELLATE BODY

A. GATT Obligations—Import Restrictions and Articles VIII and XI

1. Citation

Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, and WT/DS445/AB/R (adopted Jan. 26, 2015).[21]

2. Background[22]

[21] Appellate Body Report, *Argentina—Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015) (*adopted* Jan. 26, 2015) [hereinafter Appellate Body Report, *Argentina—Importation of Goods*]. The focus herein is on the U.S. case and Report. The Appellate Body issued a single Report, essentially treating the three Panel Reports as a consolidated case, with minor differences it explains in the Note on the cover page of its Report concerning Section 6 (concerning Findings and Conclusions). All other Sections and (1 through 5) and Annexes are the same for the cases. So, the single-document Report in essence consolidates the cases brought by the EU, United States, and Japan.

At the Appellate Stage, there were 14 Third Parties: Australia, Canada, China, Ecuador, Guatemala, India, Israel, Korea, Norway, Saudi Arabia, Switzerland, Taiwan, Thailand, and Turkey. The participation of China and Taiwan and of Israel and Saudi Arabia as Third Parties on the same case is a commendable achievement of the WTO adjudicatory forum in bringing together Members that otherwise have strong political disagreements.

[22] This case is covered in RAJ BHALA, INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK, Vol. I, Ch 7 (4th ed. 2015). The discussion herein draws on that treatment, along with Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶¶ 1:1-1:25, 4:2-4:22. Regrettably, the Appellate Body failed to consolidate the discussion of the facts into a single, concise section, but strewed them

In 2009, to help protect domestic industries reindustrialize and reduce the trade deficit amidst deteriorating global economic conditions, Argentina returned to the kinds of managed trade measures for which it was infamous from the 1930s to 1976—namely impeding imports and boosting domestic production and exports. Indeed, senior Argentine government officials publicly declared their policy to be one of "managed trade (*comercio administrado*) with the objectives of, *inter alia*, substituting imports for domestically produced goods and reducing or eliminating trade deficits."[23] The policy was coordinated by the President, Minister of Industry, and Secretary of Trade, and covered a vast swathe of the economy, including agricultural machinery, automobiles, electronic and office products, foodstuffs, medicines, mining equipment, motorcycles, publications, and textiles and apparel.

Collectively, the Appellate Body dubbed the measures "Trade Related Requirements," or TRRs. Under them, economic operators were affected as follows:[24]

(1) *Import Reduction Requirement*: Importers were compelled to limit the value or volume of their imports. Price controls on imports were imposed to reduce prices.

(2) *Prior Approval Requirement*: Exporters were mandated to obtain prior registration and approval before shipping merchandise to Argentina, i.e., all goods needed pre-approval to be imported.

(3) *Import Licensing Requirement*: In addition to prior approval, over 600 tariff lines (at the 8-digit level of the Harmonized System (HS) of consumer and industrial products also needed an import license. Among the items subject to these non-automatic import licenses were: air conditioners, autos and auto parts, bicycles, chemicals, electrical machinery, footwear, home appliances, laptops, luggage, machinery and tools, paper, plastics, tires, toys, T&A, and tractors. Getting a license

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across Sections 1 and 4. It made the same mistake in the *India Poultry* case (discussed below).

[23] Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶ 4:14 (emphasis added).

[24] *See* Bryce Baschuk, *Appellate Panel Reaffirms WTO Ruling Against Argentina's Trade Restrictions*, 32 INTERNATIONAL TRADE REPORTER 178 (BNA) (Jan. 22, 2015); David Haskel, *Argentina Scraps Duties on Grain, Beef Exports*, 32 INTERNATIONAL TRADE REPORTER (BNA) (Dec. 17, 2015).

The Appellate Body, following the Panel, put the TRRs into five categories: (1) One-to-One Trade Balancing; (2) Import Reduction; (3) Local Content; (4) Investment; and (5) Non-Repatriation. *See* Appellate Body Report*, Argentina—Importation of Goods*, *supra* note 21, ¶¶ 1:3, 1:4(a), 4:5. That is fine, though the above nine-point breakdown affords greater precision and thereby conveys better the scope of Argentina's controversial measures. It would be an overstatement to say Argentina sought to "shut down trade" and "turn to autarky," but its measures certainly were breathtaking.

meant navigating bureaucratic, non-transparent rules, waiting for long periods to get one, and sometimes never getting one for no reason at all.

(4) *One-to-One Trade Balancing Requirement*: Argentina imposed a trade-balancing rule was imposed requiring companies in the country to export dollar-for-dollar Argentine-merchandise at least an equal to or greater value than the price paid. This requirement increased the local content of the goods companies made. As a result, companies built production facilities in Argentina, refrained from transferring benefits abroad, and/or controlled the prices of their goods, if they hoped to continue importation. This Requirement basically ensured that firms exported a similar value of goods out of Argentina as was imported, i.e., annual exports had to be at least the same value of annual imports.

   a. To meet this Requirement, an importer could boost exports by: (a) exporting goods it made in Argentina directly; (b) using an exporter as an intermediary to sell goods to a buyer in a third country; or (c) contract with an exporter so that the transactions of the exporter would count as the importer's own transactions. An importer who failed to meet the Requirement would have to source merchandise domestically, thereby increasing the local content of the goods it made in Argentina, which of course was what the Argentine government and domestic suppliers wanted.

(5) *Local Content Requirement*: Companies had to incorporate a higher level of local content into domestically manufactured goods than in the past. This obligation is a quintessential import substitution measure, because to meet, it the companies needed to swap imported raw materials and/or intermediate goods for ones that were or could be produced in Argentina. Such a measure is designed to promote re-industrialization.

(6) *Non-Repatriation Requirement*: Companies were barred from repatriating funds, including profits, from Argentina to their home or other foreign country.

(7) *Minimum Balance Requirement*: Foreign companies were mandated to keep a certain minimum amount of revenue in Argentina.

(8) *Investment Requirement*: Companies had to make or increase their investments, including in production facilities, in Argentina.

(9) *Transportation Requirement*: Foreign mining companies were subjected to the above-mentioned import substitution rules. Further, they were obliged to use Argentine companies for air, land, river, and sea cargo.

Several of these nine measures were either non-transparent or administered in a non-transparent manner. None of them were published in a law, regulation, or administrative act. The Argentine government dealt with economic operators individually in respect of their obligations, and monitored their implementation. Unsurprisingly, operators complained about a lack of certainty and predictability as to which TRRs might be imposed on them, when they would be imposed, and whether the imposition would be temporary or permanent.

Rather, some TRRs were manifest in letters from economic operators to the Argentine government. Others were outright agreements economic operators signed with the government of Argentina. For instance, Argentine car and motorcycle companies, pork producers, and supermarket chains signed deals with the government to slash imports under the Import Reduction Requirement. Electronic and office equipment producers did so and pledged to cut imports (measured between the first quarters of 2014 and 2013).

Likewise, as regards the Trade Balancing Requirement, many "household" and/or global luxury brand names signed such accords, including (in the automobile sector), Alfa Romeo, BMW, Fiat, Hyundai, KIA, Mercedes, General Motors, Nissan, Porsche, Peugeot-Citroën, Renault, and Volkswagen.[25] Hyundai's agreement with the Argentine government was an interesting example of how it used the third technique, mentioned above in (c), to satisfy this Requirement. Hyundai arranged with local producer-exporters to have exports of biodiesel, peanuts, soy flour, and wine, collectively valued at U.S. $157 million, count as offsetting Hyundai's imports of autos and auto parts.

The Local Content Requirement furnished another notable illustration. Producers of agricultural machinery in Argentina were called on February 2011 to achieve integration of local content of percent by 2013. If they did so, if 55-60% of the finished machinery they made was comprised of Argentine-made agro-parts, then they were eligible for a soft loan from Banco Nación.

Argentina typically paired the Investment Requirement with the Trade Balancing or Local Content Requirement. When linked to Trade Balancing, Argentina obliged economic operators to make an irrevocable capital contribution to an appropriate local firm whenever imports by that operator exceeded its exports. In the Hyundai illustration above, Hyundai contributed $8 million of capital to the biodiesel firm exporters to facilitate exports. When linked to Local Content, the government told economic operators to start, boost, or improve manufacturing operations or processes in the country. For example, Renault committed to make a $175 million capital contribution to its plant in Córdoba to build a new automobile model designed for export, and promised a trade surplus of $231 million by 2012.[26]

Similarly, the government linked the Non-Repatriation Requirement to the Trade Balancing or Local Content Requirement. It did so with respect to firms

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[25] *See* Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶ 4:3.

[26] *See id.* at ¶ 4:9.

in the agricultural machinery, car and truck, and mining businesses. For example, Claas, an agricultural machinery manufacturer, agreed with the government not to transfer profits overseas between 2011 and 2014. That pledge was coupled with commitments by Claas to invest $60 million in two domestic plants, raise local content of its combine harvesters to 55% by 2013, increase production in Argentina of those harvesters to 800 units by 2015, and export 600 of them.[27]

All such instances bespeak the staggering nature of what Argentina was attempting in response to what it perceived as dire economic straits. Yet, wholly apart from the questions of whether these measures were prudent economically or lawful under multilateral trade rules, each such instance was an incentive for unscrupulous behavior (i.e., the opportunity for corruption) in such deals is evident to any half-astute lawyer. Here, the Argentine government was unwilling to provide copies of these agreements and letters, saying it should not have to make the case for the complainants.[28] That was fair enough, but perhaps cast even more doubt on whether its import restrictions were GATT-WTO compliant—much less with applicable anti-bribery and anti-fraud rules.

Argentina also established the so-called "*DJAI* procedure" (the "*Declaración Jurada Anticipada de Importación*" or "Advance Sworn Import Declaration"). Essentially, the *DJAI* was the means by which Argentina enforced the TRRs, though the Appellate Body, like the Panel before it, characterized it as the second of the two disputed measures (the TRRs being the first). The *DJAI* technically applied to any imports for consumption in Argentina. Under the *DJAI*, for importers to obtain the necessary prior government approval, government officials had to "observe" their proposed imports, and only thereafter could bring merchandise into Argentina. The Federal Public Revenue Administration (*Administración Federal de Ingresos Públicos*) (AFIP) implemented the *DJAI* pursuant to the AFIP General Resolution 3252/2012, which took effect on February 1, 2012.

Importers had to file a *DJAI* with AFIP before they issued a purchase order to buy merchandise from overseas, import it, and enter it for consumption in Argentina. Only if the government found the specific information submitted by an importer in its *DJAI* to be satisfactory might it approve the importer's request to bring merchandise into the country. But, even then, the government could reject the request. Moreover, other governmental agencies could ask a prospective importer for additional information, or to make export or other commitments relating to the TRR's, as a condition for *DJAI* approval by AFIP. Even a cursory account of the mechanism adduces how onerous it was:

> 4.17 To initiate the *DJAI* procedure, a declarant must file a *DJAI* through AFIP's electronic portal, known as the *MARIA* information system (*Sistema Informático MARIA*) (*SIM*), or the *SIM* system. To be processed,

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[27] *See id.* at ¶ 4:10.

[28] *See id.* at ¶ 4:3.

the *DJAI* must contain the following information: (i) name and taxpayer identification code of the importer or customs broker, where applicable; (ii) customs office of registration; (iii) quantity, codes, capacity, and type of containers; (iv) total and per-item "free on board" (f.o.b.) value, and corresponding currency; (v) tariff classification; (vi) type and quantity of marketing units; (vii) condition of the merchandise; (viii) country of origin; (ix) approximate shipping and arrival dates; and (x) name of the declarant. Once the *DJAI* has been formally entered into the *SIM* system, it attains "registered" (*oficializada*) status. The *DJAI* may then pass through several of the following statuses (*estados*): (i) "observed" (*observada*); (ii) "exit" (*salida*); (iii) "cancelled" (*cancelada*); and (iv) "voided" (*anulada*).

4.18. In principle, as from the date that the *DJAI* attains "registered" status, the importer has 180 days to complete the *DJAI* procedure successfully and import authorized goods into Argentina. Once a *DJAI* is registered, the AFIP and a number of government agencies that have signed accession agreements with the AFIP may review the information entered into the *SIM* system and enter "observations" on that specific *DJAI*. The *DJAI* procedure does not permit importers to know which agency may review and enter observations on a *DJAI*…A participating agency may enter an observation when it considers that the information provided by the prospective importer is "insufficient, faulty, or incomplete" to demonstrate compliance with the requirements under the domestic legislation that the agency administers, although no legal instruments contain the specific criteria that the relevant agency may apply in order to enter observations. A participating agency has 72 hours after the registration of a *DJAI* to enter an observation, unless otherwise provided in its accession agreement or by statute…

4.19. If a government agency enters an observation, the *DJAI* will move to "observed" status. Goods covered by a *DJAI* in "observed" status couldn't be imported into Argentina. If a *DJAI* moves to "observed" status, prospective importers must: (i) identify the agency that

entered the observation; (ii) contact such agency in order to be informed of the supplementary documents or information that must be provided; and (iii) provide the supplementary documents or information. A single *DJAI* may be "observed" by any of the participating agencies, and where multiple agencies enter observations, the importer must consult with each agency separately. A *DJAI* will leave "observed" status, and proceed to "exit" status, only after all observations have been lifted by the relevant agency or agencies.

4.20. Of the four agencies that currently participate in the *DJAI* procedure, the Secretariat of Domestic Trade (*Secretaría de Comercio Interior*) (SCI) is of particular relevance to these disputes. According to the preamble of SCI Resolution 1/2012, it is "necessary" for the SCI to have access to the information provided in the *DJAI* procedure "[to perform] analyses aimed at preventing negative effects on the domestic market, since the qualitative and/or quantitative importance of imports to be made has the effect of impacting domestic trade." To this extent, the SCI is entitled to enter observations relating to the importation of any type of product to verify *a priori* whether the importer or declarant has complied with specified Argentine laws. Moreover, the SCI has 15 working days following registration of the *DJAI* to enter observations. The SCI "systematically" imposes on importers requirements that are neither set out in any laws nor indicated in official publications explaining the operation of the *DJAI* procedure. As a condition to lift observations on *DJAIs*, in certain instances, the SCI has also required prospective importers to increase exports, to begin exporting, or to commit to other TRRs so as to achieve a trade balance.

4.21. A *DJAI* will proceed to "exit" status if no government agency enters an observation within the prescribed time period, or if all observations made by agencies are lifted within 180 calendar days from registration. A *DJAI* in "exit" status can be converted automatically into a customs clearance procedure. To initiate the customs clearance procedure, an importer must re-access the *SIM* system and formally request the

> importation of goods. The *DJAI* will proceed to "voided" status if an importer withdraws its *DJAI*, an observation is not lifted, or a *DJAI* in "exit" status is not used either within 180 calendar days from registration or after the extension period. Once the *DJAI* has been used—*i.e.*, the goods have cleared customs—the *DJAI* will enter into "cancelled" status.[29]

Manifestly, the management of trade can require a nearly Orwellian apparatus. No Argentine law or regulation set out all pertinent details about the *DJAI*. Thus, akin to the TRRs, there was a certain degree of non-transparency, uncertainty, unpredictability, and concomitant opportunity for corruption.

Unless economic operators followed the TRR's and *DJAI*, they could not import merchandise into Argentina. In addition, Argentina tacked on increases in applied tariffs; hence, the percentage of its duty-free tariff lines fell from 14.6% in 2006 to 7.5% in 2012. A few operators successfully challenged the *DJAI* in Argentine courts in instances where "observed" status impeded imports:

> The domestic courts concluded that the challenged *DJAI* procedures had: (i) unreasonably delayed the approval of *DJAIs* beyond the time-limits in the legislation; (ii) made it impossible for applicants to move the procedure forward inasmuch as observations are neither produced in hard copy nor communicated through the website portal; and (iii) affected the applicants' right of defense inasmuch as the circumstances give rise to a prohibition on the import operation, without valid legal grounds.[30]

But, these victories neither encouraged the government to reverse its managed trade policy, nor discouraged prospective importers from lobbying their home country governments to bring suit against Argentina in the WTO.

So, at the WTO, 40 Members signed a letter criticizing the Argentine measures. In May 2012, these NTBs triggered a WTO suit against Argentina by Australia, Canada, EU, Guatemala, Japan, Turkey, and Ukraine. In August, Japan, Mexico, and the United States launched separate but similar WTO actions against Argentina. In all actions, the complainants alleged Argentina violated GATT Article XI:1, which prohibits import restrictions such as licensing, as well as rules in the WTO *Agreement on Import Licensing* concerning administrative procedures for licensing regimes.

Argentina fired back. Rich countries had betrayed poor ones in the Doha Round. Rich countries had failed to commit to eliminate agricultural export subsidies, retained high tariffs on agricultural imports, and erected NTBs of their

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[29] *Id.* ¶¶ 4:17-4:21 (footnotes omitted).

[30] Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶ 4:22.

own under the guise of SPS, environmental, or animal welfare concerns. Yet, rich countries hypocritically pressured poor countries to remove their trade barriers on both agricultural and industrial products, and negotiated deals in small, cabal-like groups outside the auspices of the Doha Round. As the world's number one soymeal and soy oil exporter, number two corn exporter, number three soybean exporter, and number four wheat exporter, farm trade barriers to rich country markets hit Argentina especially hard.

America's protectionism against Argentina was a significant case. Under the guise of SPS measures, the United States blocked Argentine beef and lemons from the American market. In 2001, Argentina suffered a major outbreak of bovine foot-and-mouth disease (FMD), triggering a ban by the United States on all Argentine meat. In 2002, the World Organization for Animal Health (also known as "*Office International des Epizooties*" or "OIE") certified the Southern Patagonia region of Argentina as free of FMD (without vaccination), and in 2007, certified the rest of Argentina as free of the disease (with vaccination). Thus, nearly all other countries with exception of the United States re-opened their markets to Argentine beef. Argentina sought the same certification from the United States in 2003, and a 2007 risk analysis supported the request. America did not budge, nor did it report the results of a 2006 audit by the U.S. Department of Agriculture (USDA) (a report which remains confidential). After considerable delay, the United States authorized imports of chilled, fresh, or frozen beef from Argentina north of the 42nd parallel. The United States opened its market to cheap, cooked meats, because cooking eliminates the risk of infection.

As for lemons, starting in 2001, America closed its market to shipments from northwest Argentina, following lobbying by Arizona and California citrus producers. They were unhappy Argentina sent 20,000 metric tons of lemons to the United States following a June 2000 decision by the Department of Agriculture. That decision was to lift a ban on Argentine lemons, but the producers successfully challenged it as arbitrary and capricious.[31] So, the United States told Argentina the lemons posed a risk of the *xanthomonas campestris*, a citrus canker disease, but Argentina said its four northwest provinces are free of the ailment. So, Argentina launched a counter-attack: in cases launched against the meat and lemon restrictions in August and September 2012, respectively, Argentina alleged the United States had no scientific justification for protectionism.

Whatever the political appeal of Argentina's contentions might have been, as a legal matter Argentina lost the WTO case. In January 2015, the Appellate Body issued its Report, finding against Argentina on all three points:

(1) The Appellate Body held the controversial above-listed trade-related requirements Argentina imposed as a condition to import were a single

[31] *See* Harlan Land Co. v. U.S. Dept. of Agric., 186 F. Supp. 2d 1076, 1098 (E.D. Cal. 2001).

measure (the TRR measure) that restricted importation in violation of GATT Article XI:1.[32]

(2) The *DJAI* procedure also was an import restriction inconsistent with Article XI:1.[33] The *DJAI* was a *de facto* ban on various imports.

(3) One of the TRRs, the Local Content Requirement, was illegal under GATT Article III:4 because it modified the conditions of competition in the Argentine market, giving less favorable treatment to imported than domestic products.[34]

So, the Appellate Body recommended that Argentina bring its controversial measures into conformity with its GATT obligations. In December 2015, Argentina did so, essentially lifting the controversial import restrictions.

3. Argentina's Losing Argument under GATT Articles VIII and XI:1[35]

[32] *See* Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶¶ 5.92-5.150, 5.204-5.205, 6:2(a)-(b).

[33] *See id.* ¶¶ 5.207-5.288, 6:3.

[34] *Id.* ¶¶ 5.92-5.150, 5.204-5.205, 6:2(c).

[35] In addition to the issues treated above, the Appellate Body considered and ruled on the following:

(1) Whether finding a single, over-arching TRR measure was beyond the scope of the terms of reference of the Panel. Rejecting the Argentine appeal, the Appellate Body said "no," *i.e.*, the finding was within those terms. *See* Appellate Body Report*, Argentina—Importation of Goods*, *supra* note 21, ¶¶ 3:1(a)(i), 5:1-5:31, 6:1(a).

(2) Whether the Panel applied an incorrect legal standard in deciding a TRR exists and operates as a single measure as a condition to import. The Appellate Body rejected the Argentine appeal, and upheld the Panel conclusion *See id*. ¶¶ 3:1(b)(i), 5:92-5:148, 6:2(a). The Appellate Body agreed the Panel rightly characterized the many Argentine import restrictions as a single measure, because they were "interlinked" and "exhibit[ed] several characteristics, in particular . . . systematic and continued application." *Id*. ¶ 5:204.

(3) Whether, as a consequence of the Panel finding the TRR was a single measure, Argentina violated GATT Article III:4. The Appellate Body upheld the Panel finding, but offered no new insights on this pillar obligation of GATT. The Appellate Body agreed with the Panel that Argentina violated Article III:4. The TRR (in the words of the Panel) "modifies the conditions of competition in the Argentine market to the detriment of imported products" such that "imported products are granted less favorable treatment than like domestic products." In other words, the Panel correctly applied the long-standing test for "treatment no less favorable" under Article III:4. *See id*. ¶¶ 3:1(b)(ii), 5:149, 5:205, 6:2(c).

(4) Whether, as a consequence of the Panel finding the TRR was a single measure, Argentina violated GATT Article XI:1. The Appellate Body upheld the Panel

In the Appellate Body Report, the only significant substantive teaching about multilateral obligations concerns findings about the relationship between GATT Articles VIII and XI:1, and the application of these provisions to the *DJAI*.[36] Argentina argued unsuccessfully that the Panel erred in holding the *DJAI* violated GATT Article XI:1. The essence of the Panel's rationale was that because approval of a *DJAI* for a prospective importer is not "automatic," the procedure runs afoul of Article XI:1. Only if a procedure led ineluctably to approval for importation would it not be considered a quantitative restriction (QR) on trade. On appeal, Argentina urged "the mere fact an import formality or requirement does not result in the 'automatic' importation of goods does not render it a restriction under Article XI:1."[37]

Put differently, Argentina said the *DJAI* was not itself subject to GATT Article XI:1, because it is merely a customs risk assessment tool by which it assesses and manages the risk of non-compliance with its customs laws and regulations. The *DJAI* is a "formality or requirement" imposed in connection with importation; hence it is subject to GATT Article VIII. Article VIII, entitled Fees and Formalities, connected with Importation and Exportation, states:

> (1) (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by Members on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.
>
> (b) The Members recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).

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finding, but offered no new insights on this pillar obligation of GATT. The Appellate Body agreed with the Panel that Argentina violated Article XI:1. The TRR is a "restriction on the importation of goods." That is, the Panel correctly understood and applied the prophylactic rule against quantitative restrictions in Article XI:1. *See* Appellate Body Report*, Argentina—Importation of Goods*, *supra* note 21, ¶¶ 3:1(b)(ii), 5:149, 5:205, 6:2(b).

These matters are not discussed herein. Likewise, the EU appeal concerning the terms of reference of the Panel is not discussed (*see id*. ¶¶ 3:1(a)(ii), 5:32-5:91, 6:1(a)(ii)), nor is the Argentine appeal concerning Article 11 of the *DSU* (*see id*. at ¶¶ 3:1(b)(iii), 5:151-5:184, 5:206, 6:2(d)), or the Japanese appeal concerning judicial economy (*see id.* ¶¶ 3:1(b)(iv), 5:185-5:203, 5:206, 6:2(e)).

[36] *See* Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶¶ 5:207-5:288, 6:3-6:4.

[37] *Id.* ¶ 5:207.

> (c) The Members also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.
>
> (2) A Member shall, upon request by another Member or by the Ministerial Conference, review the operation of its laws and regulations in the light of the provisions of this Article.
>
> (3) No Member shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.
>
> (4) The provisions of this Article shall extend to fees, charges, formalities, and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:
>
> (a) Consular transactions, such as consular invoices and certificates;
> (b) Quantitative restrictions;
> (c) Licensing;
> (d) Exchange control;
> (e) Statistical services;
> (f) Documents, documentation and certification;
> (g) Analysis and inspection; and
> (h) Quarantine, sanitation and fumigation.[38]

As for Article XI:1, it says:

> No *prohibitions or restrictions other than* duties, taxes or other charges, whether made *effective* through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the *importation* of any product of the territory of any other Member or on the *exportation* or sale for export of any product destined for the territory of any other Member.[39]

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[38] *Id.* (footnote omitted).

[39] *Id.* (emphasis added).

Argentina argued these two provisions are mutually exclusive in their scope of application.

Suppose, as posited by Argentina, that they are not interpreted as mutually exclusive. Then, a WTO Member will not be able to maintain the kinds of import formalities and requirements contemplated by Article VIII. This is because at least some measures will be struck down under Article XI:1. They will then be regarded as QRs under Article XI:1, and Article XI:1 is a categorical prohibition on any QR. But, the drafters of Article VIII never intended import and export documentation formalities to be within the ambit of Article XI:1, too, and thereby be forbidden as unlawful QRs.

So, Argentina argued, to interpret the two provisions harmoniously, it is necessary to differentiate "the trade-restrictive effect of a formality or requirement itself [a matter for Article VIII] from the trade-restrictive effect of any substantive rule of importation that the measure implements [a matter for Article XI:1]."[40]

In Argentina's view, this harmonious interpretation must provide a basis for identifying the point at which an Article VIII import formality or requirement becomes a prohibited "quantitative restriction" under Article XI:1.[41]

To make this identification, Argentina argued for a Two-Step Test, or Two-Step Analytical Framework:

> [I]mport formalities and requirements can only be found to be inconsistent with [GATT] Article XI:1…where it is demonstrated that: (a) the formality or requirement *limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule* of importation that the formality or requirement implements; and (b) this separate and independent trade-restricting effect is *greater than the effect that would ordinarily be associated with a formality or requirement* of its nature…[42]

This Test, said Argentina, would result in the proper interpretation and application of Article XI:1, and also help differentiate the scope of that provision from Article VIII. To Argentina, "the Panel failed to recognize that an import formality or requirement could have some degree of trade-restricting effect that is 'an ordinary incident of the formality or requirement itself' and that does not render the formality or requirement inconsistent with Article XI:1."[43]

It was a losing argument, and thankfully so. Article XI:1 is a pillar of GATT, embodying a complete ban on QRs. Common sense suggests anything short of automatic approval for importation following completion of a formality would undermine this ban. Governments cleverly could craft procedures in which

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[40] *See id.* ¶ 5:225.

[41] *See* Appellate Body Report, *Argentina—Importation of Goods, supra* note 21, ¶ 5:238.

[42] *See id.* ¶ 5:208.

[43] *See id.* ¶ 5:224.

they, like Argentina, could exercise considerable discretion in the way they administer them and the outcomes that follow. They could sneak into their trade rules violations of Article XI:1 under the (mis)characterization of the Article VIII "fees and formalities" rubric.

Moreover, even after repeated readings of the Argentine Two Step Test, it was difficult to fathom. The Appellate Body characterized it thusly:

> Argentina requests us to … find that import formalities and requirements can be found to be inconsistent with Article XI:1 only where it is demonstrated that: (i) the formality or requirement limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (ii) this separate and independent trade-restricting effect [of the formality or requirement in controversy] is greater than the effect that would ordinarily be associated with a formality or requirement of its nature.[44]

At issue under step one (i) was "whether an import formality or requirement limits the importation of products independently of any substantive restriction that such formality or requirement may implement."[45] Unpacking this language suggested that under (i), multiple questions had to be considered:

- Does the disputed requirement "limit" imports?
- Is the degree of limitation "material"?
- Is there a "substantive" rule concerning importation?
- Does the requirement "implement" that substantive rule?
- Does the substantive rule "restrict" trade?
- Is the material limitation caused by the requirement "separate and independent" from any trade-restrictive effect of the substantive rule that the requirement implements?

If the answer to each of these questions were "yes," then the analysis would proceed to step two (ii). Under (ii), still more questions would need resolution:

- To what extent would trade ordinarily be restricted under a requirement of the same nature as the disputed requirement?
- Does the separate and independent trade-restrictive effect of the disputed requirement exceed that ordinary degree of trade restriction?

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[44] *See id.* ¶ 5:223. Unfortunately, here as in several other parts of its Report, the Appellate Body unnecessarily repeated itself. It cut-and-paste the same text into Paragraph 5:238.

[45] *See id.* ¶ 5:244.

The outcome of step two, said Argentina, would delineate the line at which an import formality governed by Article VIII crosses into the ambit of Article XI:1 and is a prohibited QR under the latter provision.

The first question under Step Two was counterfactual, designed to create a benchmark against the actually-observed trade restrictive effect of the disputed requirement. The second question then was comparative, measuring the trade-restrictiveness of the disputed measure against that of the substantive rule the measure implements. In concocting this Two Step Test, Argentina was characterizing its *DJAI* as a requirement that implemented the TRRs, but that had no greater, separate and independent, trade-restrictive effect from the TRRs. In other words, the *DJAI* was innocent in causing trade damage; the culprit, if there was one, was the TRRs. The Appellate Body aptly characterized the situation as one in which "the complainants challenged the *DJAI* procedure as something other than a customs or import formality [and thereby unlawful under GATT Article XI:1], and Argentina defended the *DJAI* procedure as a customs or import formality [namely, an import licensing procedure, and thereby governed and immunized by Article VIII]."[46] The Panel never characterized the *DJAI* as an import licensing procedure; it simply examined it for consistency under Article XI:1. I would attach footnote 47 after this sentence. The Appellate Body said this was correct.[47]

Finally, the Americans had the better interpretative argument under GATT. Articles VIII and XI:1 apply cumulatively whenever a formality or requirement exists that regulates importation or exportation. Just because that measure is a formality or requirement under Article VIII does not immunize it from scrutiny as a possible restriction under Article XI:1. Indeed, whenever the drafters intended for GATT to allow derogation from a pillar obligation, they inserted it directly into the GATT text. Thus, the Appellate Body would have none of it, i.e., it was not going to create a crack in a GATT pillar by mandating an unprecedented new analytical framework that was both convoluted and unnecessary.

4. Interpreting and Applying GATT Article XI:1 Precedents[48]

The Panel disagreed with Argentina's characterization of the *DJAI* as a customs risk assessment tool that is a formality or requirement imposed in connection with importation subject to GATT Article VIII. Even if this were true, there is still disagreement on whether the customs proceedings falling within the scope of Article VIII would be excluded from the disciplines of Article XI:1.

The Panel explained Article XI:1 forbids WTO Members from instituting or maintaining import or export prohibitions or restrictions, and does not

[46] *See* Appellate Body Report, *Argentina—Importation of Goods, supra* note 21, ¶ 5:252.

[47] *See id.* ¶ 5:253.

[48] *See id.* ¶¶ 5:207-5:288, 6:3-6:4.

differentiate among categories or types of such measures. The phrase "or other measures" means the scope of Article XI:1 encompasses all prohibitions or restrictions on imports or exports. This does not include duties, taxes, or other charges, which of course Article II governs.[49] To be sure, not any condition on imports or exports is forbidden. What Article XI:1 bars is a condition that is a limitation. That is, the word "restriction" means any condition "with regard to," or "in connection with" imports or exports of a product that has a "limiting effect."[50] There is no need to prove actual or quantifiably negative effects on the aggregate imports. All that matters is whether the design and structure of a measure imposes a "limiting condition."[51] In other words, potential dampening adverse effects suffice to show inconsistency with Article XI:1.

For all such points, the Panel stood on the solid ground of GATT-WTO precedent, citing multiple cases. The Appellate Body stood on that same ground, some of which it had laid:

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[49] *See id.* ¶ 5:212 (*quoting* Panel Reports, *Argentina—Measures Affecting the Importation of Goods*, ¶¶ 6:246, 6:248, 6:435, 6:440, 6:440, and 6:450, WT/DS438/R, WT/DS444/R, WT/DS445/R (Aug. 24, 2014) (*adopted* Jan. 26, 2015) [hereinafter Panel Report, *Argentina—Import Restrictions*]. The Panel Report was in turn citing the 2001 Panel Report in *Argentina Hides and Leather*, Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, ¶ 11:17, WT/DS155/R (*adopted* Feb. 16, 2001) (not appealed), and 1988 pre-WTO GATT Panel Report. GATT Panel Report, *Japan—Trade in Semi-Conductors*, ¶ 104, BISD (35th Supp.) at 116 (*adopted* May 4, 1988). The *Japan Semiconductors* case is analyzed in RAJ BHALA, MODERN GATT LAW, vol. I, ch. 10 (2nd ed. 2013).

[50] *See* Appellate Body Report, *Argentina Import Measures, supra* note 21, ¶ 5:212 (*quoting* Panel Report, *Argentina—Import Restrictions*, *supra* note 49, ¶¶ 6:251, 6:253-254, 6:452, which in turn cited to the *China Raw Materials* Appellate Body Report, ¶ 319, and the Panel Reports in *China Raw Materials*, ¶ 7:917. *China—Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R (adopted Feb. 22, 2012), *India Quantitative Restrictions*, ¶¶ 5:128-129 (*i.e.*, WTO Panel Report, *India—Quantitative Restrictions on Imports of Agricultural, Textile and Industrial Products*, WT/DS90/R (adopted as modified by the Appellate Body, Sept. 22, 1999), *India Autos*, ¶¶ 7:257, 7:265, 7:269-270 (*i.e.*, WTO Panel Report, *India—Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS/175/R (not appealed, adopted Apr. 5, 2002), and *Dominican Republic Cigarettes*, ¶ 7:261(*i.e.*, WTO Panel Report, *Dominican Republic—Measures Affecting the Importation and Internal Sale of Cigarettes*, WT/DS302/R (adopted as modified by the Appellate Body, May 19, 2005)).

The *India Quantitative Restrictions* Appellate Body Report is analyzed in RAJ BHALA, INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK, vol. I, ch. 29 (4th ed., 2015). The *Dominican Cigarettes* and *China Raw Materials* Appellate Body Reports are analyzed in the 2005 *WTO Case Review* and 2012 *WTO Case Review*, respectively.

[51] *See* Appellate Body Report, *Argentina—Importation of Goods, supra* note 21, ¶ 5:212 (*quoting* Panel Report*, Argentina—Importation of Goods*, ¶¶ 6:264, 6:451, 6:476, which in turn cited to the Panel Reports in *Argentina Hides and Leather*, ¶ 11:20, *Colombia Ports of Entry*, ¶ 7:240, 7:252 (*i.e.*, WTO Panel Report, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, WT/DS366/R (not appealed, adopted May 20, 2009), and *China Raw Materials*, ¶¶ 7:915, 7:1081).

> 5.217. In [the 2012] *China—Raw Materials* [case, cited above], the Appellate Body observed that the term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity." In that dispute, the Appellate Body also referred to the term "restriction" as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and, thus, generally, as something that has a limiting effect. The use of the word "quantitative" in the title of Article XI . . . informs the interpretation of the words "restriction" and "prohibition" in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported. This provision, however, does not cover simply *any* restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions "on the importation . . . or on the exportation or sale for export." Thus, . . . not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.
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> 5.218. Article XI:1. . . prohibits prohibitions or restrictions other than duties, taxes, or other charges "made effective through quotas, import or export licenses or other measures." The Appellate Body has described the word "effective," when relating to a legal instrument, as "in operation at a given time. . . ." [T]he definition of the term "effective" also includes something "[t]hat is concerned in the production *of* an event or condition." Moreover, the Appellate Body has described the words "made effective," when used in connection with governmental measures, as something that may refer to a measure being "operative," "in force," or as having "come into effect." In Article XI:1, the expression "made effective through" precedes the terms "quotas, import or export licenses or other measures." This suggests to us that the scope of

> Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.[52]

In citing itself at each key point, namely, defining "prohibition," "restriction," and "effective," the Appellate Body pointed to the *Shorter Oxford English Dictionary* (*OED*).[53] As for so many other multilateral trade treaty terms, for Article XI:1, the *OED* was the irreducible and definitive for Appellate Body interpretation.

For three reasons, the Appellate Body agreed with the Panel, and rejected the Argentine argument. First, said the Appellate Body, Argentina could cite no legal basis in the text of GATT for its Two Step Test to determine whether an import formality or requirement under Article VIII is a "restriction" under Article XI:1.

Second, there was no case law to support Argentina's Test. Argentina's effort to invoke the 2001 *Korea Beef* and 2012 *China Raw Materials* Panel Reports missed the mark.[54] They stood for the rather obvious proposition that under Article XI:1, a disputed measure must itself limit importation, and limitations caused by other measures should not be wrongly attributed to the challenged measure. In other words, those Panels rendered what in the context of AD-CVD jurisprudence is called a "non-attribution" analysis: for liability to attach to a measure challenged under Article XI:1, it must be that measure, not an underlying restriction like a quota, that causes constriction of imports.

Third, Argentina misread the Panel Report in the present case at bar. Contrary to Argentina's reading of the Panel Report, the Panel did not imply that any measure within the scope of Article VIII would be prohibited under Article XI:1. Quite the contrary, the Panel made clear that not every condition on importation is illegal under Article XI:1. Rather, only a prerequisite that limits imports violate Article XI:1:

> 5.242. Argentina's appeal calls for us to examine whether and under what circumstances measures that qualify as "formalities" or "requirements" under Article VIII … may constitute "restrictions" under Article XI:1 . . . *[N]ot every condition or burden placed on importation or exportation will be prohibited by Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products*.

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[52] Appellate Body Report, *Argentina—Importation of Goods, supra* note 21, ¶¶ 5:217, 5:218 (footnotes omitted).

[53] *See id*.

[54] *See* Panel Report, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R (*adopted* as modified by the Appellate Body, Jan. 10, 2001). The *Korea Beef* Appellate Body Report is analyzed in the *WTO Case Review 2001*, 19 ARIZ. J. INT'L. & COMP. L. 457 (2002).

> 5.243. Formalities and requirements connected to importation that fall within the scope of application of Article VIII . . . typically involve the use of documentary and procedural tools to collect, process, and verify information in connection with the importation of products. Such import formalities and requirements will often entail a certain burden on the importation of products. At the same time, such formalities and requirements are, at least to some extent, a routine aspect of international trade. Compliance with such formalities and requirements enables trade to occur within a Member's specific regulatory framework. . . . *[N]ot every burden associated with an import formality or requirement will entail inconsistency with Article XI:1 . . . . Instead, only those that have a limiting effect on the importation of products will do so*.
>
> 5.244. Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative. *If an import formality or requirement does not itself limit the importation of products independently of the limiting effects of another restriction, then such import formality or requirement cannot be said to produce the limiting effect and, thus, it will not amount to a* "*restriction*" *captured by the prohibition in Article XI:1*.[55]

Rejecting the Argentine Analytical Framework, and singling out Step Two as neither "useful or necessary," the Appellate Body intoned that an "analysis under Article XI:1 must be done on a *case-by-case basis*, taking into account the import formality or requirement at issue and the relevant facts of the case."[56]

In this case, both the law and facts were against Argentina. On the law, GATT Article XI:1 precedent ran contrary to Argentina's position the *DJAI* procedure was not an unlawful QR. The *Argentina Import Restrictions* Panel cited four types of "restrictions" that prior GATT and WTO Panels had found illegal. The Appellate Body recounted approvingly the long-standing jurisprudence on unlawful QRs:[57]

(1) Measures that Limit Market Access for Imports, held illegal in the 1988 and 1992 GATT Panel Reports in *Canada Provincial Liquor Boards* (at

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[55] Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶¶ 5.242-5.244 (emphasis added).

[56] *Id.* at ¶ 5:245 (emphasis added).

[57] *See id.* ¶¶ 5:266-5:271.

Paragraphs 4:24-4:25 in the European case, and Paragraph 5:6 in the American case) and 1978 *EEC Minimum Import Prices* (in Paragraph 4:9), respectively.[58]

(2) Measures that Create Uncertainty about Market Access for Imports, held illegal in the 2012 *China Raw Materials* Panel Report (at Paragraphs 7:948 and 7:95).

(3) Measures that Condition the Right to Import on Trade Balancing, held illegal in the 2002 *India Autos* Panel Report (at Paragraph 7:277).

(4) Measures that Make Importation Prohibitively Costly, held illegal in the *Brazil Retreaded Tires* Panel Report (at Paragraphs 7:370-372).[59]

As for the facts, the Panel applied the above precedents to them. In all four respects, the result was clear: the *DJAI* restricted importation.

First, did the *DJAI* "limit" access of imports into the Argentine market? Yes. Obtaining a *DJAI* in exit status was not "automatic" in the following sense. The Argentine government granted exit status only if (1) if no Argentine government agency entered an observation on a *DJAI* application within a prescribed period, or (2) an agency that had entered an observation lifted its previously entered observation thanks to information the importer provided to the agency. Without exit status, importation was forbidden, and that status depended on the non-transparent exercise of discretion of the government. Indeed, in the sense of the *OED* definition of "automatic," namely, "[o]ccuring as a necessary consequence" or "taking effect without further process in set circumstances," the grant of exit status was not "automatic."[60]

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[58] *See* GATT Panel Report, *Canada—Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, BISD (35th Supp.) 37 (*adopted* Mar. 22, 1988); the European case; GATT Panel Report, *Canada—Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, BISD (39th Supp.) 27 (*adopted* Feb. 18, 1992); the American case; and GATT Panel Report, *EEC—Programme of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*, BISD (25th Supp.) 68 (*adopted* Oct. 18, 1978).

Key issues raised in these GATT Panel Reports are analyzed in RAJ BHALA, MODERN GATT LAW, vol. I, ch. 18, 37-38 (2nd ed., 2013).

[59] *See* Panel Report, *Brazil—Measures Affecting Imports of Retreaded Tyres*, WT/DS/332/R (*adopted* as modified by the Appellate Body, December 17, 2007).

The Appellate Body Report in this dispute is analyzed in the *WTO Case Review 2007,* 25 ARIZ. J. INT'L & COMP. L. 75 (2007).

[60] Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21, ¶ 5:280 (*quoting* the SHORTER OXFORD ENGLISH DICTIONARY vol. 1, 157 (6th ed., W.R. Trumble & A. Stevenson eds., 2007).

The Appellate Body rejected Argentina's argument connecting GATT Article XI:1 to Article 3:2 of the WTO *Agreement on Import Licensing*. Argentina said Article 3:2 differentiates between the trade-distorting effects of (1) an import licensing procedure and

Second, did the *DJAI* create "uncertainty" among prospective importers as to their ability to import into Argentina? Yes. There was a lack of clarity as to obtaining exit status. Government agencies had broad discretion as to entering and lifting observations, and deciding what information to ask of importers (even data unrelated to disclosures provided on the original *DJAI* application). Whether an agency might ask more of them, what agency that might be, what information might be asked of them—what documents they might need to produce—and what criteria might be applied to them; all were murky matters from the perspective of a prospective importer.

Third, did the *DJAI* "condition the right to import on trade balancing requirements?" Yes. Government agencies, particularly the SCI, as a condition to lifting an observation, often required prospective importers to commit to boost exports, and/or limit the value of merchandise they import in proportion to the value of their exports. Because importers had to keep a watchful eye on their export performance, they were not free to import as much as they desired.

Fourth, did the *DJAI* make importation "prohibitively costly?" Yes. Compliance with the procedures, at the very least, raised transactions costs for importers. Worse yet, trade-balancing export commitments were such a significant burden, unrelated to normal importing activity, that importation was prohibitively costly.

Therefore, the *DJAI* procedure itself and the discretionary control exercised by the Argentine government had a "limiting effect" on imports and thereby "restricted" market access for imported goods into Argentina. The limitation and consequent restriction ran afoul of Article XI:1. There was nothing wrong with the Panel refusing to adopt and apply Argentina's proposed Two Step Test for interpreting Article XI:1. That provision does not require such a Test.

5. Are GATT Articles VIII and XI:1 Mutually Exclusive?

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(2) an underlying rule that the procedure implements. Argentina thought the Panel interpreted GATT Article XI:1 to forbid any non-automatic import licensing procedure. That interpretation, said Argentina, would mean any such procedure would conflict *per se* with Article 3:2 of the *Agreement*. To avoid this conflict, Argentina said it was critical to recognize an import licensing procedure is not a "restriction" under Article XI:1 merely because that procedure is not "automatic." *Id.* ¶ 5.274.

The Appellate Body rejected the argument on three grounds. First, as a factual matter, Article 3:2 of the *Agreement* contemplates the existence of a separate, WTO-consistent restriction occurring through an import licensing procedure, whereas in the case at bar, the *DJAI* is itself a trade restriction. Second, as a legal matter, there is no conflict between the text of Article XI:1 and Article 3:2. Third, Argentina misread the Panel Report, putting too much emphasis on the way in which the Panel used the term "automatic," and consequently drawing the incorrect inference the Panel implied every import procedure that is not "automatic" violates Article XI:1. The Panel never made a finding as to whether the *DJAI* was an "import license procedure" under the *Agreement*. It simply applied to the *DJAI* the law of Article XI:1—did it restrict imports or not? *See id.*, ¶¶ 5:274-279.

Argentina was incorrect in its contention that the Panel erred as to the scope of application of Article VIII in relation to Article XI:1. The Appellate Body explained Article VIII establishes three "clear obligations," none of which render it mutually exclusive with Article XI:1.

First, Paragraph 1(a) says all fees and charges, other than import or export duties (covered by Article II), and internal taxes (covered by Article III) must be limited to the approximate cost of services rendered. Such fees and charges must not afford protection, even indirectly, to domestic producers, and nor be a tax on imports or exports. Second, Paragraph 2 says upon request, a WTO Member must review its laws and regulations to ensure compliance with Article VIII. Third, Paragraph 3 says no Member can impose a substantial remedy for a minor breach of its customs rule. In brief, the key duties (respectively) are (1) limit fees to cost recovery, (2) be vigilant about conformity, and (3) ensure any punishment "fits the crime" (i.e*.,* proportionality). The next two Paragraphs (2 and 3) of Article VIII are hortatory: they lack the word "shall," and thus do not impose mandatory obligations. The final Paragraph (4) illustrates in a non-exclusive way the scope of Article VIII.

This exegesis of GATT Article VIII mattered, and led directly to the Appellate Body holding on the relationship between it and Article XI:1:

> 5.233. Argentina's argument [that the two provisions are mutually exclusive] relies on the language in Article VIII:1(c). . . . We do not necessarily disagree with Argentina that the reference, in Article VIII:1(c), to the "need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements" implies a recognition by Members that import formalities and requirements can have trade-restricting effects, at least to some degree. We also accept that Article VIII:1(c) constitutes context for the interpretation of Article XI:1 . . ., and for what amounts to a restriction on importation within the meaning of the latter provision. Yet, such language does not suffice to establish the type of carve-out or derogation from Article XI:1 that Argentina seems to envisage for formalities and requirements referred to in Article VIII. . . . To the contrary, the general and hortatory language of Article VIII:1(c) stands in contrast to, for example, the language of Article VIII:1(a). . . . The mandatory language used in Article VIII:1(a) makes clear that fees and charges imposed in connection with importation will be consistent with the obligation set down in that provision only when such fees and charges meet the specific conditions prescribed therein, that is, when

> they are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic products or a taxation of imports for fiscal purposes.
>
> 5.237. [W]e agree with the Panel that *formalities or requirements under Article VIII . . . are not excluded per se from the scope of application of Article XI:*1, . . . and that *their consistency could be assessed under either Article VIII or Article XI:1, or under both provisions*. Thus, we *reject* Argentina's *argument that Articles VIII and XI:1 have mutually exclusive spheres of application*.[61]

Here, then, a new precedent was set.

In setting it, the Appellate Body also rejected the Argentine view that the Panel said any formality or requirement that does not result in the automatic importation of goods is necessarily inconsistent with Article XI. In truth, the Panel simply—and correctly—found that the *DJAI* procedure was a prerequisite for importation, and that it "operate[d] as a discretionary system of authorization of imports by which the Argentine authorities decide on an *ad hoc* basis whether to grant the right to import to each applicant on the basis of criteria not specified in advance."[62] The Panel was right to appraise the *DJAI* as: "not directed at a mere observance of forms; it is not a mere formality imposed by Argentina in connection with the importation of goods. Rather, it is a procedure by which Argentina determines the right to import."[63] Argentina was incorrect to infer from this characterization that the Panel erred by implying any import procedure that is a necessary condition to import goods, or by which the right to import is determined, is outside the scope of Article VIII.

6. Commentary: A New Precedent

In reaching its substantive holding that GATT Articles VIII and XI:1 are not mutually exclusive, the *Argentina Import Restrictions* Appellate Body cited no previous jurisprudence. That is, in support of this finding, it gave no citations to previous Appellate Body or pre-Uruguay Round GATT Panel jurisprudence—other than for the generic point that "the provisions of the WTO covered agreements should be interpreted in a coherent and consistent manner, giving meaning to all applicable provisions harmoniously."[64] Its citation to eight cases

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[61] *Id.* (emphasis added).

[62] *Id.*, ¶ 5:248.

[63] Appellate Body Report, *Argentina—Importation of Goods*, *supra* note 21 ¶ 5:250 (*quoting Argentina Import Restrictions* Panel Report, ¶ 6:433).

[64] *Id.* ¶ 5:236.

on this point easily could be read as a veiled statement that it had the power to interpret textual provisions with a view to ensuring the fabric of GATT-WTO law is as seamless as possible.[65]

The holding itself was a new law that the Appellate Body had to find on its own. It is doubtless that it will apply its teaching in the future.

B. GATT Obligations and WTO *Agriculture Agreement*

1. Citation

WTO Appellate Body Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R (adopted Jul. 31, 2015).[66]

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[65] The eight prior Appellate Body Reports were:

(1) Appellate Body Report, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, ¶ 5:123, WT/DS400/AB/R, WT/DS401/AB/R (*adopted* June, 2014) (analyzed in the *WTO Case Review 2014*, 32 ARIZ. J. INT'L & COMP. L. 497-646 (2015)).

(2) Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 570, WT/DS379/AB/R (*adopted* Mar. 25, 2011) [hereinafter *US—Anti-Dumping Duties (China)*] (analyzed in the *WTO Case Review 2011*, 29 ARIZ. J. INT'L & COMP. L. 287-476 (2012)).

(3) Appellate Body Decision, *United States—Subsidies on Upland Cotton*, ¶ 549, WT/DS267/AB/R (*adopted* Mar. 21, 2005) (analyzed in the *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107-345 (2006).).

(4) Appellate Body Decision, *Argentina—Safeguard Measures on Imports of Footwear*, ¶ 81, WT/DS121/AB/R (*adopted* Jan. 12, 2000) (analyzed in BHALA, *supra* note 22, at Vol. II, Ch. 69).

(5) Appellate Body Decision, *Korea—Definitive Safeguard Measure on Imports of Certain Dairy Products*, ¶ 81, WT/DS98/AB/R (*adopted* Jan. 12, 2000) (analyzed in the *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1-101 (2001)).

(6) Appellate Body Decision, *India—Patent Protection for Pharmaceutical and Agricultural Chemical Products* 1998 *India Patent Protection*, ¶ 45, WT/DS50/AB/R (*adopted* Jan. 16, 1998) (analyzed in *International Trade Law*, *supra* note 2, Vol. I, Ch. 48).

(7) Appellate Body Decision, *United States—Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (*adopted* May 20, 1996) (analyzed in *International Trade Law, supra* note 2, Vol. II, Ch. 92,).

(8) *See* Appellate Body Decision, *Japan—Taxes on Alcoholic Beverage*s, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (*adopted* Nov. 1, 1996) (analyzed in *International Trade Law*, *supra* note 2, Vol. I, Ch. 16).

[66] Appellate Body Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R (*adopted* July 2015) [hereinafter, Appellate Body Report, *Peru—Agricultural Products*].

2. Facts

a. Peruvian Price Range System[67]

Agriculture is a critical sector for many developing countries, with the potential to significantly contribute to food security, economic growth, and alleviation of rural poverty, but developing economies tend to be particularly vulnerable to sudden changes in commodity prices. Price range systems (PRS) and similar instruments are intended to help stabilize domestic prices in order to shield producers and consumers alike from shocks in the global economy. However, these systems distort trade and often run afoul of WTO rules.

In 2011, Guatemala and Peru signed a Free Trade Agreement (FTA), which noted that Peru's PRS and its amendments may remain in place. In April 2013, before either party ratified the FTA, Guatemala filed a request for consultations with Peru concerning the consistency of the PRS with Peru's WTO obligations. Although a Panel was established in July 2013 to hear the dispute, Guatemala still underwent domestic procedures to prepare for ratification of the FTA in December 2013. Several months later, in February 2014, Guatemala notified Peru that it had ratified the FTA. Peru for its part, rather understandably, refrained from ratifying the agreement.

As mentioned, the measure at issue in this dispute is a Peruvian PRS, under which an additional duty may be issued for certain rice, sugar, maize, and milk products. The additional duty levied is in addition to Peru's applied *ad valorem* tariff, which is bound at 68% for the agricultural products subject to the PRS. As reported by the Panel, Peru's applied tariffs are zero for the products subject to the PRS, except three maize products that are subject to an applied tariff of six percent.

The Peruvian PRS consists of floor and ceiling prices for each product that are based on average international prices in a specified international market set forth by Peruvian decree over the previous 60-month period. To calculate the floor price, the PRS applies a confidence interval to the monthly average prices using free on board (f.o.b.) prices that account for inflation. The PRS applies the same standard deviation that established the confidence interval in order to calculate the ceiling price. Both the floor and ceiling prices are converted from f.o.b. to cost, insurance, and freight (c.i.f.) terms.

The Peruvian PRS also sets a reference price for each product that is derived from the average international f.o.b. price over the previous two weeks and then converted to c.i.f. terms in the same manner as for the floor and ceiling price conversions.

There were 11 Third Parties at the appellate stage, namely, Argentina, Brazil, China, Colombia, Ecuador, El Salvador, the European Union, Honduras, India, Korea, and the United States.

[67] This discussion draws on *id.* at ¶¶ 1:2, 5:1-5:2.

If the reference price falls within the floor and ceiling prices, then no additional duty or refund is applied. If the reference price is above the ceiling price, then Peru issues a rebate equal to:

> The difference between the reference price and the ceiling price multiplied by a factor associated with import costs, and may not exceed "the sum payable by the importer as the ad valorem duty and additional tariff surcharge corresponding to each product.[68]

However, if the reference price falls below the floor price, an additional duty is applied in the amount of the price difference. Under the PRS, the additional duty plus the applied duty must not exceed the Peruvian bound tariff rate of 68%.

The price band system (PBS), which the Appellate Body had examined previously in *Chile Price Band System* (2002),[69] is similar to the PRS. In fact, that case is frequently mentioned in the present dispute. Although the PRS and PBS share similar policy goals, the two instruments have important distinctions. Kamal Saggi and Mark Wu explain:

> Under a PBS, the government sets a particular floor and ceiling price. Whenever the import price falls below this range, an additional tariff is imposed equal to the difference between the floor price and import price, bringing the local price of the import back up to the floor price. Similarly, whenever the import price exceeds the ceiling price, a tariff rebate equal to the difference between the import price and ceiling price is issued. This brings the local price of the import back down to the ceiling price. The additional tariff/rebate may be subject to additional adjustment, as necessary. Overall, it should serve to keep the price of the imported good within the desired price band. A PRS operates in much the same way as a PBS, except that the *adjustments are not made on a transaction-specific basis*.[70]

In other words, while sharing similarities, the PRS differs from the PBS in that the amount of the additional duty or rebate remains the same for each product until the next adjustment to the reference price and/or floor and ceiling prices is made.

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[68] *Id.* at ¶ 5:2 (n. 34) (referencing Article 8 of the Supreme Decree No. 115-2001-EF of Peru).

[69] Appellate Body Report, *Chile—Price Band System and Safeguard Measures Relating to Certain Agricultural Products*, WT/DS207/AB/R (*adopted* Oct. 23, 2002) [hereinafter, Appellate Body Report, *Chile—Price Band System*].

[70] Kamal Saggi & Mark Wu, *Understanding Agricultural Price Range Systems as Trade Restraints: Peru—Agricultural Products* (European University Institute Robert Schuman Centre for Advanced Studies, EUI Working Paper RSCAS 2015/58, 1 (2015)).

3. *Agriculture Agreement* Article 4:2 Issue

Peru lost the majority of its arguments before the Panel and focused on two major issues on appeal related to Article 4.2 of the Agreement on Agriculture and GATT Article II:1(b).[71]

The first issue of importance concerned Article 4.2 of the Agreement on Agriculture. Peru appealed several issues related to the Panel finding that the PRS violates Article 4.2 of the Agreement on Agriculture, most notably that the Panel incorrectly assessed both the "variability" and the "additional features" of the measure at issue.[72]

First, Peru argued the Panel erred in its assessment of "variability" because it "confuses the measure at issue—i.e. the additional duties resulting from the PRS—with the methodology used to calculate the reference price and the potential duty."[73] The Appellate Body disagreed, stating instead that the Panel was "required" to assess the methodology.[74]

Second, Peru claimed the Panel erred in its assessment of the "additional features" of the PRS. Here, Peru argued the Panel incorrectly analyzed the transparency and predictability of the PRS. The Appellate Body again disagreed and upheld the Panel findings.

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[71] Appellate Body Report, *Peru—Agricultural Products*, *supra* note 66, ¶ 4:1(a)(ii) (The first appeal by Peru concerned the Panel finding that "there was 'no evidence that Guatemala brought these proceedings in a manner contrary to good faith' under Articles 3.7 and 3.10 of the DSU, and that there was, therefore, "no reason for the Panel to refrain from assessing the claims put forward by Guatemala." The Appellate Body discussed Peru's arguments and Guatemala's counterarguments in ¶¶ 5:5-5:28 of its report).

The primary appeal by Guatemala was that the Panel erroneously interpreted and applied "minimum import prices" and "similar border measures" within the meaning of footnote 1 to Article 4.2 of the Agreement on Agriculture and asked the Appellate Body to complete the analysis and issue a finding. Although the Appellate Body found that the Panel's interpretations of the terms "minimum import price" and "similar border measure" were correct, it found the Panel erred in its application of the terms because in each instance it failed to assess deeply enough the design, structure and operation of the PRS. Therefore, the Appellate Body reversed the Panel findings that the measure at issue constitutes a "minimum import price" or at least a "similar border measure." However, the Appellate Body was unable to complete the analysis based on the record. The Appellate Body addresses the issue in ¶¶ 5:122 -5:165.

[72] Appellate Body Report, *Peru—Agricultural Products*, *supra* note 66, ¶¶ 5:62-5:68 (Peru also claimed the Panel violated Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) when assessing the issue under Article 4.2 of the Agreement on Agriculture because the Panel failed to properly compare the measure at issue with ordinary customs duties and variable import levies. The court stated that Peru's arguments on appeal relate to the legal standard applied by the Panel as opposed to the Panel's assessment. Consequently, the Appellate Body found the Panel did not act inconsistently with Article 11 of the DSU.).

[73] *Id.* ¶ 5:43.

[74] *Id.* ¶ 5:43.

4. *Agriculture Agreement* Article 4:2 Holding and Rationale[75]

Peru claimed the Panel erred in its assessments of "variability" and "additional features" in finding that the additional duties under the PRS violate footnote 1 of Article 4.2 of the Agreement on Agriculture because the additional duties are "variable import levies" or "similar measures." Article 4.2 states:

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

Footnote 1 to Article 4.2 reads:

> These measures include quantitative import restrictions, *variable import levies*, minimum import prices, discretionary import licensing, non-tariff measures maintained through state-trading enterprises, voluntary export restraints, and *similar border measures other than ordinary customs duties*, whether or not the measures are maintained under country-specific derogations from the provisions of GATT 1947, but not measures maintained under balance-of-payments provisions or under other general, non-agriculture-specific provisions of GATT 1994 or of the other Multilateral Trade Agreements in Annex 1A to the WTO Agreement.[76]

To provide a more complete backdrop against which an Article 4 assessment concerning market access is undertaken, the Appellate Body recalled the overarching aim of the Agreement on Agriculture, which immediately reiterates the Uruguay Round goals in its preamble:

> to establish a fair and market-oriented agricultural trading system", and to initiate a reform process "through the negotiation of commitments on support and protection and through the establishment of strengthened and more operationally effective GATT rules and disciplines". The preamble further states that, to achieve this objective, it is necessary "to provide for substantial progressive reductions in agricultural support and protection … resulting in correcting and preventing restrictions and distortions in world agricultural

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75 This discussion draws on *Id.* ¶¶ 5:29-5:61.

76 *Id.* ¶ 5.31 (emphasis added).

> markets," through achieving "specific binding commitments in [*inter alia*] market access. . . .[77]

The Appellate Body then explained rationale of the tariffication process advanced by negotiators during the Uruguay Round as it linked to the overarching goals of the Agreement on Agriculture. Critically, the measures listed in footnote 1 of Article 4.2 were considered to be trade restrictive and market distorting, therefore they should be converted into ordinary customs duties. It was envisioned that the shift to ordinary customs duties would improve market access because ordinary customs duties are more transparent and predictable, and they can be better compared among Members, simplifying future negotiations to lower tariff barriers.

Regarding footnote 1 to Article 4.2, the Appellate Body stated all the measures listed "restrict the volume or distort the price of imports of agricultural products," which "frustrate a key objective of the Agreement."[78] The Appellate Body noted that a duty listed in that footnote might take the same form as an ordinary customs duty. In order to differentiate between the two, a Panel may need to look "in-depth" at the design, structure and operation of the measure at issue.[79]

a. Meaning of "Variability"[80]

The Appellate Body first took up the issue of "variability," relying primarily on the Appellate Body's statements in *Chile Price Band System (2002)*. Variable import levies and ordinary customs duties can vary, so whether a duty is variable is an insufficient characteristic in defining the measure at issue. To distinguish between the two, it is important to understand the underlying mechanism that causes the variance. According to the Appellate Body, variable import levies are "'inherently' variable because they [necessarily] incorporate a scheme or formula that causes and ensures that levies change automatically and continuously."[81] Conversely, an ordinary customs duty varies through "'discrete changes in applied tariff rates that occur independently and unrelated to such … scheme or formula' and usually as a result of separate administrative or legislative action."[82]

In addition, variable import levies may have other characteristics that reduce market access. Such characteristics include less transparency or

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[77] Appellate Body Report, *Peru—Agricultural Products*, *supra* note 66, ¶ 5:37 (emphasis added) (internal notes omitted).

[78] *Id.* ¶ 5:39.

[79] *Id.*

[80] *Id.* ¶¶ 5:43-5:52.

[81] *Id.* ¶ 5:40.

[82] Appellate Body Report, *Peru—Agricultural Products, supra* note 66, ¶ 5:40 (*quoting* the Appellate Body in *Chile—Price Band System*, *supra* note 69).

predictability than ordinary customs duties, which may be considered in an assessment but which the Appellate Body cautioned "are not independent or absolute characteristics . . ." of a variable import levy.[83] Thus, in determining whether a measure at issue is a "variable import levy" within the meaning of footnote 1, the analysis of these additional features "should not be given more prominence . . . than the determination of whether a measure can be characterized as 'inherently variable,' which is a necessary and key element."[84]

Ultimately, the Appellate Body disagreed with Peru's claim that the Panel incorrectly assessed "variability" in finding the additional duty applied by the PRS is a variable import levy. In responding to Peru's arguments on appeal, the Appellate Body confirmed that, due to the measure at issue itself, the Panel necessarily had to assess both the PRS calculation methodology and the additional duty resulting from the PRS to determine whether the duty and its underlying calculation methodology have "inherent variability" in order to distinguish the measure from an ordinary customs duty. This confirmation was in line with its own assessment.

The Appellate Body also reasoned that, "duties that are calculated based on an "inherently variable" system will themselves be "inherently variable." However, there is no need to identify a specific frequency of change in duties, as the measure could still be variable even though the duties do not change with each transaction.[85] The Appellate Body finally clarified that although "a given measure may contain elements that are common to both 'variable import levies' and 'minimum import prices,' [a] 'variable import levy,' however, need not necessarily contain a certain minimum threshold for it to be characterized as 'variable' or more precisely as 'inherently variable.'"[86]

b. Meaning of "Additional Features"[87]

The Appellate Body also disagreed with Peru's claim that the Panel erred in its assessment of "additional features" and was incorrect in determining that the PRS lacks transparency and predictability compared with ordinary customs duties. It further stated that Peru "assigns too prominent a role to the assessments of a lack of transparency and predictability, and of distortion of the transmission of international prices to the domestic market, within the context of an analysis of whether a measure is a 'variable import levy.'"[88] This determination contributed to the finding that the additional duty applied by the PRS constitutes a variable import levy.

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[83] *Id.* ¶ 5:41.
[84] *Id.* ¶ 5:60.
[85] *Id.* ¶ 5:46.
[86] *Id.* ¶ 5:51.
[87] Appellate Body Report, *Peru—Agricultural Products*, *supra* note 66, ¶¶ 5:53-5:61.
[88] *Id.* ¶ 5:60.

Peru quickly lost arguments that the Panel "conflate[ed] the ability to forecast duties with transparency and predictability" and that "any 'variability' of the measure is due to the fluctuations in world market prices."[89] Instead, the Appellate Body agreed with the Panel's assessment. According to the Appellate Body, the Panel found the "inherent variability" of the PRS "relates to the 'series of steps and mathematical formulas for calculating the ceiling and floor prices … and the reference prices,"[90] and "[b]y contrast, in its analysis of transparency and predictability, the Panel observed that, in the context of the PRS, the difficulty in estimating future international prices" means that the PRS lacks transparency and predictability compared with ordinary customs duties.[91]

Peru also sought to claim the "PRS results in a close correlation between international and domestic prices" in contrast with Chile's price band system.[92] This distinction was rejected by the Appellate Body, which quickly declared whether the PRS is more or less distorting than the price band system is insufficient. The Panel rightly "took into account the floor and reference prices when concluding that the short-term and medium-term effects of the PRS distort the transmission of international prices to the domestic market, differently from 'ordinary customs duties.'"[93] Its assessment found that the PRS recalculates the floor price every six months and the additional duties every two weeks, which by design and effect "'neutralize[s]' or dilute[s] fluctuation[s] in international prices."[94]

In addition, the Appellate Body clarified that "whether a measure falls within the scope of one or of another measure listed in footnote 1 of the Agreement on Agriculture nonetheless remains a separate question,"[95] and specifically, "the issue of whether a measure is a 'variable import levy that distorts the transmission of international prices to the domestic market is separate from the issue of whether such measure also qualifies as a 'minimum import price.'"[96] Next, the Appellate Body turned to the issue concerning GATT Article II:1(b).

5. GATT Article II:1(b) Issue

In addition to the appeal concerning the Agreement on Agriculture, Peru also alleged "the Panel erred in finding that the additional duties are not 'ordinary

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89 *Id.* ¶¶ 5:54-5:53.

90 *Id.* ¶ 5:51, n.178 (*quoting* Guatemala's appellee's submission, ¶ 139).

91 *Id.* ¶ 5:55.

92 Appellate Body Report, *Peru—Agricultural Products*, *supra* note 66, ¶ 5.59.

93 *Id.* ¶ 5.59 (quoting Panel Report, *Peru—Additional Duty on Imports of Certain Agricultural Products*, ¶¶ 7.97-7.167, 7.344-7.347, 7.349, WT/DS457/R (Nov. 27, 2014) [hereinafter Panel Report, *Peru—Agricultural Products*]).

94 Appellate Body Report, *Peru—Agricultural Products*, *supra* 66, ¶ 5.59 (quoting Panel Report, *Peru—Agricultural Products*, *supra* note 93, ¶¶ 7.344, 7.346).

95 Appellate Body Report, *Peru—Agricultural Products*, *supra* 66, ¶ 5.57.

96 *Id.* ¶ 5.59.

customs duties' under the first sentence of GATT Article II:1(b)."[97] Specifically, Peru argued this finding was based on the Panel's finding under Article 4.2 of the Agreement on Agriculture as opposed to under GATT Article II:1(b). The Appellate Body disagreed and Peru lost the appeal.

6. GATT Article II:1(b) Holding and Rationale[98]

On appeal, Peru unsuccessfully argued that the Panel incorrectly based its finding, that the PRS additional duties violate GATT Article II:1(b), on the Panel's findings that these duties are "variable import levies or a "similar border measure" under footnote 1 to Article 4.2 of the Agreement on Agriculture.

[97] *Id.* ¶ 5.69. On appeal, Peru also argued, unsuccessfully, that the Panel violated Article 11 of the DSU because it failed to consider certain evidence in its assessment of whether the additional duties resulting from the PRS were "ordinary customs duties" within the meaning of GATT Article II:1(b). *Id*. ¶¶ 5.77-5.80.

In addition, Peru claimed the Panel erred in its assessment of Article 4.2 of the Agreement on Agriculture and GATT Article II:1(b) by failing to account for the FTA between Guatemala and Peru and ILC Articles 20 and 45 under Article 31 of the Vienna Convention. Guatemala asserted this argument by Peru was not raised before the Panel and is thus outside the scope of appeal, but lost. Peru also took issue with the Panel decision not to rule on whether the FTA between Guatemala and Peru "could, by means of the FTA, modify as between themselves their rights and obligations under the WTO covered agreements." *Id.* ¶ 4.1(e). With respect to Peru's appeal, the Appellate Body found:

> [Peru's arguments] amount to arguing that, by means of the FTA, Peru and Guatemala actually modified these provisions between themselves. Moreover, we find that the FTA between Peru and Guatemala and ILC Articles 20 and 45 are not "relevant" to the interpretation of Article 4.2 and Article II;1(b) within the meaning of Article 31(3)(c) of the Vienna Convention and that the FTA is not a subsequent agreement "regarding the interpretation" of these provisions within the meaning of Article 31(3)(1).

Appellate Body Report, *Peru—Agricultural Products*, *supra* 66, ¶ 5.118. The Appellate Body upheld the Panel decision, and stated:

> [O]n appeal, Peru has not challenged the Panel's finding that an agreement that has not yet entered into force, such as the FTA, cannot modify the rights and obligations under the covered agreements. In light of this, we find that the Panel did not err in declining to make findings as to whether the FTA modified the WTO rights and obligations between Peru and Guatemala because the FTA was not in force.

Id. ¶ 5.119. The arguments by Peru and Guatemala are discussed in ¶¶ 5.91-5.119.

[98] This discussion draws on Peruvian Agricultural Products Appellate Body Report. *Id.* ¶¶ 5.69-5.76.

Instead, Peru claims the Panel should have undertaken a separate analysis under Article II:1(b) as to whether the additional duty under the PRS violates the GATT, as opposed to finding a violation by "implication."[99] But, Peru acknowledges the meaning of "ordinary customs duty" is the same in Article 4.2 as Article II:(1)(b). Article II:1(b) of the GATT states:

> The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, *shall*, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, *be exempt from ordinary customs duties in excess of those set forth and provided for therein*. *Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date*.[100]

The Appellate Body stated that while the obligations under Article 4.2 of the Agreement on Agriculture and GATT Article II:1(b) are different, notably, both reference ordinary customs duties. The parties acknowledged the term "ordinary customs duties" has the same meaning under both Article 4.2 and Article II:1(b). The Panel found the additional duties under the PRS to be "variable import levies" or similar measures and thus not ordinary customs duties under Article 4.2, the Panel stated further analysis was unnecessary. Therefore, the additional duties were not ordinary customs duties under Article 4.2 and thus also under Article II:1(b), which defines "ordinary customs duties" in the same way. The Panel further reasoned the additional duties are "other duties and charges" not in Peru's Schedule of Concessions within the meaning of GATT Article II:1(b), and thereby constitute a violation of the GATT.

The Appellate Body found the Panel's analysis sufficient, as it properly recognized the distinct legal obligations under Articles 4.2 and II:1(b) and examined each Article under separate sections of the Panel Report. In addition, the Panel "did not make a consequential finding of inconsistency with the second sentence of Article II:1(b) based on its earlier finding under Article 4.2."[101] Finding thus, the Appellate Body upheld the Panel finding that the additional duties under the PRS are not "ordinary customs duties" within the meaning of GATT Article II:1(b).

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[99] *Id.* ¶¶ 5.70-5.71, 5.75.

[100] General Agreement on Tariffs and Trade, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 (Emphasis added).

[101] Appellate Body Report, *Peru—Agricultural Products*, *supra* note 66, ¶ 5.75.

7. Commentary

As mentioned, developing countries with a PRS or similar system often have important policy considerations behind its implementation, but these systems also typically violate a Member's WTO obligations due to their design, structure, and operation. Although the Appellate Body upheld the Panel findings that the Peruvian PRS violates Article 4.2 of the Agreement on Agriculture and GATT Article II:1(b), there may remain ways in which a Member could successfully uphold a challenge to its PRS. One such avenue could be through an FTA, which Peru attempted in this dispute, albeit unsuccessfully. Peru's reliance on its FTA with Guatemala in this dispute had a number of challenges, not the least of which was the fact that the FTA had not entered into force. A fully ratified, well-worded FTA may fair better under the scrutiny of the Panel or Appellate Body. Regardless, a PRS remains trade distorting and can have negative effects on the very market participants that policymakers are keen to protect. Instead, policymakers in developing countries should consider alternative policy tools, such as targeted safety net programs.

C. Sanitary and Phytosanitary (SPS) Measures and WTO *SPS Agreement*

1. Citation

Appellate Body Report, *India—Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R (adopted Jun. 19, 2015).[102]

2. India's Controversial Measures Against Bird Flu[103]

[102] Appellate Body Report, *India—Measures Concerning the Importation of Certain Agricultural Products,* WT/DS430/AB/R (June 4, 2015) (*adopted* June 19, 2015) [hereinafter Appellate Body Report, *India—Poultry*]. The Panel Report in the case was Panel Report, *India—Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/R (Oct. 14, 2014) (adopted as modified by the Appellate Body, June 19, 2015). [hereinafter Panel Report, *India—Poultry*].

At the Appellate stage, there were 10 Third Party participants: Argentina, Australia, Brazil, China, Colombia, Ecuador, European Union, Guatemala, Japan, and Vietnam. The absence of any Middle Eastern country is perhaps surprising in view of the Middle East Respiratory Syndrome (MERS) and other public health concerns potentially arising from cross-border farm product trade. Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.

[103] *Id.* ¶ 2.4.3. In addition to the sources cited below, the facts of the *India Poultry* dispute are set out in Appellate Body Report, *India—Poultry, supra* note 102, ¶¶ 1.1-1.19 and 4.1-4.22, and in Panel Report, *India—Poultry, supra* note 102, ¶¶ 2.1-2.59.

That India would seek to impose sanitary and phytosanitary (SPS) measures may come as a surprise to its critics and friends alike.[104] The country is not the picture of perfect hygiene; streets in Mumbai and villages in Punjab look rather different from those in Geneva and towns outside Berne. But, Indians have dignity, too, and among his many reform initiatives, Prime Minister Narendra Modi is trying to improve sanitation. The question, then, is not why India would resort to such measures, but whether doing so was justified. Was India essentially protecting domestic agricultural interests against foreign competition?

That is precisely the kind of question the WTO *Agreement on Sanitary and Phytosanitary* Measures (*SPS Agreement*) is designed to address. So, when India imposed a ban on poultry (as well as eggs, live pigs, and meat) imports from the United States, costing American poultry producers $300 million in lost sales annually,[105] it should have anticipated a lawsuit under the *Agreement* and have been armed with pertinent Appellate Body precedents dating from the 1998 *Beef Hormones* case.[106]

It was avian influenza (AI)—commonly called "bird flu"—that worried India, and for good reason. AI afflicts waterfowl such as ducks and geese, with no manifest illness, and then spreads to poultry, other animals and humans. AI is a virus, with two components: "H" (for haemagglutinin) and "N" (for neuraminidase). That is why AI typically is referred to as "HxNy." The "x" and "y" refer to one of the 16 H and 9 N sub-types that scientists identified with new types emerging as a result of genetic mutation.[107]

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[104] *Id.* ¶ 1.1. As defined in Annex A, Paragraph 1, to the *SPS Agreement*, an "SPS" measure is one designed to protect animal, human, or plant life or health against certain risks.

[105] *See* Bryce Baschuk, *India Must Comply With WTO Decision on Poultry or Face Retaliation From U.S.*, 32 INT'L TRADE REP. 1162 (BNA) (June 25, 2015) [hereinafter *India Must Comply With WTO Decision on Poultry*]; Bryce Baschuk, *WTO Faults India for 2007 Ban on U.S. Poultry, Egg Products*, 31 INT'L TRADE REP. 1825 (BNA) (Oct. 16, 2014) [hereinafter *WTO Faults India for 2007 Ban on U.S. Poultry*].

[106] *See* Appellate Body Report, *EC—Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (*adopted* February 13, 1998). This case is treated in BHALA, *supra* note 22, Vol. I, ch. 43.

[107] Appellate Body Report, *India—Poultry, supra* note 102, ¶ 2.7. As the Appellate Body explained:

> 4.9 AI is classified into one of two groups according to its ability to cause disease, or "pathogenicity," in birds: (i) highly pathogenic avian influenza (HPAI); and (ii) low pathogenicity avian influenza (LPAI). HPAI is an extremely infectious, systemic viral disease of poultry that causes high mortality and various types of lesions in multiple visceral organs, the brain, and skin. By contrast, poultry infected with LPAI may exhibit no symptoms of the disease, or only very mild symptoms, such as ruffled feathers, reduced egg production, or mild effects on the respiratory system.

The USDA admitted the ailment affected 48 million birds in 15 states, i.e., afflicting much of America's commercial poultry stock; it was the largest outbreak of bird flu in American history. The Indian ban also applied to other WTO Members in which bird flu had been cited. Many Buddhists, Christians, Hindus, Muslims, and Sikhs (but not Jains) in India eat chicken (as well as certain other meats and eggs, all of which provide protein), if they can afford to do so,

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> 4.10 AI viruses are transmitted among birds through direct contact between infected and susceptible birds or indirect contact through aerosol droplets or exposure to virus-contaminated materials, trays, or the surface of eggs. Wild birds, particularly wild aquatic birds such as ducks, geese, and gulls, are the principal reservoirs for LPAI viruses. Moreover, wild birds are the original source of the H5 and H7 LPAI viruses that, when circulating in poultry, give rise to HPAI viruses. In general, the longer that an H5 or H7 LPAI virus is allowed to circulate in poultry, particularly in areas of high poultry density, the greater the chances that an HPAI virus will emerge. Wild birds thus play a significant role in introducing AI viruses in domestic poultry.
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> 4.11 Once AI is established or adapted in poultry, however, wild birds play a very limited role in secondary dissemination. Instead, the spreading or wider distribution of AI takes place within flocks or sizeable numbers of poultry and is greatly influenced by commercial production and marketing practices. Humans may facilitate transmission of AI viruses through the movement of dead infected birds and the use of contaminated equipment. With respect to HPAI viruses, the high virus levels in tissues mean that consumption of infected carcasses by birds can also be a route for transmission.
>
> 4.12 Transmission between humans appears to have occurred only rarely and, in nearly all reported cases of human infection with AI viruses, there has been a close association with infected birds or infective carcasses. Generally, serious complications or fatal cases in humans have been reported in cases of infection with certain strains of HPAI viruses, notably H5N1. Other AI subtypes including H7N7, H7N9, and H9N2 have also infected humans; some of these cases have resulted in fatalities, but most infections have been mild or even subclinical. Although there have been outbreaks of LPAI (H7N9) resulting in fatalities and illness to humans, illness from infection with LPAI viruses has generally been clinically mild and has ranged from mild signs and symptoms (e.g., conjunctivitis) to more acute systemic illness (e.g., fever and upper respiratory tract disease) with full recovery.

Appellate Body Report*, India—Poultry, supra* note 102, ¶¶ 4.9-4.12.

and poultry farming matters to the Indian agricultural sector. Recall that one of the most popular Indian dishes across the globe is *Chicken Tikka Masala*, and it is easy to appreciate why Indian consumers and farmers were worried about infection from America.

India set forth the ban through two legal instruments: (1) The "*Livestock Act*," i.e., the *Live-Stock Importation Act, 1898* (Number 9 of 1898), published on August 12, 1898, as amended by *The Live-Stock Importation (Amendment) Act, 2001* (Number 28 of 2001) (July 19, 2001), published in *The Gazette of India* on August 29, 2001, Number 35, Part II, Section 1, pp. 1-2. As the Appellate Body explained:

> 4.2. The *Livestock Act* was enacted "to make better provision for the regulation of the importation of live-stock and live-stock products which is liable to be affected by infectious or contagious disorders." The *Act* includes in its definition of "infectious or contagious disorders" any disease or disorder that may be specified by the Indian Central Government by notification in the *Official Gazette*. "Live-stock" includes any animal that may be specified by the Central Government by notification in the *Official Gazette*. "Live-stock products" consist of "meat and meat products of all kinds including fresh, chilled and frozen meat, tissue, organs of poultry, pig, sheep, goat; egg and egg powder" and "any other animal product which may be specified by the Central Government by notification in the *Official Gazette*."
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> 4.3. Section 3 of the *Livestock Act* is entitled "Power to regulate importation of live-stock." Section 3(1) provides:
>
> > The Central Government may, by notification in the *Official Gazette*, regulate, restrict or prohibit in such a manner and to such extent as it may think fit, [the import] into [India] or any specified place therein, of any live-stock which may be liable to be affected by infectious or contagious disorders, and of any fodder, dung, stable-litter, clothing harness or fittings appertaining to live-stock or that may have been in contact therewith.
>
> 4.4. In addition, Section 3A of the *Livestock Act* provides:

> The Central Government may, by notification in the *Official Gazette*, regulate, restrict or prohibit in such manner and to such extent as it may think fit, the import into the territories to which this *Act* extends, of any live-stock product, which may be liable to affect human or animal health.[108]

In the Indian governmental structure, the Department of Animal Husbandry, Dairying, and Fisheries (DAHD) regulates livestock and livestock product importation under Sections 3(1) and 3A of the *Act*. When DAHD does so, for instance when it issues a notice regulating such imports, then that notice also operates as a customs notification under Indian law and technically is called "delegated legislation." Such legislation is assigned a Statutory Order (S.O.) number and published in the *Official Gazette*.

(2) "S.O. 1663(E)," that is the Statutory Order 1663(E) issued by India's Department of Animal Husbandry, Dairying, and Fisheries (DAHD) on July 19, 2011, pursuant to Sections 3 and 3A of the *Livestock Act* and published in *The Gazette of India* on July 20, 2011, Number 1390, Part II, Section 3(ii), pp. 1-2. Section 1 of this S.O. contained the import ban at issue in the case:

> In exercise of the powers conferred by sub-section (1) of Section 3 and Section 3A of the *Livestock Importation Act*. . . the Central Government hereby prohibits, with effect from the date of publication of this notification, in the *Official Gazette*, namely:
>
> (1)(i) the import into India from all countries, in view of Notifiable Avian Influenza ["NAI"] (both Highly Pathogenic Notifiable Avian Influenza ["HPNAI"] and Low Pathogenic Notifiable Avian Influenza ["LPNAI"]), of wild birds except those reared and bred in captivity;
>
> (ii) the import into India from the countries reporting Notifiable Avian Influenza (both Highly Pathogenic Notifiable Avian Influenza and Low Pathogenic Notifiable Avian Influenza), the following livestock and livestock products, namely:
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> (a) domestic and wild birds (including poultry and captive birds);

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[108] *Id.* ¶¶ 4.2-4.4 (footnotes omitted).

> (b) day-old chicks, ducks, turkeys and other newly hatched Avian species;
> (c) un-processed meat and meat products from Avian species, including domesticated, wild birds and poultry;
> (d) hatching eggs;
> (e) eggs and egg products (except Specific Pathogen Free eggs);
> (f) un-processed feathers;
> (g) live pigs;
> (h) pathological material and biological products from birds;
> (i) products of animal origin (from birds) intended for use in animal feeding or for agricultural or industrial use;
> (j) semen of domestic and wild birds including poultry.[109]

The S.O. authorized the central government to permit imports of processed poultry meat, subject to a satisfactory conformity assessment by the exporting country, and exempted processed pet food, biological, and other pathological items used for research in India's National Referral Laboratories. Collectively, the *Livestock Act* and S.O. 1663(E) are called the "AI Measures," for "Avian Influenza" (discussed below).

Perhaps India was prepared for the legal onslaught. Or, perhaps it felt impregnable given that the basis for its disputed ban dated from 1898, the Victorian Era (1876-1901) when Robert Gascoyne-Cecil (1830-1903), was the British Prime Minister, and William McKinley (1843-1901), was President of the United States. Yet there was no strength in that history. India lost the case brought by the United States—an action backed, and victory cheered by, the USA Poultry and Egg Export Council (USAPEEC) and the National Chicken Council (NCC).[110]

The Appellate Body held India had to drop its import ban on American poultry and other agricultural goods. The ban was far more than what India needed to protect human or animal health. India failed to justify the ban under international scientific standards under the standards of the OIE. Moreover, the ban was not the aftermath of a proper risk assessment. Still more, the ban was more trade restrictive than necessary to achieve the appropriate level of protection (ALOP, defined in Annex A, Paragraph 5 of the *SPS Agreement*, and also called therein "acceptable level of risk") India set for itself. The ban failed to account for disease-free areas, precluding delineation among regions and instead applying

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[109] *Id.* ¶ 4.6 (footnotes omitted).

[110] *See WTO Faults India for 2007 Ban on U.S. Poultry*, *supra* note 105.

to a whole territory, even though the affected poultry came from a specific region. Finally, the ban arbitrarily and unjustifiably discriminated among Members, singling out imports from one Member (America), and favoring like domestic products (Indian poultry).

India lost at the Panel stage, and in affirming the Panel's holdings, the Appellate Body did little other than tweak some aspects of the Panel legal reasoning. The United States Trade Representative (USTR) hailed the victory as "comprehensively demonstrat[ing] that categorical import prohibitions are not appropriate in addressing the risks from avian influenza."[111] The USTR was diplomatic in not stating bluntly the failure of India to devise, implement, and enforce a domestic surveillance regime to check for bird flu within India was not only a grave weakness in India's case, but it also reeked of the hypocrisy that India is fond of accusing powerful developed countries and former colonial powers of being guilty. Though "America's poultry producers" were "being challenged again by an outbreak of highly pathogenic avian influenza," said Secretary of Agriculture Tom Vilsack the Appellate Body Report "continues to encourage USDA's efforts to maintain open markets for United States poultry based on international standards."[112] The Secretary was polite, too. He said, "[a] rules based international trading system is critical to allow U.S. farmers and ranchers to compete on a level playing field." He did not add that India is wont to accuse mighty countries of veiled double standards to serve their protectionist interests.

Yet, India's well-founded worry about AI translated into an over-reaction without supporting legal textual or precedential basis, rather than what the Americans said should have been an "appropriate" response to an "occasional" outbreak to which any Member is vulnerable.[113] India erred on the side of thinly veiled protectionism, not on the side of scientifically verifiable evidence. The USTR pointed out that under international standards, an outright import ban is not mandatory if the bird flu is low pathogenic avian influenza (LPAI).[114] A ban was necessary only in High Pathogenic Avian Influenza (HPAI) instances. The Indian ban, first imposed in February 2007, covered poultry imports from the United States and any other country in which there was any report of any type of avian influenza. But, America had not had an HPAI case since 2004.[115] Its LPAI cases

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[111] *India Must Comply With WTO Decision on Poultry*, *supra* note 105. *See also* Bryce Baschuk, *India Cites Multitude of Errors in WTO Ruling on U.S. Poultry Ban*, 32 INT'L TRADE REP. 282 (BNA) (Feb. 5, 2015) (summarizing the Panel findings and India's appellate arguments).

[112] Brian Flood, *U.S. Wins World Trade Organization Appeal Over Indian Bird Flu Agricultural Prohibitions*, 32 INT'L TRADE REP. 1048 (BNA) (June 11, 2015).

[113] *India Must Comply With WTO Decision On Poultry*, *supra* note 105.

[114] *See WTO Faults India for 2007 Ban on U.S. Poultry*, *supra* note 105; Daniel Pruzin, *U.S. Secures WTO Panel to Rule On Indian Agricultural Barriers*, 29 INT'L TRADE REP. 1072 (BNA) (June 28, 2012).

[115] *See WTO Faults India for 2007 Ban on U.S. Poultry, supra* note 105; Pruzin, *U.S. Secures WTO Panel to Rule on Indian Agricultural Barriers*, *supra* note 114.

dated form 2002, 2005, and 2006. The asymmetry—hypocrisy, dare it be said—was obvious:

> 4.13 *Between 2004 and January 2014, the United States did not notify* the . . . OIE of *any outbreaks of HPAI*, but did notify occurrences of LPAI in poultry. *Over a ten-year period from the end of 2003 to March 2013, India notified to the OIE 95 outbreaks of HPAI* (subtype H5N1) in poultry. As of October 2014, India had never notified an occurrence of LPAI in poultry to the OIE.

The Indian measure constituted a nationwide import ban on poultry and other pertinent products as soon as an outbreak of LPAI was reported in that member.[116] In other words, any AI—LPAI or HPAI—triggered the ban.

Neither the complainant, the United States, nor India, the respondent, disagreed as to the international SPS standard applicable to the disputed measures: it was the OIE *Terrestrial Animal Health Code* (*Code*), specifically, the 21st edition dated May 2012, which was in force when the Panel was established. Indeed, the *SPS Agreement* itself recognizes the OIE as the right organization:

> The OIE is the international organization responsible for establishing health standards for international trade in animals and animal products, including standards relating to AI. The preamble of the *SPS Agreement* refers explicitly to the OIE, stating that it is desirable "to further the use of harmonized sanitary and phytosanitary measures between Members, on the basis of international standards, guidelines and recommendations developed by the relevant international organizations, including . . . the [OIE]." Annex A(3)(b) to the *SPS Agreement* recognizes the OIE as the relevant standard-setting body for SPS measures relating to animal health and zoonoses [i.e., infectious diseases in an animal that are transmissible to humans]. . . . [A] cooperation agreement was developed between the WTO and the OIE in 1998, and . . . the OIE was granted permanent observer status by the SPS Committee at its first meeting of March 1995. Representatives of the OIE are invited to attend meetings of the SPS Committee and to participate, without voting rights, in deliberations on items on the agenda in which the OIE has an interest, with the exception of meetings limited to WTO Members. Similarly, representatives of the WTO are invited to attend the annual

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[116] *See* Pruzin, *U.S. Secures WTO Panel to Rule on Indian Agricultural Barriers*, *supra* note 114.

> general sessions of the International Committee of the OIE in which the WTO has an interest.[117]

Given the complex scientific nature of the case, the Panel obtained written expert advice from the OIE on how to interpret the OIE *Code*, the key Chapter of which was 10:4:

> 4:15. Members of the OIE annually adopt the . . . *OIE Code*, the aim of which is to set international standards for the improvement of terrestrial animal health and welfare and veterinary public health worldwide, including through standards for safe international trade in terrestrial animals, including mammals, birds, and bees, and their products. The OIE *Code* contains recommendations that are based on the most up-to-date scientific information and available techniques, and that are designed to prevent specific diseases from being introduced into the importing country, taking into account the nature of the commodity and the animal health status of the exporting country. The recommendations in the OIE *Code*, when correctly applied, provide for safe international trade in animals and animal products while avoiding unjustified sanitary barriers to trade. . . .
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> 4:17. Chapter 10:4 of the *OIE Code* requires OIE members to notify the OIE of any occurrence of HPAI in birds and the occurrence of certain types of LPAI in poultry in their territories. The term "poultry" is defined in the OIE *Code* as consisting of all domesticated birds, including backyard poultry, used for the production of meat or eggs for consumption or other commercial products. Thus, although the notification obligation in respect of certain types of LPAI is confined to poultry, OIE members must notify the occurrence of HPAI in all birds, including poultry, wild birds, and pet birds.[118]

The Panel also procured written and oral advice from independent experts on AI surveillance regimes, LPAI, and India's disputed measures.

Of considerable importance to the Panel and Appellate Body findings (discussed below) against India were the distinctions in the OIE *Code* concerning

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[117] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 4.14 (footnote omitted).

[118] *Id.* ¶¶ 4.15, 4.17 (footnotes omitted).

disease status (HPNAI versus LPNAI) and disease zones (infected or free, and country-wide or in a defined sub-unit of a country):

> 4.18. Chapter 10:4 of the OIE *Code* contains various recommendations that apply on the basis of the type of poultry product concerned, as well as the disease status of the place of origin. The disease status is determined on the basis of NAI, which is defined as an infection of poultry that can be classified as either … HPNAI or … LPNAI. With regard to disease status, the applicability of a specific recommendation may depend on whether the importation takes place from a territory that is NAI free or HPNAI free. By definition, a territory that is HPNAI free might not be LPNAI free. For six product categories, Chapter 10:4 contains recommendations applicable to importation from an NAI-free country, zone, or compartment. For five product categories, Chapter 10:4 contains recommendations regarding importation from an HPNAI-free country, zone, or compartment. In addition, for ten product categories, Chapter 10:4 indicates that the specific recommendations apply regardless of the NAI status of the country of origin.
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> 4.19. Chapter 10:4 of the OIE *Code* provides that disease status can be determined with respect to a country, zone, or compartment, based on certain criteria. Specifically, Articles 10:4:3 and 10:4:4 provide the conditions that must be met for a country, zone, or compartment to be considered either "NAI free" or "HPNAI free." Article 10:4:3 provides that a country, zone, or compartment may be considered NAI free when it is shown that neither HPNAI nor LPNAI infection in poultry has been present for the past 12 months, based on a surveillance system in accordance with the OIE *Code*. Article 10:4:4 prescribes two scenarios for establishing that a country, zone, or compartment is HPNAI free: (i) when it has been shown that HPNAI infection in poultry has not been present for the past 12 months, although its LPNAI status is unknown; or (ii) when the country, zone, or compartment does not meet the criteria for freedom from NAI but no NAI virus detected has been identified as an HPNAI virus. Together with the text of the product-specific importation from NAI-free or

> HPNAI-free countries, as well as from NAI-free or HPNAI-free zones and compartments when the relevant criteria are met.[119]

These distinctions were particularly pertinent to the issues in the case arising under Article 6:1-2 of the *SPS Agreement*. The Panel reached 13 significant substantive findings, all under the *SPS Agreement*:[120]

(1) The AI Measures were illegal under Article 3:1, because they were not "based on" the relevant international standard, namely, Chapter 10:4 of the OIE *Code*.

(2) Because the AI Measures were not "based on" that standard, and thus did not "conform to" that standard, they were not entitled to the presumption of consistency allowable under *SPS Agreement* Article 3:2.

(3) The AI Measures are illegal under Article 5:1-2, because they are not based on a risk assessment appropriate to the circumstances, nor do they take into account risk assessment techniques and factors developed by international organizations like the OIE.

(4) Because the AI Measures are not based on a risk assessment, they are not based on scientific principles, but rather are enforced without sufficient scientific evidence, in violation of Article 2:2.

(5) The AI Measures are illegal under the first sentence of Article 2:3, because they arbitrarily and unjustifiably discriminate among Members in which the same or similar conditions exist.

(6) The AI Measures are illegal under the second sentence of Article 2:3 of the Agreement, because India applied them in a way that constitutes a "disguised restriction on trade."

(7) The AI Measures are illegal under Article 5:6, because they are significantly more trade restrictive than necessary to achieve India's ALOP concerning the products in Chapter 10:4 of the OIE *Code*.

(8) Because the AI Measures are more trade restrictive than necessary to achieve the ALOP, they are illegal under Article 2:2 in a second way (in addition to that under point (4)), namely, India applied them beyond the extent necessary to protect human or animal life or health.

(9) The AI Measures are illegal under the first sentence of Article 6:2, because they fail recognize and delineate between "disease free areas" and "areas of low disease prevalence."

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[119] *Id.* ¶¶ 4.18, 4.19 (footnotes omitted). The Appellate Body uses "LPAI" and "LPNAI," and "HPAI" and "HPNAI" in its Report, and lists them separately in its Table of Abbreviations at Page 4 of the Report. The difference, of course, is whether the AI is "Notifiable" or not.

[120] *Id.* ¶ 1.12. Six are listed, but a more nuanced breakdown facilitates understanding.

(10) The AI Measures are illegal under the second sentence of Article 6:2, because their failure to distinguish between disease-free and low-disease prevalence areas makes it impossible to apply the factors enumerated in that sentence to make this distinction.

(11) Because of their failure to differentiate disease-free from low-disease prevalence areas, the AI Measures are illegal under the first sentence of Article 6:1, as they are not adapted to the SPS characteristics of the areas from which the products originate and to which they are destined.

(12) The failure to distinguish disease-free from low-disease prevalence areas also renders the AI Measures illegal under the second sentence of Article 6:1, because India failed to consider the factors in that sentence (again, concerning this distinction).

(13) The AI Measures (specifically, S.O. 1663(E)) violate Article 7, and Annex B, because of the way in which they were proposed, published, and entered into force.

Simply put, India lost every important substantive issue at the Panel stage. On appeal, there were five key issues, again all under the *SPS Agreement*.[121]

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[121] *Id.* ¶ 2.1. In association with each of these issues, the Appellate Body considered whether the Panel violated *DSU* Article 11, *i.e.*, whether the Panel failed to make an "objective assessment of the matter." These portions of the Appellate Body Report are not discussed herein. The *DSU* Article 11 question arose with respect to, and is treated in, the following portions of its Report:

(1) Articles 2.1 and 5.1-5.2, ¶ 3.1(a)(iii) (Issues), ¶¶ 5.41-5.52 (concerning *DSU* Article 11 and completion of legal analysis); ¶ 6.1(a)(iv)-(v) (Findings and Conclusions).

(2) Article 3.1, at ¶ 3.1(b)(i)-(ii) (Issues), ¶¶ 5.82-5.110 (concerning *DSU* Articles 11 and 13.2 and consultation with the OIE); ¶ 6.1(b)(i)-(ii) (Findings and Conclusions).

(3) Article 6.3, at ¶ 3.1(c)(iii) (Issues), ¶¶ 5.177-5.187 (concerning *DSU* Article 11); ¶ 6.1(c)(iii) (Findings and Conclusions).

(4) Article 5.6, at ¶ 3.1(d)(ii) (Issues), ¶¶ 5.234-5.242 (concerning *DSU* Article 11); ¶ 6.1(d)(iii) (Findings and Conclusions).

(5) Article 2.3, at ¶ 3.1(e) (Issues), ¶¶ 5.245-5.287 (concerning whether India's AI Measures were arbitrarily or unjustifiably discriminatory, and a disguised restriction on trade, as among WTO Members in which identical or similar conditions prevail); ¶ 6.1(e)(i) (Findings and Conclusions). On this issue, much of the Appellate Body discussion focused on India's contention that the Panel violated *DSU* Article 11 by consulting with individual experts about the LPNAI situation in India. Because India did not challenge on appeal the Panel's interpretation of Article 2.3 (first sentence), nor its application of that provision to India's AI Measures, the Appellate Body discussion concerning Article 2.3 is not treated above. *See id*. ¶¶ 5.259 and 6.1(e)(ii).

(1) Under Articles 2:2 and 5:1-2, did the Panel correctly interpret the relationship between Article 2:2, on the one hand, and Article 5:1-2, on the other hand?[122]

(2) Was the Panel right to find that the AI Measures were illegal under Article 2:2 solely as a consequence of their being illegal under Article 5:1-2?[123]

(3) Did the Panel properly understand the relationship between Articles 6:1 and 6:3?[124]

(4) Did the Panel misapply Article 6:2 by not relying solely on Sections 3 and 3A of the *Livestock Act* when deciding whether India recognizes the concepts of, and distinguishes between, "disease-free areas" and "areas of low disease prevalence"?[125]

(5) Did the Panel make a mistake in applying Article 5:6, and thus in applying Article 2:2, to the AI Measures by finding the United States successfully identified alternative measures, short of an outright import ban, that would achieve India's ALOP, and by failing to identify those alternatives with precision?[126]

So, as at the Panel level, at the Appellate stage, India lost every major substantive issue.

3. Dependency Between Articles 2:2 and 5:1-:2[127]

What is the relationship between Article 2:2, on the one hand, and Article 5:1-2, on the other hand? These provisions of the *SPS Agreement* state:

> [Article 2, "Basic Rights and Obligations"]
>
> 2. 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.

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122 *See* Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 3.1(a)(i).

123 *See id.* ¶ 3.1(a)(ii).

124 *See id.* ¶ 3.1(c)(i).

125 *See id.* ¶ 3.1(c)(ii).

126 *See id.* ¶ 3.1(d)(i).

127 Appellate Body Report, *India—Poultry*, *supra* note 102, ¶¶ 5.1-5.54, 6.1(a)(i)-(ii), (vi). The Appellate Body reversed in part one Panel finding, namely, that the AI Measures specifically relating to the import ban on fresh poultry meat and eggs from countries reporting LPNAI violated Article 2.2 as not based on scientific evidence. *See id.* ¶ 6.1(a)(iii).

> [Article 5, "Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection"]
>
> 1. 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.
>
> 2. In the assessment of risks, Members shall take into account available scientific evidence; relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

India's appeal focused in part on its peculiar interpretation of this relationship, but this was a case about recalling and applying precedent.

Unfortunately, the *India Poultry* Appellate Body made a confusing muck of the relevant precedents, jumbling them together (across Paragraphs 5:12-5:20), and creating and responding to unnecessary points (as in Paragraph 5:21). The result is the reader is compelled to unscramble matters.

Doing so reveals that in its Reports in 1998 *Beef Hormones* (at Paragraphs 180 and 212, concerning the relationship between Articles 2:2 and 5:1-2, and Paragraph 212 concerning Articles 2:3 and 5:5), 2008 *Continued Suspension* (at Paragraph 674, concerning Articles 2:2 and 5:1-2),[128] and 2010 *Australia Apples* (at Paragraphs 339-341, concerning Articles 2:2 and 5:6),[129] the Appellate Body emphasized the close link between the two Articles. Article 5 sets out more specific and detailed rights and duties for the context that Article 2 creates. The two Articles are to be read together constantly, as each informs the other. Overall, as the Appellate Body put it in *Beef Hormones* (at Paragraph 212) and *Australia Apples* (at Paragraph 339), the means for complying with the basic Article 2 duties is through the "particular routes" or "specific obligations" of Article 5.[130]

In particular, Article 2 sets out three basic duties and one right, while Article 5 elaborates on those rights and duties:

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[128] *See* Appellate Body Report, *United States—Continued Suspension of Obligations in the EC—Hormones Dispute*, WT/DS320/AB/R (Oct. 16, 2008) (*adopted* Nov. 14, 2008). This dispute is analyzed in the *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113-228 (2009).

[129] *See* Appellate Body Report, *Australia—Measures Affecting the Importation of Apples from New Zealand*, WT/DS367/AB/R (Nov. 29, 2010) (*adopted* Dec. 17, 2010) [hereinafter Appellate Body Report, *Australia—Apples*]. This case is analyzed in the *WTO Case Review 2010*, 28 ARIZ. J. INT'L & COMP. L. 239-360 (2011).

[130] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.12.

(1) First, Article 2:2 says a measure must be as least intrusive as possible, as it must be imposed only to the extent "necessary" to protect the threatened population. Article 5:6 elaborates on this stricture.

(2) Second, Article 2:2 requires any SPS measure to be "based on scientific principles." Under its 1998 *Beef Hormones* precedent, the Appellate Body said (at Paragraphs 189 and 193) "based on" means an objective relationship, namely, a "rational relationship," between an SPS measure and a risk assessment. A "risk assessment," envisaged by Article 5:1, is defined in Annex A (at Paragraph 4) to the *SPS Agreement*, entails an evaluation of "the likelihood of entry, establishment or spread of a pest or disease within the territory of an importing Member" if a particular SPS measure is applied, and the attendant potential biological and economic consequences. Article 5:2 lists the factors a Member must consider in its risk assessment, such as "available scientific evidence." All such links were ones the Appellate Body mentioned not only in *Beef Hormones*, but also in 2008 in *Continued Suspension* (at Paragraph 527). Further, it said in *Beef Hormones* (at Paragraphs 180 and 187), *Continued Suspension* (at Paragraph 527), and in 2010 in *Australia Apples* (at Paragraphs 207-208), that a "risk assessment" involves a "systematic, disciplined, and objective inquiry and analysis" to differentiate fact from opinion, in which science plays a "central role," but in which "other factors" ascertainable outside a laboratory, such as actual and potential adverse health effects in the real world, may be considered.

(3) Third, "sufficient scientific evidence" must support a measure. Article 5:1-2 discusses what these phrases mean. In its 1999 *Japan Agricultural Products* Report, the Appellate Body explained the links between Articles 2 and 5.[131] It also (at Paragraph 84 of that Report), defined "sufficient scientific evidence" to mean a "rational or objective relationship between the SPS measure and scientific evidence," and said whether that relationship exists depends on the facts of the case, such as "the characteristics of the measure at issue and the quality and quantity of the scientific evidence." To be sure, there need not be unanimity among the scientific community (there often is not), the science must be "reputable" in the sense of its "methodological rigor," as the Appellate Body put it, in its *Continued Suspension* (Paragraph 591) and *Australia Apples* (Paragraph 215) Reports.

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[131] *See* Appellate Body Report, *Japan—Measures Affecting Agricultural Products*, WT/DS76/AB/R (*adopted* Mar. 19, 1999). Key issues raised in this case are analyzed in BHALA, *supra* note 22, Vol. I, Ch. 43.

(4) Fourth, Article 2:2 gives Members the right to derogate from its three obligations by expressly referencing the Article 5:7 precautionary principle.

Of vital importance in the *India Poultry* appeal were its 2010 *Australia Apples* (at Paragraph 340) and 1998 *Australia Salmon* (at Paragraph 138) precedents.

In these cases, the Appellate Body held an SPS measure not based on a "risk assessment," as Article 5:1-2 requires, violates Article 2:2, as it is not based on "scientific principles," and is "maintained without scientific evidence." Failure to meet the specific elaboration in Article 5:1-2 of the general duty under Article 2:2 allows for the inference that the failure also constitutes a violation Article 2:2. In common sense terms, if an importing Member does not do a risk assessment to justify its SPS measure, then that measure is not scientific. The relationship is a one-way, dependent one, between the specific requirements of Article 5:1-2 and the general mandate of Article 2:2: to violate the former is presumptively to violate the latter.

The presumption of inconsistency with Article 2:2 from incongruity under Article 5:1-2 is neither invariable nor irrefutable. That is because the language of the two Articles is different, and neither should be read as diluting or undermining the other. As the Appellate Body said in its 1996 *Japan Alcoholic Beverages* decision (at Page 12, cited *supra*) that the Principle of Effectiveness (*ut res magis valeat quam pereat*), as part of textual interpretation under Article 31 of the 1969 *Vienna Convention on the Law of Treaties* (*Vienna Convention*), must be followed. That Principle calls for giving meaning to all terms of a treaty, and not reading them in a way that would reduce a provision to redundancy or inutility.

Nevertheless, the presumption is not easy to rebut, as the India Poultry Appellate Body said (at Paragraph 5:29): "even though the presumption of inconsistency under Article 2:2 flowing from a violation of Articles 5:1 and 5:2 is rebuttable, establishing that there exists a rational or objective relationship between the SPS measure and the scientific evidence for purposes of Article 2:2 would, in most cases, be difficult without a member demonstrating that such a measure is based on an assessment of the risks, as appropriate to the circumstances." It is even more difficult to defend a measure under Article 2:2 as being based on scientific principles, and possessing sufficient scientific evidence, if the scientific basis underlying the risk assessment under Article 5:1-2 is wanting.

With the enormous weight of these precedents, the destiny of India's argument that Articles 2:2 and 5:1-2 are independent legal provisions, setting out distinct obligations, was predetermined. That is not always so with the doctrine of *stare decisis*, as it is a flexible one, allowing for evolution, even revolution, in the law, within a broad pattern of consistency and predictability across time. But, to effect change demands counter-precedents, or cogent distinctions, neither of which India provided. India argued the link between the two Articles was so tight as to make them equal, rendering Article 2:2 redundant. India contended the

obligations under Article 2:2 can be fulfilled independently without resorting to Article 5:1:

> India considers that a proper interpretation of Article 2:2 and Article 5:1 establishes that a Member can either base its SPS measure under Article 2:2 by directly establishing a link between the SPS measure and the scientific principles and sufficient scientific evidence, or, alternatively, a Member can follow the process under Article 5:1 by conducting a risk assessment and thus also comply with Article 2:2.[132]

Because India premised its defense on compliance with Article 2:2, the Panel ought to have started with, and focused on, that provision, and not emphasized Article 5:1-2. Simply put, India said an SPS measure may be found to be consistent with Article 2:2 without the obligation to conduct any Article 5:1-2 risk assessment.

The Appellate Body (at Paragraph 5:32) easily disposed of that argument: A member adopting an SPS measure may not elect to base that measure either on (1) scientific principles with sufficient scientific evidence under Article 2:2, or (2) a risk assessment under Article 5:1-2. Compliance with Article 2:2 cannot exclude application of Article 5:1-2. So, the Panel had properly understood how the Articles relate to each other. To summarize with a phrase common in Catholic culture, it is not a question of "either or, but rather of both and."

Like the United States, the Appellate Body found India's defense to be a *non sequitur*. Article 2:2 was violated for two reasons: first, as a consequence of the inconsistency of India's AI measures with Articles 5:1-2; and second, because they failed to comport with Article 2:2 in its own right. That is, there were two bases for finding the Article 2:2 violations, one consequential and one independent. Nothing in the text of these Articles says a consequential claim is converted into a subsidiary claim, the success of which is dependent on the independent claim. Nothing in the text precludes multiple claims.

India scored a minor victory by persuading the Appellate Body to reverse in part the Panel finding that the AI Measures were inconsistent with Article 2:2. That was because the Panel did not consider India's evidence or arguments offered to rebut the presumption of inconsistency with Article 2:2 that flowed from the inconsistency with Article 5:1-2. The Panel essentially treated the presumption as irrebuttable.

Nonetheless, the damage to India's appeal was done; its AI Measure was illegal outright under Article 5:1-2. Perhaps, had the Panel given a reason for applying the presumption (i.e., if it had taken a moment to weigh what India adduced), India might have lost on that point too. As it was, the Appellate Body

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[132] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.30.

(unable to complete the legal analysis) left open the possibility that the Measure was illegal under Article 2:1 as a consequence of the Article 5:1-2 violation.

4. *Chevron*-Like Approach to Article 3:1[133]

The Appellate Body upheld the Panel findings, and agreed with the American arguments and advice the Panel received from the OIE, with respect to how and why India's AI Measures violated Article 3 of the *SPS Agreement*. The Measures were illegal under Article 3:1. They were not "based on" the relevant international standards, namely those in the OIE *Code*.

India agreed with the United States that the OIE *Code*, specifically Chapter 10:4, was the pertinent standard.[134] The United States had a peculiar reading of the *Code*, just as India had in respect of the relationship between Articles 2:1 and 5:1-2. India thought Chapter 10:4 envisaged a complete import ban, a categorical prohibition, in the event of NAI, even if what was reported was LPNAI, not HPNAI. America understood that Chapter to say importation of products from countries reporting LPNAI should be allowed. The *Code* language spawning the Indo-American disagreement was in Article 10:4:1:10, which states:

> A Member should *not* impose immediate bans on the trade in poultry commodities in response to a notification, according to Article 1:1:3 of the [OIE] *Code*, of infection with HPAI and LPAI virus in birds *other than* poultry, including wild birds.[135]

To read this text carefully is to see the logic of the Indian position; the language means "in all circumstances *other than* where there is infection with the HPAI and LPAI virus in non-poultry birds, countries can ban trade in poultry product."[136] This logic was not inherently more cogent than the American understanding, which was: "this provision provides *only* that notification of HPAI and LPAI in birds *other than* poultry should *not* be a basis to impose bans on poultry products."[137] India simply drew an inference of larger scope from the text than did the United States. The text is permissive (India), allowing for an import ban on poultry if the virus is not non-poultry (i.e., if it is a poultry virus), versus the text is silent (America), saying only that no ban is allowed on poultry if the

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[133] *See id.* ¶¶ 5.55-5.111, 6.1(b)(iii).

[134] *SPS Agreement* Annex A, Paragraph 3, lists the OIE as the relevant international standard-setting body for animal health issues, including as they affect human health. In the India Poultry case, the OIE *Code* provided recommendations for eight of the ten product categories covered by the AI Measures. For the other two, no relevant international standard was found, so the Panel said Article 3.1-2 did not apply to them and the matter was not dealt with on appeal. *See id.* ¶ 5.61.

[135] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.63 (emphasis added).

[136] *Id.* ¶ 5.63 (emphasis in original).

[137] *Id.* ¶ 5.63 (emphasis added).

virus is non-poultry, but not going further to say what happens in the event of a poultry virus.

On a second interpretative point, there was an Indo-American difference over how to read Chapter 10:4 of the OIE *Code*. India thought Chapter 10:4 left it to an importing country to impose a prophylactic ban, that is, one on products from everywhere in an exporting country. The United States said Chapter 10:4 did not give India the right to disregard zones of an exporting country that were free of NAI or HPNAI. So, India interpreted the *Code*, in a situation of LPNAI but not HPNAI from America, to allow it to establish a "condition of entry" as to how (1) categorical its prohibition should be (a full import ban, or something less restrictive), and as to (2) prophylactic that prohibition should be (applying to all or part of the exporting country of origin).

The distinctions reflected the relative positions of the two countries in the case. India was arguing as an importing country protecting itself from disease, and also possibly harboring some protectionist motives. The United States was arguing as an exporting country seeking to preserve market access, and cognizant of bitter experiences in many countries, including China and Russia, and across Europe, which had enacted protectionist measures. Had the positions of the two countries been reversed, they likely would have adopted the reading of the OIE *Code* against which they argued in the case.

The Appellate Body had to make new law because, other than the Panel Report it was reviewing, there was no GATT-WTO text, nor any prior case law, on point. The Appellate Body rejected both Indian points, relying on what the OIE said about its own *Code*. Cast in the terminology of American Administrative Law, the Appellate Body applied the *Chevron* standard of review that American courts use when reviewing agency interpretation of regulations.

Of course, the Appellate did not say they were applying the *Chevron* standard, and may not even have been aware it was doing so, yet the reality is in SPS (and TBT) cases, where recourse is had to expert international bodies, it makes sense for the Appellate Body to apply *Chevron*-like review. When confronted with an ambiguous text (Article 10:4:1:10), ask the expert agency (the OIE) that wrote and administers the text. Then, as long as the expert gives a reasonable (that is, not arbitrary or capricious) reply, defer to that interpretation. Indeed, if the Appellate Body did not do so, then it would be rightly accused of being judicially activist, substituting its own preferences in place of reasonable interpretations by expert bodies, even ones listed in Annex A(3) to the *SPS Agreement*.

Because the Appellate Body agreed the AI Measures violated Article 3:1, it exercised judicial economy, and did not decide whether they failed to "conform to" the *Code* (as America argued successfully to the Panel, but India denied). With respect to Article 3, India's arguments failed not so much because they went against the weight of precedent, as they had with respect to Articles 2 and 5:1-2, but rather because they ran counter to expert advice. The Indian reading of the

Code, went against what the OIE itself told the Panel, when the Panel asked it how to interpret Chapter 10:4 properly.[138]

Article 3 sets out a tripartite scheme for regulatory harmonization, that is, for gauging an SPS measure of a WTO Member against a relevant international standard. Article 3 states:

> 1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall *base* their sanitary or phytosanitary measures *on* international standards, guidelines or recommendations, where they exist, except as otherwise provided for in this *Agreement*, and in particular in paragraph 3.
>
> 2. Sanitary or phytosanitary measures which *conform to* international standards, guidelines or recommendations shall be *deemed* to be necessary to protect human, animal or plant life or health, and presumed to be *consistent* with the relevant provisions of this *Agreement* and of GATT 1994.
>
> 3. Members may introduce or maintain sanitary or phytosanitary measures which result in a *higher* level of sanitary or phytosanitary protection *than* would be achieved by measures based on the relevant international standards, guidelines or recommendations, if there is a scientific justification, or as a consequence of the level of sanitary or phytosanitary protection a Member determines to be appropriate in accordance with the relevant provisions of paragraphs 1 through 8 of *Article 5*. [The footnote to this sentence states: "For the purposes of paragraph 3 of Article 3, there is a scientific justification if, on the basis of an examination and evaluation of available scientific information in conformity with the relevant provisions of this *Agreement*, a Member determines that the relevant international standards, guidelines or recommendations are not sufficient to achieve its appropriate level of sanitary or phytosanitary protection."] Notwithstanding the above, all measures which result in a level of sanitary or phytosanitary protection different from that which would be achieved by measures based on international standards, guidelines or recommendations *shall not be inconsistent* with any other provision of this *Agreement*.

[138] *Id.* ¶ 5.84. India also thought the Panel exceeded permissible boundaries of consultation with the OIE, but its argument that the Panel violated Article 11.2 of the *SPS Agreement* also proved to be a losing one. *See id.* ¶¶ 5.82-5.110 (concerning *DSU* Articles 11 and 13:2 and consultation with the OIE).

Though the above-quoted language is reasonably clear, thanks to its *Beef Hormones* precedent,[139] the Appellate Body delineated three tiers, or scenarios, and their legal consequences:

(1) *Article 3:1* "*Based On*" *Measure*: In this instance, a Member adopts an SPS measure that is not completely in conformity with a pertinent international standard. Instead, the Member bases its measure on that standard: the measure contains some, but not all, of the features of the standard. Because of this imperfect symmetry, the measure does not benefit from any presumption that it compliance with the *SPS Agreement* (or GATT). However, the Member does not bear the initial burden of showing compliance. Rather, the complainant has the burden of establishing a *prima facie* case that the measure violates Article 3:1, i.e., that the measure is not "based on" the relevant international standard.

As the Appellate Body defined in *Beef Hormones*,[140] to be "based on" means to "stand" on, be "founded" or "built" on, or to be "supported by." Likewise, in the 2002 *Sardines* case,[141] the Appellate Body defined the similar language of Article 2:4 of the *Agreement on Technical Barriers to Trade* (*TBT Agreement*): the phrase "as a basis for" (i.e., a technical regulation contradicts the relevant international standard if that standard was not used "as a basis for" the regulation.[142] In *Sardines*[143], the Appellate Body said a "very strong and very close relationship" must exist between two things for one to be the basis for the other.

(2) *Article 3:2* "*Conforms to*" *Measure*: Here, a Member adopts a measure that embodies completely the applicable international standard. Thus, it "conforms to" that standard. Because of this full conformity, the measure is entitled to a rebuttable presumption that it complies with the *SPS Agreement* (and all provisions of GATT). The measure is deemed to be necessary to protect human, animal, or plant life or health. The burden is on the complainant to overcome this presumption.

(3) *Article 3:3* "*Higher*" *Measure*: Members have the right to set a level of protection against SPS threats higher than that in the otherwise-appropriate international standard. The *Agreement* does not rob them of their sovereignty to determine their risk profiles. So, in this third scenario, a Member deviates from the level set out in a standard by

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[139] Appellate Body Report, *EC—Measures Concerning Meat and Meat Products*, *supra* note 106, ¶ 170.

[140] *Id.* ¶¶ 163, 177.

[141] *Id.* ¶¶ 242, 248.

[142] *See* Appellate Body Report, *European Communities—Trade Description of Sardines*, WT/DS231/AB/R (*adopted* Sep. 26, 2002). This dispute is analyzed in the *WTO Case Review 2002* 20 ARIZ. J. INT'L & COMP. L. 143-289 (2003).

[143] *Id.* ¶ 245.

> exceeding it, giving its human, animal, or plant population a higher degree of protection than the standard provides. The Member then is obliged to show it has followed the rest of the Agreement, particularly that it performed an Article 5:1-2 conformity assessment procedure.

These tiers may be thought of as incomplete harmonization, perfect harmonization, and superior harmonization, using the relevant international scientific standard as the benchmark. The thrust of the Article 3 is to push Members gently toward harmonization, in an incentivized manner, but not compel them to do so. Whenever an SPS measure is challenged, the WTO adjudicator is responsible for a comparative assessment, weighing the challenged measure against the international standard, to see if the measure is "based on," "conforms to," or is "higher than" the benchmark.

In so doing, the adjudicator refers to the customary rules of interpretation of Public International Law, i.e., Articles 31-32 of the *Vienna Convention*.[144] But, given the specialized nature of international scientific standards, additional sources, such as "recourse to the views of the relevant standard-setting body, as referred to in Annex A (3) to the *SPS Agreement*," may be consulted.[145] Here again, is the *Chevron*-like approach the Appellate Body and Panel essentially took.[146]

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[144] Vienna Convention on the Law of Treaties arts. 31-32, May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention].

[145] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.79.

[146] *Id.* In a curious footnote, the Appellate Body discussed whether the OIE *Code* is a treaty subject to the rules of the *Vienna Convention*, or is context for interpreting treaty language, namely, that of the *SPS Agreement*:

> It appears to us that India's position on appeal differs from its position before the Panel. India's principal position before the Panel was that the OIE *Code* was a treaty and therefore must be interpreted in accordance with the rules of the *Vienna Convention*. (India's appellant's submission, para. 124 (referring to letter from India to the Panel, dated 11 July 2013, pp. 2-3; India's comments on the OIE's and individual experts' responses to Panel questions, dated 28 November 2013, paras. 3, 34-36; and India's closing statement at the second Panel meeting, para. 7)). At the oral hearing, India stated that it is not arguing on appeal that the OIE *Code* is itself a treaty subject to *Vienna Convention* rules, but rather that it serves as context for the interpretation of Articles 3:1 and 3:2 of the *SPS Agreement*. We further note that, although India makes reference on appeal to Articles 31(2) and 31(3) of the *Vienna Convention*, it advances no clear explanation as to how, and for what purpose, in India's view, the OIE *Code* meets the specific criteria for those provisions to apply. (India's appellant's submission, paras. 121-22) *Id.* ¶ 5.98 n. 442.

The third tier was not at issue in the *India Poultry* case. India never contended its AI Measure were higher than that in the OIE *Code*. Perhaps India should have done so, given the fact that it insulated itself form all poultry (without distinguishing afflicted and disease-free regions), regardless of whether HPAI was at issue. But, because India violated Article 5:1-2, it could not avail itself of the Article 3:3 scenario and, as above, that violation was thanks to its failure to engage in conformity assessment. In other words, if India had simply done the necessary laboratory testing, then it might have been able to defend its "above OIE *Code*" AI Measure. So, India was left having to dispute America's contention the Measure was not "based on" the *Code*, and urged in defense that the Measure actually "conformed to" the *Code*.

That India would lose was clear when the Appellate Body recounted that the OIE explanations of the two above-mentioned interpretative points were consistent with the American reading of Chapter 10:4.

First, Article 10:4:1:10 of that Chapter does not envisage, either explicitly or implicitly, imposition of an import ban on poultry products. Rather, where the *Code* recommends prohibitions, it does so explicitly. The OIE's expert consultancy indicated that under Chapter 10:4, if an exporting country is not free from LPNAI, importation from that country can occur from any zone that is HPNAI free. Trade in poultry products should continue, notwithstanding the finding of poultry infected with LPAI, as long as appropriate risk mitigation conditions are fulfilled.

Second, the OIE confirmed to the Panel that Chapter 10:4 does not give a choice to an importing country to fix a "condition of entry" (as India put it) that could be either importation from (1) only an NAI-free or HPNAI-free exporting country (i.e., forbidding imports from an exporting country unless that country is completely disease free across all of its territory) or (2) any NAI-free or HPNAI-free zone or compartment within tan exporting country (i.e., forbidding imports only from the disease-afflicted areas within an exporter). Rather, the *Code* encourages importing countries to consider regionalization: zoning and compartmentalization are concepts the OIE promotes, so as to allow safe trade even from a country that is not disease free.

An exporting country may not be entirely free of NAI or HPNAI, but it may have zones and compartments that are free of NAI and HPNAI, and from those safe areas, imports ought to be allowed. Indeed, Chapter 10:4 states its recommendations are not intended only for country-wide application, but also designed for geographical units within a country. If an exporting country that is not disease-free takes appropriate steps such as biosecurity, control, and surveillance measures, to reduce the size of the population that could be affected by the disease, then the importing country should recognize those steps. The

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Whether the distinction India apparently sought to make is one without a difference is interesting to consider, as is the question of whether the OIE and other standard-setting bodies are dominated by developed country interests.

Code does not insist on NAI-free status, nor does it invariably suggest a countrywide ban.

Thus, the Appellate Body agreed the AI Measures were not premised on the OIE *Code*. To the contrary, as the Panel put it, they were a "fundamental departure" from, and "contradict[ed]," Chapter 10:4 of the *Code*. S.O. 1663(E) forbade importation of poultry in any country reporting HPNAI or LPNAI, without regard to whether appropriate risk mitigation measures had been taken. S.O. 1663(E) also forbade importation on a countrywide basis from any country reporting NAI, without regard to NAI-free or HPNAI-free zones within that country. In both respects, India's over-reaction meant it could not justify its AI Measures under Article 3:1 as being "based on" the *Code*. With that violation, the Appellate Body found no need to determine whether the Measures "conformed to" the Code as per Article 3:2; obviously, if they did not meet the lower "basis" level of Article 3:1, then logically they did not rise to the higher Article 3:2 "conformity" tier.

5. Recognizing Areas, Ensuring SPS Measures are Adapted, and Article 6

Article 6 calls on WTO Members to take into account findings in which a disease is identified on a regional basis, instead of regarding disease findings as applicable to all of the territory of a Member. [147] That makes sense; why impose a trade restriction on merchandise from an entire country if an SPS threat is from only a portion thereof? Doing so would smack of collective punishment, not carefully crafted justice. Yet, America accused India of doing exactly that—punishing all for risks arising from a few. The resulting issue under *SPS Agreement* Article 6 was novel. No WTO Panel had ruled on this provision in the past.

At both the Panel and Appellate stages, India lost its argument that its AI Measures were consistent with Article 6:1-2 of the *SPS Agreement*. That Article is entitled "Adaptation to Regional Conditions, Including Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence." Given that rubric in relation to India's defeat under Article 3:1, perhaps India's loss was foreseeable. But, until this case, the Appellate Body had not interpreted Article 6, and in particular decided whether and how Articles 6:1-2 interact with Article 6:3. So, it was worthwhile for India to bring the matter to its attention. Article 6 states:

> 1. Members shall ensure that their sanitary or phytosanitary measures are *adapted to the sanitary or phytosanitary characteristics of the area*—whether all of a country, part of a country, or all or parts of several countries—from which the product originated and to which the product is destined. In

147 *See id.* ¶¶ 5.112-5.187, 6.1(c)(i)-(ii), (iv).

> assessing the sanitary or phytosanitary characteristics of a *region*, Members shall take into account, *inter alia,* the *level of prevalence of specific diseases* or pests, the *existence of eradication or control programs*, and appropriate criteria or *guidelines* which may be developed by the *relevant international organizations*.
>
> 2. Members shall, in particular, *recognize the concepts* of pest- or *disease-free areas* and *areas of low* pest or *disease prevalence*. Determination of such areas shall be based on *factors such as* geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.
>
> 3. Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.[148]

With respect to the relationship between Articles 2 and 5:1-2, India argued unsuccessfully the two provisions are independent. Here, with respect to Article 6, India argued unsuccessfully the three Paragraphs are dependent.

That is, the gist of India's point was it was under no obligation to fulfill the requirements of Article 6:1 or 6:2, because America had not fulfilled its duties under Article 6:3. The former are linked to the latter, i.e., the duties of an importing WTO Member under Paragraphs 1 and 2 must be triggered first by an exporting Member satisfying the rule of Paragraph 3. Until the exporter pulls that trigger, the importer need not modify its controversial measure unilaterally.

India's point was not a bad one. It made sense in terms of a logical chain of events. Perhaps its point was even a bit creative; flipping the order of three Paragraphs that Uruguay Round negotiators had failed to connect clearly. Had the Appellate Body taken India's point, then the onus would have been on developed countries to "do something" before complaining about SPS measures in poor ones. Perhaps as a matter of equity, fairness, or social justice, that is where the onus should lie. But, the problem with the Indian point was its incongruence with a careful reading of the text of all three Paragraphs.

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[148] *Id.* ¶ 5.130 (emphasis added).

A careful reading is what the Panel gave, and the Appellate Body upheld its findings. On this issue of first impression—how to interpret the relationship of the Paragraphs of Article 6—the following precedents were set:

> (1) The obligations in Paragraphs 1 and 2 are not contingent on whether an exporting WTO Member goes through the steps in Paragraph 3.
>
> (2) Paragraphs 1 and 2 are intended to have distinctive effects. That is because of their different wording. Paragraph 1 (first sentence) is addressed to all WTO Members, requiring them to "adapt" any measure they impose in a manner suitable for the SPS characteristics of the area from which the good in question originates, or of the area to which that good destined. Paragraph 2 (first sentence) emphasizes concepts. It obligates Members to acknowledge the concepts of disease-free and low-disease prevalence areas.
>
> (3) Paragraph 3 is aimed at exporting WTO Members. It directs them to undertake certain steps. But, in doing so, Paragraph 3 presupposes (in a loose way) there is an importing Member from which the exporting Member seeks recognition that an area exists in the territory of the exporter that is disease free and/or of low-disease prevalence.[149]
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> (4) Paragraph 1 fixes a "free standing" obligation (as the Panel put it) for a WTO Member to ensure that adaptation of its measure to the SPS characteristics of the area "is an element of the SPS Measure *as such*."[150] Likewise, Paragraph 2 creates a free-standing obligation concerning concept recognition. These

[149] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.131. The Appellate Body was uncomfortable with the use of the verb "presuppose" by the Panel (in the context of the relationship between Paragraphs 1 and 2, and the relationship of both of those Paragraphs to Paragraph 3). But, the Appellate Body concluded such use was not reversible error. *See id.* ¶¶ 5.143, 5.153, 5.160.

[150] *Id.* ¶ 7.675 (quoted in Appellate Body Report, *India Poultry*, *supra* note 102, ¶ 5.119) (emphasis original). *See also id.* ¶ 5.119, n. 471, in which the free-standing nature of Article 6.2 is justified in part by the contrast with Article 4 (in which obligations of an importing Member are expressly conditioned on action by an exporting Member). Note the Appellate Body was uncomfortable with the Panel's characterization of the obligation of Article 6.1, first sentence, as being "free standing" vis-à-vis Article 6.3, thinking it overly broad. But, it did not view the characterization as reversible error. *See id.* ¶¶ 5.152, 5.160.

duties are free standing in relation to Paragraph 3, i.e., they are not contingent on a request from an exporting Member that claims areas with its territory are disease-free. Put differently, the obligations in Paragraphs 1 and 2 are incumbent on all Members; an exporting Member submitting a claim to an importing Member under Paragraph 3 does not trigger them, nor are they applicable only to an importing Member that gets a request from an exporting Member for recognition of an area under Paragraph 3.

(5) There is a "logical continuum" (as the Panel put it) when a Member frames and enforces an SPS measure:[151]

Step 1: Under Article 6:2, first sentence, a Member "recognizes" the concepts of "disease-free areas" and "disease-prevalent areas." A Member does so by applying the factors in the second sentence.

Step 2: Under Article 6:1, first sentence, a Member "ensures" that it "adapts" its measure to the SPS characteristics of the "disease-free areas" and "disease-prevalent areas."[152] The Member does so by taking into account the factors listed in the second sentence, including the advice of international standard-setting bodies like the OIE.

(6) The *SPS Agreement* does not specifically define how a Member must "ensure" its measure is "adapted" to the characteristics of the areas of origin or destination. It is up to the Member to design and implement precise steps that result in its measure being suitable to the SPS

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[151] Panel Report, *India—Poultry*, *supra* note 102, ¶ 7.672 (quoted in Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.118). The Appellate Body noted the order of analysis was not on appeal, so it did not express an opinion about it. *See* Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.142.

[152] Panel Report, *India—Poultry*, *supra* note 102, ¶ 7.618. The Appellate Body ensured there was no adaptation in the meaning of these terms from its trusted lexicographic source, citing the definitions of "ensure" (*i.e.*, "guarantee" or "warrant") and "adapt" (*i.e.*, "fit" or "adjust") in the *Shorter Oxford English Dictionary* (Angus Stevenson ed., 6th ed., 2007, at 840 and 24, respectively). *See* Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.132 n. 496-497.

> features of those areas. So, rendering judgment under Article 6 is inherently "case-specific:"[153]
>
> [A]ssessing whether or not a Member has complied with the obligations in Articles 6:1 and 6:2 will *necessarily be a function of the nature of the claims raised by the complainant and the circumstances of each case*. This may involve scrutiny of the specific steps and acts that the Member has or has not taken in the light of the SPS characteristics of the relevant areas, which may include pest- or disease-free areas or areas of low pest or disease prevalence, as well as of broader aspects of the importing Member's regulatory regime, if any, governing SPS matters. The second sentence of Article 6:1 also points to the *relevance of appropriate criteria and guidelines developed by relevant international organizations* to the obligation set out in that Paragraph.[154]

(7) The obligation under Article 6:1 to ensure a measure is appropriately adapted is not static, but dynamic, i.e., an "ongoing" or "continuing" duty (as the Appellate Body put it) to be flexible and adjust the measure so that it is suitable to the SPS characteristics of the relevant areas.[155]

(8) In complying with Article 6:1-2, an "area" may be a territory that is bigger than, the same size as, or smaller than a country, and both the "area" from which the product originated and the "area" to which it is destined are relevant.

(9) If a Member has not "recognized" the "concepts" of distinct areas under Article 6:2, then it is "difficult to see how" (as the Panel worded it) that Member has "ensured" its SPS measure is appropriately "adapted" under Article 6:1.[156] As the Appellate Body said:

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[153] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.137.

[154] *Id.* ¶ 5.137 (emphasis added).

[155] *Id.* ¶ 5.154.

[156] Panel Report, *India—Poultry*, *supra* note 102, ¶ 7.672 (quoted in Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.118). However, the Appellate Body did not express an opinion about the Panel's apparent views that an inevitable violation of the second sentence of (1) Paragraph 1 occurs if no risk assessment is conducted and (2) Paragraph 2 if no determination is made about disease-free and low-disease prevalence

> The inter-linkages between Articles 6:1 and 6:2 … illuminate the close nexus between a Member's satisfaction of the obligation to recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence set out in Article 6:2, on the one hand, and its satisfaction of the obligation to ensure that its SPS measures are adapted to the relevant SPS characteristics within the meaning of Article 6:1, on the other hand. More specifically, in a situation where pest- or disease-free areas or areas of low pest or disease prevalence are relevant, *a Member may be required to recognize the concepts of these areas not only by virtue of the express obligation in Article 6:2, but also so as to be in a position properly to* "*assess*" *the SPS characteristics of relevant areas under the second sentence of Article 6:1, and ultimately ensure, as required under the first sentence of Article 6:1, that its SPS measures are adapted accordingly*.[157]
>
> In effect, a violation of Article 6:2 creates a rebuttable presumption that Article 6:1 also was violated.

(10) The word "recognize" is not defined in the *SPS Agreement*, i.e., from the text it is unclear whether "recognition" must be explicit, and whether it must happen in writing as through legislation or regulation. So, the manner in which a Member" recognizes disease-free and low-disease prevalence areas under Article 6:2 (first sentence) depends on the facts of each case; there is no mandatory prescription for all Members. However, at a minimum, the Member must not contradict or deny the concepts. That is (as the Appellate Body said in approving the work of the Panel), "SPS measures or regulatory schemes that explicitly *foreclose* the possibility of recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence *cannot* … be found to be consistent with Article 6:2."[158]

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areas. These points were not on appeal. *See* Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.142.

[157] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.139 (emphasis added).

[158] *Id.* ¶ 5.138 (emphasis added).

> (11) Within Article 6:1, the word "area" in the first sentence and "region" in the second sentence are sufficiently similar so that a risk assessment under the second sentence (for a "region") relates to the adaptation of an SPS measure under the first sentence (for an "area"). Conversely, failure to adapt a measure to the SPS characteristics of an "area" under the first sentence may warrant a finding that the risk factors for a "region" listed in the second sentence were not assessed.
>
> (12) Within Article 6:2, a finding that the concepts in the first sentence of disease-free and low-disease prevalence areas have not been recognized leads inevitably to a finding that the areas have not been determined based on factors listed in the second sentence such as ecosystems, effectiveness of controls, epidemiological surveillance, and geography.
>
> (13) An analysis under Article 6:1-2 should begin with Paragraph 2. That is because a Member cannot ensure its measure is adapted to the SPS characteristics of an "area" under Paragraph 1 (first sentence) unless that Member already has recognized the concept of disease-free and low-disease prevalence areas under Paragraph 2 (first sentence).
>
> (14) A request under Paragraph 3 from an exporting Member to an importing Member that the importer recognize a disease-free or low-disease prevalence area in the exporter is not a prerequisite to the obligations in Paragraphs 1-2. The importing Member must fulfill those obligations, regardless of whether such a request is made, i.e., they are not triggered only upon a request. So, an importing Member could violate Paragraphs 1-2, even though the exporting Member has provided no evidence under Paragraph 3 about disease-free or low-disease prevalence areas inside the exporter.

These precedents were set thanks to a "plain reading" of the text, in the words of the Panel with respect to Paragraph 1.[159]

[159] Panel Report, *India—Poultry*, *supra* note 102, ¶ 7.675 (quoted in Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.119).

So, both the Panel and Appellate Body agreed India's AI Measures were inconsistent with four aspects of Article 6: Article 6:1, first and second sentences; and Article 6:2, first and second sentences.[160] The inconsistencies arose because the *Livestock Act* was silent as to the concepts of disease-free and low-disease prevalence areas, and though Sections 3 and 3A of the *Act* conferred discretion on government officials, there was no evidence to indicate they used it to recognize such areas. Similarly, S.O. 1663(E) forbade importation of poultry products on a countrywide basis, and nothing in this instrument recognized a distinction between these types of areas once a country notifies the OIE of NAI. Quite the opposite was true, as the S.O. clearly, unequivocally allowed a prophylactic ban.

At no point in the entire case did America ever claim that a specific area within its territory was AI free. Rather, it said the AI Measures were illegal on their face because they lacked the opportunity for India to recognize the concept of a disease-free or low-disease area. Therein was the violation of Article 6:2, first sentence. India's AI Measures did not allow for recognition of these concepts.[161] As a consequence of that lack of recognition, regarding the second sentence, it was impossible for India to identify AI-free areas based on the factors in that sentence. Hence, India violated the second sentence. India banned poultry from all parts of any exporting country whenever AI was detected in that country, thus precluding India from applying its ban on a regionalized basis, and in turn precluding India from taking into account the SPS characteristics of different regions in that country.

Next, thanks to the violation of Article 6:2 came the violation of Article 6:1. As to Article 6:1, first sentence, India did not adapt its AI Measures to the sanitary characteristics of the area from which imports originated. As to the second sentence, India neglected to take into account areas free of disease, areas of low disease prevalence, the existence of eradication and control schemes, and the OIE *Code*. That is, India failed to conduct a risk assessment of the SPS characteristics of the pertinent region.

In reaching these findings, the Panel and Appellate Body rejected India's argument about sequencing. India argued that adaptation (or, "modification," as India called it) of an SPS measure under Article 6:1-2 occurs "*ex post facto*" not *ex ante*. India urged it occurs (or ought to occur) only after a request from an exporting Member under Article 6:3.[162] Not so, said the WTO adjudicators:

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[160] Panel Report, *India—Poultry*, *supra* note 102, ¶ 7.679; Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.143. The Appellate Body noted the method of finding a separate violation of each sentence of each Paragraph was not on appeal, so it did not express an opinion about it. *See* Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.142.

[161] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 1.12(e). The Appellate Body upheld the Panel's reliance on the delegated legislation, S.O. 1663(E), rather than the parent legislation, Sections 3 and 3A of the *Livestock Act*. *See id.* ¶¶ 5.161-5.176. It could well have done so in one page (instead of three and one-half pages, 97-101), or even one paragraph (instead of 16 of them).

[162] *Id.* ¶ 5.119.

Paragraphs 1 and 3 are not explicitly linked, that is, compliance with Paragraph 1 is not contingent on the operation of Paragraph 3. There is no need for an exporting WTO Member to make a formal proposal under Paragraph 3 before an importing Member must adapt its SPS measure to the characteristics of the area of the exporter. Because the "adaptation" obligation under Article 6:1 is a continuing one, an importing Member must alter its SPS measure as conditions warrant in relevant areas of its territory, or of the territory of the exporting Member. So, adaptation may occur both *ex ante* and *ex post facto*, in relation to a request from the exporting Member.

6. Trade Restrictiveness and Article 5:6[163]

India called on the Appellate Body to reverse the finding of the Panel that the AI Measures were significantly more trade restrictive than necessary to achieve India's appropriate level of protection, and thus illegal under Article 5:6 of the *SPS Agreement*. India also asked the Appellate Body to overturn the Panel holding that India violated Article 2:2 of that *Agreement*, because India applied its AI Measures beyond the extent necessary to protect human and animal life or health. Articles 2:2 and 5:6 of the *SPS Agreement* state:

> [Article 2: Basic Rights and Obligations]
>
> 2. 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.
>
> [Article 5: Assessment of Risk and Determination of the Appropriate Level of Sanitary or Phytosanitary Protection]
>
> 6. Without prejudice to paragraph 2 of Article 3, when establishing or maintaining sanitary or phytosanitary measures to achieve the appropriate level of sanitary or phytosanitary protection, Members shall ensure that such measures are *not more trade-restrictive than required to achieve their appropriate level of sanitary or phytosanitary protection*, taking into account technical and economic feasibility. [The footnote to this Paragraph states: "For purposes of paragraph 6 of Article 5, a measure is not more trade-restrictive than

[163] *See id.* ¶¶ 5.188-4.244, 6.1(d)(i)-(ii), (iv).

> required unless there is *another measure, reasonably available* taking into account technical and economic feasibility, that achieves the appropriate level of sanitary or phytosanitary protection and is significantly less restrictive to trade."[164]]

India lost the first point. As the Appellate Body agreed with the Panel that with respect to the products covered by Chapter 10:4 of the OIE *Code*, the AI Measures were considerably more trade restrictive than India needed them to be to meet its desired level of protection. With that finding, the Appellate Body exercised judicial economy, saying there was no need to address the Article 2:2 issue.

On the Article 5:6 issue, the Appellate Body agreed with the Panel, which in turn accepted the American argument based on the OIE *Code*. That is, the United States showed the OIE *Code* provided for clear, scientifically based alternatives to the AI Measures that were reasonably available to India. In particular, Chapter 10:4 of the *Code* listed measures for eight of the ten product categories covered by India's *Livestock Act* and S.O. 1663(E), and it was economically and technically feasible for India to implement those measures.

Moreover, India failed to articulate its ALOP. The best the Panel could fathom from India's briefs and oral arguments was India sought two different levels: (1) prevention of ingress of HPNAI and LPNAI; or (2) country freedom from NAI. As to the first, the Panel could not discern the "intensity, extent, or amount of protection or risk that India will tolerate or that it considers suitable."[165] So, the Panel said the first level flunked the definition of "ALOP" in Annex A(5) of the *SPS Agreement*. As to the second possibility, the Panel said it does not "truly reflect" India's ALOP, because the goal of the AI Measures is not to achieve NAI freedom in each of its trading partners.

So, the Panel had to infer the ALOP from India's domestic surveillance and control devices. True, the AI Measures were an import prohibition, and the 1998 *Australia Salmon* precedent[166] indicated such a ban could be equated with a zero risk level of protection.[167] But, in India's case, inferring from the import ban a zero risk ALOP was inappropriate, because AI is transmitted not only through commercial trade, but also wild birds, informal trade, and smuggling. The *Livestock Act* and S.O. 1663(E) did not deal with these other transmission means. So, the better inference was India's ALOP was "*very high* or *very*

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[164] The WTO Agreement on the Application of Sanitary and Phytosanitary Measures (SPS Agreement), Jan. 1, 1995, G/SPS/1 (emphasis added).

[165] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.195.

[166] Appellate Body Report, *Australia—Measures Affecting Importation of Salmon*, ¶ VII(c)(4), WT/DS18/AB/R (*adopted* Nov. 6, 1998) [hereinafter Appellate Body Report, *Australia—Salmon*].

[167] *See id.* Key issues raised in this case are analyzed in BHALA, *supra* note 22, ch. 43.

conservative."[168] America contended the Indian devices indicated that level was quite low with respect to HPNAI, and negligible against LPNAI, but the Panel neither endorsed nor referred to this contention.

India could have achieved a "very high" or "very conservative" protection level rather easily by implementing the recommendations in Chapter 10:4 of the OIE *Code*, rather than slapping on an across-the-board import prohibition. The *Code* does not envisage import bans, but rather delineates an optimal level of security for safe trade of products from countries of origin afflicted by NAI. Indeed, if India had availed itself of the OIE-backed measures, then it would have achieved a higher level of protection than it obtained through its domestic devices. The result also would have been significantly less trade restrictive than a ban, hence the Article 5:6 violation.

In sum, the key holdings in the Appellate Body Report were an affirmation of precedent set in the 1998 *Australia Salmon* Report (at Paragraph 194), namely, a successful claim under Article 5:6 requires proof by the complainant (i.e., presumably exporting WTO Member) that an alternative SPS measure exists that is:

(1) Reasonably available to the respondent (presumably, the importing Member);

(2) Takes into account the economic and technical feasibility of the respondent;

(3) Achieves the respondent's desired ALOP, as defined in Annex A, Paragraph 5, to be that level of protection the Member itself deems appropriate when it designs its SPS measure to protect people, animals, or plans inside its territory; and

(4) It is significantly less trade-restrictive than the disputed SPS measure.

Of course, the Appellate Body restated the law with redundancy. Paragraph 5:216 is entirely unnecessary, for example, and the Appellate Body seems unaware that every time it reiterates a point it either annoys the reader, if it regurgitates the point verbatim, or it risks creating ambiguity in the precedent, if it unskillfully employs distinct language.

Supplementing these precedents were two other related ones the Appellate Body set *Australia Salmon*[169] and *Australia Apples*[170] in 1998 and 2010, respectively.

First, the ALOP is an "objective" than an importing Member logically chooses. Indeed has the sovereign "*prerogative*" to do so, and defines with

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[168] Panel Report, *India—Poultry*, *supra* note 102, ¶ 7.570 (quoted in Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.196) (emphasis in original).

[169] Appellate Body Report, *Australia—Salmon*, ¶¶ 199-201, 203, 205, 207.

[170] Appellate Body Report, *Australia—Apples*, *supra* note 129, ¶ 344.

sufficient precision before establishing the "instrument" to achieve the ALOP, which is its SPS measure.[171] Neither a Panel nor the Appellate Body designates an ALOP for a Member. An alternative, if one exists, serves as a benchmark, or "conceptual tool" (as the *Australia Apples* Appellate Body said at Paragraph 363 of that Report). The respondent is not compelled to implement that particular alternative, even if its extant controversial measure is held illegal, because other satisfactory alternatives may exist. Put colloquially, for proof of an Article 5:6 case, "you only need to show one alternative."

Second, what if a Member does not follow this logical order, i.e., first choose the ALOP objective and then set an instrument? Or, what if it does not define the ALOP with sufficient precision? Generally, an objective is not to be inferred from an instrument, because doing so might presume the instrument always achieves the objective. But, if these shortcomings exist, then a Panel or the Appellate Body may look to the actual SPS measure a Member implemented to understand the target ALOP. Indeed, that happened in the present case. India did not identify with sufficient precision its ALOP, so the Panel had no choice but to study S.O. 1663(E) and discern India's ALOP from this regulation.

On appeal, India was upset the United States drew the inference that India's ALOP was "quite low" by looking at the 2012 Indian National Action Plan 2012 (NAP 2012), which had five chapters in which India outlined its response to domestic AI outbreaks. That is, India did not like the basis on which America drew its inference, namely, Indian domestic surveillance and control measures. Invoking the 1998 *Australia Salmon* Appellate Body precedent[172], India said "'*it is an accepted jurisprudence*' that the appropriate level of protection must always be discerned from the measure at issue."[173] So, urged India, America was supposed to make out a *prima facie* case that India violated Article 5:6 using the actual rules at issue, the *Livestock Act* and S.O. 1663(E).

The Appellate Body disagreed. A complainant is not required to identify the ALOP of the respondent on the basis of the measures at issue in order to win an Article 5:6 case. Rather, citing the same precedent *Australia Salmon* precedent (at Paragraph 199, 203, and 205-207), the Appellate Body reminded India that identifying ALOP on the basis only of the disputed measure might lead to a "circular analysis."[174]

Related to this second point is the extent of deference a WTO adjudicator must give to what a complainant says is its ALOP. The Appellate Body observed that statements of a respondent about its ALOP might be weighted along with the "totality of the arguments and evidence on the record," particularly if those statements do not "genuinely reflect that Member's appropriate level of protection." In other words, though a respondent has the prerogative to set its

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[171] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 5.205 (quoting Appellate Body Report, *Australia—Salmon, supra* note 166, ¶ 199) (emphasis in original).

[172] Appellate Body Report*, Australia—Salmon*, *supra* note 166, ¶¶ 190-191, 197, 207.

[173] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶¶ 5.219, 5.226.

[174] *Id.* ¶ 5.226.

ALOP, deference to its characterization need not be absolute. In the case, the Panel did just that: it neither deferred entirely to India's self-characterization, nor accept uncritically America's claim. Instead, the Panel rightly looked at the totality of material before it, including India's argument S.O. 1663(E) reflects India's ALOP, and thus decided (as quoted above) this ALOP was "*very high* or *very conservative*."

Third, implicit in an analysis of Article 5:6 is the possibility of two levels of protection. One is the ALOP. The other is the protection afforded by the alternative. Only if the alternative would provide the same or higher level of protection than the importing Member's disputed measure is the disputed measure possibly significantly more trade restrictive than necessary. India never disputed that the OIE *Code* could achieve a level of protection at least as high as its "very high" or "very conservative" level.[175]

Unfortunately, in reaching these points, the Appellate Body missed a good opportunity to clarify its statement in its *Australia Apples* Report[176] that: "[i]f the level of protection achieved by the proposed alternative meets or exceeds the appropriate level of protection, *then* (assuming that the other two conditions in Article 5:6 are met) *the importing Member's SPS measure is more trade restrictive than necessary to achieve its desired level of protection*."[177] That is technically incorrect.

Whether the disputed measure is more trade restrictive than necessary is not an automatic inference from the existence of a reasonably available alternative. Showing that is so is a conceptually distinct step, as at least in theory the alternative could be even more of a protectionist devil, dampening imports to a greater degree, than the disputed measure. The Appellate Body seems to have appreciated this distinction, because later in its *India—Poultry* Report it wrote:

> 5:211. [T]he Panel's findings of inconsistency with Article 5:6 … rested upon three cumulative findings. First, the Panel found that measures based on the recommendations of the OIE Code would be technically and economically feasible and reasonably available alternatives to India's AI measures. Second, the Panel found that the United States had identified alternative measures that would achieve India's

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[175] *Id.* ¶ 5.228. India did dispute the precision with which the Panel identified alternatives to the AI Measures. India said the Panel failed to specify product-specific recommendations in the OIE *Code* that correspond to each product category for which S.O. 1663(E) bans importation upon occurrence of HPNAI or LPNAI in the exporting country. The United States easily rebutted the Indian argument with a handy Table correlating eight product categories India banned directly with eight OIE *Code* recommended alternative measures. *See id.* ¶ 5.230.

[176] Appellate Body Report, *Australia—Apples*, *supra* note 129, ¶ VIII(B)(9).

[177] Appellate Body Report, *India—Poultry*, *supra* note102, ¶ 5.206 (emphasis added) (quoting Appellate Body Report, *Australia—Apples*, *supra* note 129, ¶ 344).

> appropriate level of protection. *Third, the Panel found that the proposed alternative measures would be significantly less trade restrictive than India's AI measures with respect to the product categories covered by Chapter 10.4 of the OIE Code*.
>
> 5.225. [W]e recall the Appellate Body's finding that "[a] demonstration that an alternative measure meets the relevant Member's appropriate level of protection, is reasonably available, and is significantly less trade restrictive than the existing measure suffices to prove that the measure at issue is more trade restrictive than necessary."[178]

The point is the Appellate Body should take care to quote sparingly from its previous Reports, and ensure those quotes tightly convey its decisional law. Sometimes, less is more. The Appellate Body should have dropped its earlier quote, present instead the passage in Paragraph 5:225 as the accurate statement of the rule, and dropped the phrase "we recall," which is misleading in favor of an opener like "our clear jurisprudence is…"

Also unfortunate was the lack of clarification of how to decide whether an alternative measure is economically and technically feasible for an importing Member to utilize. To be fair to the Appellate Body, that concern was not on appeal. But, what is the standard of feasibility? Is that standard differentiated according to the level of development of a WTO Member, with more expected of rich countries and less of poor ones? Would differentiation account for big emerging Members? What is the difference between "economic" and "technical" considerations? Do political factors also matter? Perhaps future jurisprudence will develop on such questions.

7. Commentary

a. Precedent in the Indian Legal System

India Poultry was another case that the operation of the doctrine of *de facto stare decisis* was readily apparent. The Appellate Body looked to its previous decisional law, and in respect of Article 6 of the *SPS Agreement*, set new precedents. Both parties cited and debated the meaning and application of prior Appellate Body Reports. Doing so was a familiar exercise for the United States, but it was also well known to India. In the Indian legal system, precedent matters,

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[178] *Id*. ¶¶ 5.211, 5.255 (emphasis added) (quoting Appellate Body Report, *Australia—Apples*, *supra* note 129, ¶ 363).

hence argumentation based on it at the international level is not a paradigmatically different exercise.

b. English Writing

The English used in this report is generally understandable, although awkward in a number of instances. However, one could reasonably hope that the Appellate Body Secretariat, despite its extremely heavy workload, would be able to undertake whatever English language "scrubbing" may be desirable to assure that any individual report meets high standards for readability. This is important because in our view the entire dispute settlement function of the WTO, by far and away the most successful international dispute settlement mechanism in history, is enhanced by making the Appellate Body reports as understandable as possible, both for the native English speaking and the English as a second language audiences. The same applies to the French and Spanish versions of the reports. With the death of the Doha Round casting doubt on the WTO's utility as a negotiating venue, we hope that the WTO secretariat will take every opportunity to further enhance the reputation of what generally is justifiably viewed as the WTO's crown jewel, i.e., its judicial function.

In a related thought we wonder whether a more or less standard outline for Appellate Body reports would facilitate a more consistent and understandable structure, with less repetition, including the manner and sequence of important sections such as facts, issues, and arguments of the Parties, as well as the substantive portions of the report. This of course would require agreement of the members of the Appellate Body and the Appellate Body Secretariat leadership, and then efforts by the Secretariat during the production process of individual reports to implement such a framework. The authors of this case review have only limited experience as arbitrators or panelists, but as authors, including fifteen years of these WTO Case Reviews, we have learned to value highly the editing functions performed by the members of the *Arizona Journal of International and Comparative Law,* including from time to time improvements in our use of the English language, as well as suggestions for restructuring parts of our various case reviews to make them more understandable to our readers.

D. Trade Remedies—Antidumping Law and Vietnam

1. Citation

Appellate Body Report, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/AB/R (adopted Apr. 7, 2015).[179]

[179] Appellate Body Report, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/AB/R (*adopted* Apr. 22, 2015) [hereinafter Appellate

2. Prior Unliquidated Entries and Section 129(c) of 1994 *Uruguay Round Agreements Act*[180]

The United States implements a uniquely retroactive system by which antidumping duties are collected. The Appellate Body neatly explains its retroactive nature:

> In general terms, under that system, there is a time lag between calculations of estimated anti-dumping duty rates, the collection of cash deposits on imports on the basis of those estimated rates, and the liquidation (final settlement) of the anti-dumping duties actually owed on the imports for which the deposits have been collected.[181]

When an investigation shows that dumping has occurred, the United States Department of Commerce (USDOC) issues an antidumping order. The final dumping margin determination serves as the basis for assessing the antidumping duty applied by the United States Customs and Border Protection (USCBP) to previous unliquidated entries as well as for the security deposit (equal to the dumping margin) collected on future entries of subject merchandise.

Every twelve months after the initial antidumping order is issued, an interested party may request an administrative review, pursuant to which the USDOC recalculates the dumping margin. If the recalculated dumping margin is different, then the adjusted determination serves as the final dumping margin for the respondent during the previous twelve months as well as for future entries of subject merchandise. The respondent will either pay an additional amount owed plus interest or receive a refund for the difference, with interest. Once all documentation is complete and all final duties and fees have been paid, then the entry is considered liquidated. The adjusted final dumping margin becomes the basis for the adjusted final antidumping duty for future entries of subject merchandise.

The antidumping order may be amended by means of appeal or WTO adjudication. The measure at issue on appeal is Section 129 of the 1994 Uruguay Round Agreements Act (URAA),[182] which addresses the implementation of

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Body Report, *United States—Shrimp II (Viet Nam*)]. *See also* Panel Report, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/AB/R (*adopted* Nov. 17, 2014) [hereinafter Panel Report, *US—Shrimp II (Viet Nam)*]. At the Appellate stage, there were six third-parties: China, Ecuador, the European Union, Japan, Norway, and Thailand.

[180] This discussion is drawn from Appellate Body Report, *US—Shrimp II (Viet Nam)*, *supra* note 179, ¶¶ 4.2-4.5.

[181] *Id*. ¶ 4.2.

[182] Codified under the Uruguay Round Agreements Act, 19 U.S.C. § 3538 (2016), reads:

recommendations and rulings by the WTO dispute settlement body (DSB). In particular, Section 129(c)(1) concerns the timing for implementation of dumping determinations that were revised pursuant to DSB rulings. Under Section 129(c)(1), revised determinations are implemented on the date the United States Trade Representative (USTR) directs the administering authority, i.e., USDOC, to revoke an order or to implement the revised determination.

3. "As Such" Challenge under Antidumping Agreement Articles 1, 9:2-3, 11.1, and 18.1

The matter on appeal concerns an alleged violation of Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Agreement on the Implementation of Article VI of the General Agreement on Tariffs and Trade (Anti-Dumping Agreement). These Articles are reproduced below for easy reference. Article 1 of the Anti-Dumping Agreement reads:

> An anti-dumping measure shall be applied only under the circumstances provided for in Article VI of GATT 1994 and pursuant to investigations initiated and conducted in accordance with the provisions of this Agreement. The following provisions govern the application of Article VI of GATT 1994 in so far as action is taken under anti-dumping legislation or regulations.[183]

(c) Effects of determinations; notice of implementation.

(1) Effects of determinations. Determinations concerning title VII of the Tariff Act of 1930 [19 U.S.C. §§ 1671 et seq.] that are implemented under this section shall apply with respect to unliquidated entries of the subject merchandise (as defined in section 771 of that Act [19 U.S.C. § 1677]) that are entered, or withdrawn from warehouse, for consumption on or after--

(A) in the case of a determination by the Commission under subsection (a)(4), the date on which the Trade Representative directs the administering authority under subsection (a)(6) to revoke an order pursuant to that determination, and

(B) in the case of a determination by the administering authority under subsection (b)(2), the date on which the Trade Representative directs the administering authority under subsection (b)(4) to implement that determination.

[183] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 401, art. 1 [hereinafter Anti-Dumping Agreement].

Articles 9.2 and 9.3 concern the collection of antidumping duties in excess of a WTO compliant antidumping margin:

> 9.2 When an anti-dumping duty is imposed in respect of any product, such anti-dumping duty shall be collected in the appropriate amounts in each case, on a non-discriminatory basis on imports of such product from all sources found to be dumped and causing injury, except as to imports from those sources from which price undertakings under the terms of this Agreement have been accepted. The authorities shall name the supplier or suppliers of the product concerned. If, however, several suppliers from the same country are involved, and it is impracticable to name all these suppliers, the authorities may name the supplying country concerned. If several suppliers from more than one country are involved, the authorities may name either all the suppliers involved, or, if this is impracticable, all the supplying countries involved.
>
> 9.3 The amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2.
>
> 9.3.1 When the amount of the anti-dumping duty is assessed on a retrospective basis, the determination of the final liability for payment of anti-dumping duties shall take place as soon as possible, normally within twelve months, and in no case more than eighteen months, after the date on which a request for a final assessment of the amount of the anti-dumping duty has been made. Any refund shall be made promptly and normally in not more than 90 days following the determination of final liability made pursuant to this sub-paragraph. In any case, where a refund is not made within 90 days, the authorities shall provide an explanation if so requested.
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> 9.3.2 When the amount of the anti-dumping duty is assessed on a prospective basis, provision shall be made for a prompt refund, upon request, of any duty paid in excess of the margin of dumping. A refund of any such duty paid in excess of the actual margin of dumping shall normally take place within twelve months, and in no case more than eighteen months, after the date on which a request for a refund, duly supported by

> evidence, has been made by an importer of the product subject to the anti-dumping duty. The refund authorized should normally be made within 90 days of the above-noted decision.
>
> 9.3.3 In determining whether and to what extent a reimbursement should be made when the export price is constructed in accordance with paragraph 3 of Article 2, authorities should take account of any change in normal value, any change in costs incurred between importation and resale, and any movement in the resale price which is duly reflected in subsequent selling prices, and should calculate the export price with no deduction for the amount of anti-dumping duties paid when conclusive evidence of the above is provided.[184]

Article 11.1 states: An anti-dumping duty shall remain in force only as long as and to the extent necessary to counteract dumping, which is causing injury.[185] Finally, Article 18.1 reads: "No specific action against dumping of exports from another Member can be taken except in accordance with the provisions of GATT 1994, as interpreted by this Agreement."[186]

Before the Panel, Vietnam challenged Section 129(c)(1) as inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement because the measure "precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries."[187] The Panel found Vietnam failed to establish its argument and concluded Vietnam had shown that Section 129(c)(1) is inconsistent "as such" with the aforementioned provisions of the Anti-Dumping Agreement.

On appeal, Vietnam claimed the Panel violated Article 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU) because "its interpretation and analysis of Section 129(c)(1) was not based on an objective assessment of the provision and its broader statutory context."[188] In particular, Vietnam claimed the Panel "applied an incorrect analytical framework," improperly requiring Vietnam to "establish that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries."[189] Vietnam also argued the Panel "failed to conduct a holistic assessment in ascertaining the meaning of Section 129(c)(1)."[190] In addition, Vietnam requested the Appellate Body to complete the analysis if it

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184 *Id.* art. 9.2, 9.3.
185 *Id.* art. 11.1.
186 *Id.* art. 18.1.
187 Appellate Body Report, *US—Shrimp II (Viet Nam)*, *supra* note 179, ¶ 4.29.
188 *Id.* ¶ 2.1.
189 *Id.* ¶ 4.17.
190 *Id*. ¶ 4.17.

finds a violation of Article 11 of the DSU, and to find Section 129(c)(1) inconsistent with the aforementioned articles in the Anti-Dumping Agreement.

The Appellate Body found the Panel did not violate Article 11 of the DSU, and therefore did not complete the analysis or reverse the Panel finding.

4. Holdings and Rationales[191]

In its assessment of the matter at issue, the Appellate Body repeatedly noted the narrowness of Vietnam's appeal, which was:

> [L]imited to the Panel's finding that Viet Nam had failed to establish that Section 129(c)(1) precludes implementation of recommendations and rulings of the DSB with respect to unliquidated entries, and the Panel's consequential finding that Viet Nam had not established Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.[192]

Given the limited scope of the appeal and the relatively higher burden on Vietnam to prove its "as such" claim, it is unsurprising that the Appellate Body did not find the Panel in violation of Article 11 of the DSU, and therefore that it did not proceed with Vietnam's additional requests on appeal.

a. Appropriate Analytical Framework[193]

By requiring Vietnam to demonstrate "that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries of subject merchandise," Vietnam argues the Panel applied the incorrect analytical framework that resulted in a finding that Section 129(c)(1) is not inconsistent "as such" with the Anti-Dumping Agreement.[194] According to Vietnam: "the Panel's approach was flawed because the fact that the United States might apply a different mechanism to implement DSB recommendations and rulings in *some* circumstances does not answer the question of whether Section 129(c)(1) precludes implementation in *other* circumstances."[195] In addition, Vietnam argued the Panel failed to appreciate the "United States' duty assessment system and the statutory context in which Section 129(c)(1) operates" specifically because of the existence of "Category 1 entries" that "'might only be

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191 *See id.* ¶¶ 4.1-4.51.
192 Appellate Body Report, *US—Shrimp II (Viet Nam)*, *supra* note 179, ¶ 1.6.
193 *See id.* ¶¶ 4.18-4.26.
194 *Id.* ¶ 4.17.
195 *Id*. ¶ 4.18.

addressed' by a Section 129 determination."[196] Category 1 entries are the "subset of prior unliquidated entries that have been subject to a final determination in an investigation or review."[197]

Here, the Appellate Body disagreed, stating the Panel simply responded to Vietnamese argument that "Section 129(c)(1) 'serves as an absolute legal bar to any refund of duties [for] prior unliquidated entries' and sets out an 'express prohibition against duty refunds for prior unliquidated entries.'"[198]

Vietnam also argued the Panel asserted that to prove an "as such" claim, the "complainant is required to show that the measure results in WTO-inconsistent action not merely in some instances but, rather, in all instances in which it is applied."[199] Here, Vietnam points to Paragraph 7.266 of the Panel Report that points out an instance in which the United States used Section 129 *and* Section 123 of the URAA (concerning rule modification) on some prior unliquidated entries and therefore the Panel thought that this example "disproves Viet Nam's argument that the United States Government is in some in some **general way** precluded from 'implementing' DSB recommendations and rulings with respect to prior unliquidated entries."[200] But, Vietnam argues the Panel failed to articulate the legal basis for this analytical framework, and therefore "the Panel's reasoning . . . lacks coherence" in violation of DSU Article 11.[201]

Here again, the Appellate Body disagreed, stating that the Panel statement quoted by Vietnam was not actually an articulation of the Panel's analytical framework. In fact, considered the Appellate Body, the evidence offered by the United States as to alternative methods of implementing DSB recommendations and rulings "would appear to have been sufficient for the Panel to conclude that, contrary to what Viet Nam had argued, Section 129(c)(1) does not, itself, preclude implementation of DSB recommendations and rulings with respect to prior unliquidated entries."[202] The Appellate Body also cautioned that simply disagreeing with the Panel's analysis does not mean the Panel erred to a degree that it violated Article 11 of the DSU.

Relying on *China Rare Earths* (2014) the Appellate Body noted it is the burden of the complainant to explain, "*why* the alleged error *meets* the standard of review under [Article 11 of the DSU]."[203] Although a Panel has broad discretion to use or develop legal arguments freely when making objective assessments, complainants need to construe legal arguments backed by evidence tied to those

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196 *Id*. ¶ 4.18 (quoting Viet Nam's appellant's submission, ¶ 54).

197 Appellate Body Report, *US—Shrimp II (Viet Nam)*, *supra* note 179, ¶ 4.18.

198 *Id.* ¶ 4.19 (quoting Viet Nam's appellant submission, ¶ 54).

199 *Id*. ¶ 4.20.

200 *Id*. (emphasis in original).

201 *Id*.

202 Appellate Body Report, *US—Shrimp II (Viet Nam)*, *supra* note 179, ¶ 4.21.

203 *Id*. ¶ 4.23 (quoting Appellate Body Reports, *China—Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (*adopted* Aug. 29, 2014)).

arguments and not "simply submit evidence and expect the panel to divine from it a claim of WTO-inconsistency."[204]

The Appellate Body pointed out that Vietnam had not argued "Section 129(c)(1) precludes implementation of DSB recommendations and rulings in respect to 'Category 1 entries,'" rather, it claimed the measure at issue concerned prior unliquidated entries being precluded from implementation of DSB recommendations and rulings and is "as such" inconsistent with certain provisions of the Anti-Dumping Agreement.[205] Consequently, the Panel "was required to examine whether Viet Nam had demonstrated that Section 129(c)(1) *necessarily operates*, at least in certain circumstances, to preclude implementation of DSB recommendations and rulings."[206]

In examining this issue, the both the Panel and Appellate Body appear to have given considerable weight to the alternative methods to implement DSB recommendations and rulings put forth by the United States.[207] Vietnam accepted as accurate these alternative methods, but argued they are "WTO-consistent action by coincidence" and a "consequence of the normal operation of US law in that the rule had been changed through Section 123 action, and the USDOC only followed the modified rule in administrative reviews subsequent to the date of implementation of the Section 129 determination, thereby affecting prior unliquidated entries."[208] That troubled the Appellate Body, as it seemed to "undermine Viet Nam's argument that Section 129(c)(1), in itself, precludes implementation of DSB recommendations and rulings."[209] The Appellate Body listed alternative methods by which the United States might implement DSB recommendations and rulings:

- Section 123 of the URAA concerning rule modification;
- Congressional action;
- Entering into Agreements with WTO Members to settle WTO disputes;
- Judicial remand;
- Modification of applicable margins or revocation of an antidumping order by USDOC (discretionary); and
- Request by USDOC that its determinations be voluntarily remanded (discretionary);

Although one might be skeptical of the overall discretionary nature of the alternative methods listed above, when combined with its abovementioned assessment, the Appellate Body was sufficiently swayed and found Vietnam failed

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[204] *Id*. ¶ 4.23 (quoting Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (*adopted* Apr. 20, 2005)).

[205] *Id*. ¶ 4.24.

[206] *Id*.

[207] Appellate Body Report, *US—Shrimp II (Viet Nam)*, *supra* note 179, ¶ 4.21.

[208] *Id*. ¶ 4.26.

[209] *Id*. ¶ 4.27.

to prove the Panel applied an incorrect analytical framework in violation of DSU Article 11.

b. Holistic Assessment[210]

The Appellate Body started by stating it is "essential" for a Panel to comprehensively assess whether a Member's domestic legal and regulatory frameworks comply with WTO rules, but that dispute settlement bodies do not "interpret a Member's domestic legislation as such."[211] In addition, Panels must "examine the meaning and scope of the municipal law at issue in order to make an objective assessment of the matter before it" under Article 11 of the DSU.[212] Panels need to look at the content and meaning of the law, and that while sometimes the text is enough, occasionally a Panel may need to go beyond the text to the application of the measure at issue, treatment by domestic courts, or recognized scholarship. Finally, the Appellate Body noted the complainant that brings an "as such" claim has the burden of providing sufficient evidence to prove that another party's law is in violation of the agreement at issue.

In this dispute, the Appellate Body reviewed that the Panel started its assessment with the text of Section 129(c)(1), and looked at the statutory context and the Statement of Administrative Action to the URAA (SAA). The Panel also looked at the application of Section 129(c)(1) by the USDOC and finally to legal interpretations by the United States Court of International Trade (USCIT). Vietnam made a number of arguments concerning the Panel's assessment of each of these elements, which the Appellate Body quickly addressed. The Appellate Body highlighted that simply because a Panel does not agree with a party's own assessment or interpretation of evidence, that alone is not sufficient to prove a violation of DSU Article 11. The Appellate Body determined the "Panel properly relied on the various elements that it examined to inform its understanding of the meaning and effect of Section 129(c)(1)."[213] Therefore, the Appellate Body found the Panel did not violate Article 11 of the DSU and refused to address the other issues on appeal.

5. Commentary

The importance of the domestic shrimp industry to Vietnam's economy was likely a significant motivating factor in bringing its claim on appeal. In terms of productivity, Vietnam's shrimp industry was worth USD $3.1 billion and was ranked third in the world in 2013. Although exports rose by 27 percent between 2013 and 2014, more recently, Vietnamese shrimp farmers and processors have

210 *See id.* ¶¶ 4.30-4.51.
211 *Id.* ¶ 4.31.
212 Appellate Body Report, *US—Shrimp II (Viet Nam)*, *supra* note 179, ¶ 4.31.
213 *Id.* ¶ 4.50.

taken a hit, as imports of shrimp have decreased, export prices have dropped, and exchange rates have fluctuated. Yet another motivating factor for Vietnam may have been related to the well-known practice of zeroing in the United States. Here, Vietnam's prior unliquidated entries referenced in this dispute previously had been subjected to zeroing.

When considering the importance of the shrimp industry to Vietnam, it is perhaps more understandable why Vietnam would pursue a narrow "as such" claim concerning Section 129(c)(1), which had a dubious outlook for success. Throughout its report, the Appellate Body emphasized repeatedly the limited scope of the Vietnamese claim and highlighted the higher standard of review associated with it. Perhaps Vietnam would have had more success arguing a well-tailored "as applied" claim.

E. Trade Remedies—Antidumping Law and China

1. Citation

WTO Appellate Body Report, China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan, WT/DS454/AB/R (adopted Oct. 28, 2015);

WTO Appellate Body Report, China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SST") from the European Union, WT/DS460/AB/R (adopted Oct. 28, 2015).

2. Facts

This dispute encompasses challenges by Japan and the EU to the imposition by China of anti-dumping duties on imports of high-performance stainless steel seamless tubes ("HP-SSST"). According to the Appellate Body, HP-SSST is "mainly used in the manufacture pressurized components such as superheaters and reheaters of supercritical and ultra-supercritical boilers."[214] MOFCOM determined that three grades of HP-SSST were relevant to the investigations, Grade A (primarily imported), and Grades B and C (primarily made in China).

Japan and the EU dispute various aspects of the determinations by China's Ministry of Commerce (MOFCOM) in its preliminary and final anti-determinations, relating to both dumping margin and injury determinations by MOFCOM. Most of the issues relate to the consistency of the methodology used by MOFCOM in its dumping and injury findings under various provisions of the

[214] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 1.4.

Anti-Dumping Agreement (ADA)[215] rather than to Chinese statutes or regulations *per se.* A minor issue arises under the Dispute Settlement Understanding (DSU).[216]

Although the Appellate Body reports provide some useful guidance to administrating authorities in how to conduct an anti-dumping investigation, it breaks little new ground with regard to any of the largely technical issues applicable to anti-dumping investigative procedures in China or in other WTO Member states. For example, the injury determination issues had earlier been discussed in such cases as *China—GOES, US—Hot-Rolled Steel,* and the dumping margin issues in *EC—Tube or Pipe Fittings* and *EC—Selected Customs Matters*, as discussed in the text of this review. If anything stands out it is the fact that this is a relatively short Appellate Body Report (107 pages in the EU version); that the parties among them managed to raise twenty issues for the Appellate Body to decide; and that it is one of the comparatively rare reports in which the respondent loses on each and every issue appealed by the respondent and claimants, including several issues where the claimants are successful in having adverse panel findings reversed. The overall picture is one of a significantly flawed MOFCOM proceeding for both the dumping margins and injury determinations.

3. Summary of Appellate Issues[217]

The following issues were raised in the appeals:

(1) Issues under the ADA, Articles 2.2.1 and 2.2.2 [dumping margin calculations]:

   (a) Whether the panel erred in determining that certain of the EU's claims under these articles complied with the requirement in Article 6.2 of the DSU that claimants provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly to the Respondent (raised in DS460 by China);
   (b) Whether the Panel erred in its interpretation of ADA Article 2.2.2 when it determined that China filed to determine an amount for Selling, General and Administrative Expenses (SG&A) on the basis of actual data (raised in DS460 by China); and

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[215] *See* Anti-Dumping Agreement, *supra* note 183.

[216] Understanding on Rules and Procedures Governing the Settlement of Disputes, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

[217] *See* Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 4.1. Some of the listed issues, because of their minor significance, will not be addressed in detail in the discussion.

(c) Whether the Panel, in reaching its findings under the ADA, acted inconsistently with Articles 11 and 12.7 of the DSU and Article 17.6(i) of the ADA (raised in DS460 by China);

(2) Whether the Panel erred in finding that China, by rejecting SMST's218 request for rectification of certain information only on the grounds it was not provided prior to verification, acted inconsistently with ADA Article 6.7 (raised in DS460 by the EU);

(3) With regard to the Panel's finding that China acted inconsistently with Article 6.5 of the ADA:

(a) Whether the Panel erred in finding that China erred because MOFCOM allowed certain of the Chinese petitioners' supplemental evidence to remain confidential (and thus unavailable to the foreign respondents) with making an objective assessment of the petitioners' showing of "good cause" for withholding the confidential information (raised in DS454 and DS460 by China); and

(b) Whether the Panel in so finding applied an erroneous standard of review under DSU Article 11 and ADA Article 17.6(i) information (raised in DS454 and DS460 by China);

(4) In regard to the Panel findings under ADA Article 6.9:

(a) Whether the Panel erred in rejecting the EU claim that MOFCOM acted inconsistently with Article 6.9 by failing to disclose adequately the essential facts relied on by MOFCOM in its determination of dumping by SMST and Tubacex[219] (raised in DS460 by the European Union);
(b) Whether the Appellate Body can complete the legal analysis with regard to d)(i) above (raised in DS460 by the European Union); and

(5) With regard to the Panel's findings under ADA Articles 3.1 and 3.2 [injury; volume and price undercutting]:

(a) Whether the Panel erred by finding that where price undercutting is considered, the administering authority may simply determine whether dumped imports sell at a lower price than comparable domestic products (raised in DS454 by Japan and in DS460 by the EU);

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[218] SMST, Salzgitter Mannesmann Stainless Tubes, is a German producer and interested party.

[219] Another German producer and interested party.

(b) Whether the Panel erred by rejecting Japanese and EU claims that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by failing to consider whether Grade C imports had any price undercutting effect on domestic Grade C products, by placing downward pressure on those domestic prices because of being sold at lower prices (raised in DS454 by Japan and in DS460 by the EU);

(c) Whether the Appellate Body can have completed the legal analysis for e)(ii) above so as to determine whether MOFCOM's assessment of the existence of significant price undercutting resulting from imports of Grade C imports from Japan is inconsistent with ADA Articles 3.1 and 3.2 (raised in DS454 by Japan and in DS460 by the EU); and

(d) Whether the Panel erred by rejecting the EU's claim that MOFCOM acted inconsistently with ADA Articles 3.1 and 3.2 by improperly extending its finding of price undercutting in regard to Grades B and C to the domestic product as a whole, thus undercutting domestic Grade A sales as well (raised in DS460 by the EU);

(6) With regard to Panel findings under ADA Articles 3.1 and 3.4 [injury: evaluation of domestic industry condition]:

(a) Whether the Panel erred by concluding that Japan's claim that MOFCOM failed to examine whether dumped imports explained the state of the domestic industry, because the claim was outside the Panel's terms of reference (raised in DS454 by Japan); and

(b) Whether the Panel erred in rejecting Japanese and EU claims that MOFCOM acted inconsistently with ADA Articles 3.1 and 3.4 as a result of failing to undertake a segmented impact analysis (raised in DS454 by Japan and DS460 by the EU);

(7) With regard to the Panel's finding that China acted inconsistently with ADA Articles 3.1 and 3.5 [injury; causation]:

(a) Whether the Panel erred in addressing a claim outside the Panel's term of reference, to wit, that MOFCOM improperly relied on the market share of dumped imports in determining a causal link between those imports and injury to the domestic industry;

(b) Whether the Panel in this finding acted inconsistently with ADA, Article 11 by ruling on a matter not before it and in making the case for the complainant (raised in DS454 and DS460 by China);

(c) Whether the Panel erred in finding that MOFCOM improperly relied on the market share of dumped imports as the basis for causation because MOFCOM made no finding of cross-grade price effects, whereby price undercutting by Grade B and C imports could be shown to affect the price of Grade A HP-SSST (raised in DS454 and DS460 by China);

(d) Whether the Panel erred in finding that China acted inconsistently with ADA Articles 3.1 and 3.5 because MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and increase in domestic production capacity was not attributed to dumped imports (raised in DS454 and DS460 by China); and

(e) Whether the Panel acted inconsistently with DSU Article 11 in finding that complainants had not advanced independent claims with regard to MOFCOM's price effects and impact analyses other than those concerning reliance on market shares and MOFCOM's non-attribution analysis (raised in DS454 by Japan and DS460 by the EU); and

(8) With regard to the Panel's designation of business confidential information (BCI) and adoption of BCI procedures, whether the Panel erred in its interpretation and application of DSU Articles 18.2 and 13.1, and ADA Articles 17.7 and 6.5, with particular regard to the finding that in the context of a dispute under the ADA, "confidential information" in Article 17.7 refers to the confidential information earlier examined by the investigating authority and treated as confidential under Article 6.5, which information is then provided to a dispute settlement panel under ADA Article 17.7 (raised in DS 460 by the EU).

4. Data for Determining SG&A Amounts under ADA Article 2:11-2

MOFCOM in general followed the requirements of the ADA, Article 2.1.1 for determining constructed normal value[220] by adding cost of production in the country of origin; and amounts for SG&A and profits, which under the ADA, Article 2.2.2 are to be based on actual data.[221] China argued that the Panel erred by determining that MOFCOM failed to calculate the SG&A costs for German producer SMST on the basis of "actual data pertaining to production and sales in

[220] Under Article 2.1 of the Anti-Dumping Agreement a product is "dumped" where the imported product is introduced into the commerce of another country at less than its "normal value". "Normal value" is defined as the "comparable price, in the ordinary course of trade, for the like product when destined for consumption in the exporting country." *See* Anti-Dumping Agreement, *supra* note 183.

[221] *See* Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.1.

the ordinary course of trade of the like product."[222] The EU had asserted that the SG&A amounts used by MOFCOM did not reflect the records and actual data of the exporters.[223] China countered by arguing that several of the EU's related claims were outside the Panel's terms of reference and consequently should not have been considered.[224] The Panel rejected China's objections, concluding that when the Panel request was considered as a whole, effectively finding that a careful reading of the "European Union's panel request, including any narrative explanation contained therein, permits a sufficiently clear identification of the legal basis regarding each of the Article 2 claims pursued in the European Union's first written submission."[225]

The Appellate Body began by noting that the requirements of DSU, Article 6.2 are "(i) the identification of the specific measures at issue; and (ii) the provision of a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[226] It then observed that under the scheme of ADA Article 2.2.1, below cost sales could be excluded from calculating normal value only under certain conditions met by the investigating authority, the obligation imposed on the authority under Article 2.2.1 consists of:

> [A] single obligation whereby an investigating authority may disregard below-cost sales of the like product only if it determines that "such" below-cost sales display the three specific characteristics mentioned above. The fact that the European Union did not include statements in its panel request foreshadowing the arguments it would make in order to substantiate its claim under Article 2.2.1 does not mean that the European Union's panel request does not comply with the standard set out in Article 6.2 of the DSU.[227]

The Panel's finding that the EU panel request complied with DSU Article 6.2 was therefore affirmed.[228]

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[222] *Id.* ¶ 5.2.

[223] *Id.* ¶ 5.3.

[224] *Id.* ¶ 5.5.

[225] *Id.* ¶ 5.7 (quoting Panel Report, *China—Measures Imposing Anti-Dumping Duties on High Performance Stainless Steel Seamless Tubes (HP-SSST) from Japan*, ¶ 7.47, WT/DS454/R, WT/DS460/R (*adopted* Feb. 14, 2015) [hereinafter Panel Report, *China—HP-SSST*]).

[226] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.12 (emphasis omitted) (noting also that the request must be made in writing and indicate whether consultations had been held). The consultation requirement is jurisdictional under DSU, Article 4.7; without consultations no panel may be requested.

[227] *Id.* ¶ 5.22 (referring to Appellate Body Report*, European Communities—Selected Customs Matters*, ¶ 153, WT/DS315/AB/R (*adopted* Dec. 11, 2006) [hereinafter Appellate Body Report, *EC—Selected Customs Matters*]).

[228] *Id.* ¶ 5.22.

With regard to the ADA, the Appellate Body noted the requirement under ADA, Article 2.2.2 that the investigating authority when calculating constructed normal value:

> first attempt to make such a calculation using the 'actual data pertaining to production and sales in the ordinary course of trade.' Therefore, if *actual* data for SG&A costs and profits in the ordinary course of trade exists for the exporter under investigation, an investigating authority may not calculate constructed value using data from other sources.[229]

After reviewing the language of Article 2.2.2, the Appellate Body ultimately disagreed with China that the provision sets out separate obligations; the narrative in the panel request is sufficiently broad to encompass "actual data pertaining to production and sales in the ordinary course of trade" despite the fact that the EU did not add additional language from Article 2.2.2 in its request.[230]

Turning to the key issue, the Appellate Body addressed MOFCOM's failure to use actual data pertaining to production and sales. It first noted that the:

> Panel concluded that MOFCOM improperly utilized data relating to two free samples, which MOFCOM had excluded for the purpose of determining the COP, to establish the SG&A amounts. On this basis, the Panel concluded that "China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product."[231]

The Appellate Body ultimately upheld the Panel, rejecting China's challenges, primarily on the ground that "MOFCOM was required, in its determination to explain why it calculated an amount for SG&A costs 'based on the application of coefficients to data that had already been excluded for the purpose of constructing normal value.'"[232] MOFOCOM thus failed to act consistently with ADA Article 2.2.2 "by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product."[233]

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[229] *Id.* ¶ 5.25 (emphasis in original) (referring to Appellate Body Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or Pipe Fittings from Brazil*, ¶ 97, WT/DS219/AB/R (*adopted* Aug. 18, 2003) [hereinafter Appellate Body Report, *EC—Tube or Pipe Fittings*]).

[230] *Id.* ¶ 5.36.

[231] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.40 (citing Panel Report, *China—HP-SSST, supra* note 225 ¶ 7.66).

[232] *Id.* ¶ 5.52 (quoting Panel Report, *China—HP-SSST*, *supra* note 17, ¶ 7.66).

[233] *Id.* ¶ 5.59.

The Appellate Body also rejected China's challenge to the Panel finding that China had acted inconsistently with ADA Article 6.7 and Annex, para. 7 by rejecting SMST's "request for rectification of information on the sole basis that this request was not made before the verification started."[234] ADA, Article 6.7, provides for verifications of information provided by respondents in the territory of the other member, subject to certain limitations not relevant here. Annex I governs verification procedures, and notes that a major purpose of the investigation is for authorities to "satisfy themselves as to the accuracy of the information supplied by interested parties upon which their findings are based."[235] However, "[i]n addition to laying down evidentiary rules that apply throughout the course of an anti-dumping investigation, Article 6 speaks to the due process rights that are enjoyed by interested parties during the investigation."[236]

Still, the authority is not "under an obligation to accept and use all information that is submitted to them."[237] Thus, the authority must balance due process interests with the "need to control and expedite the investigating process."[238] In the instant proceeding, MOFCOM had requested SMST to prepare certain documents, which SMST sought to correct in the course of the verification, leading the Panel to conclude that there was a "clear and direct connection" between the information sought by MOFCOM and that which SMST wished to correct.[239] Nor did the Panel find any evidence that that accepting the evidence "would have caused undue difficulties in the conduct of the investigation," but only because SMST did not raise the matter before the investigation began.[240]

5. Withholding of Confidential Data from Respondent without "Good Cause" under ADA Article 6.5

Article 6.5 of the ADA provides in pertinent part that:

> Any information which is by nature confidential (for example, because its disclosure would be of significant competitive advantage to a competitor or because its disclosure would have a significantly adverse effect upon a person supplying the information or upon a person from whom that person acquired the information), or which is provided on a confidential basis by

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234 *Id.* ¶ 5.62.

235 *Id.* ¶ 5.72.

236 Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.73.

237 *Id.* ¶ 5.74.

238 *Id.* ¶ 5.74 (citing Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan,* ¶ 86, WT/DS184/AB/R (*adopted* Aug. 23, 2001) [hereinafter Appellate Body Report, *US—Hot-Rolled Steel*]).

239 *Id.* ¶ 5.76 (quoting Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.99).

240 *Id.*

> parties to an investigation shall, *upon good cause shown*, be treated as such by the authorities.[241]

This provision relates to Article 6.4, which requires authorities to "whenever practicable provide timely opportunities for all interested parties to see all information that is relevant to the presentation of their cases. . . ." The tension between these conflicting objectives is obvious, and is resolved in part by requiring the party seeking to withhold otherwise relevant information to show good cause to the authorities as to why it should be withheld.

China objected on appeal to the Panel's finding that MOFCOM had failed to objectively assess "good cause" by the petitioners' for withholding allegedly confidential information from the respondents, in contravention of Article 6.5. China also challenged the Panel's reasoning and alleged that the Panel had effectively made the case for the complaining parties.[242] China challenged, also unsuccessfully, the Panel's conclusion that while the EU could have been more specific in establishing a *prima facie* case the EU had "sufficiently connected its Article 65. claim" to the confidential reports, which MOFOCOM had permitted to remain fully confidential, without requiring any attempt by the petitioners at providing even parts of the texts to respondents.[243]

The Appellate Body noted that they had considered the same issue in *EC—Fasteners (China)*, where the Appellate Body held that both information that is "by nature confidential" as well as that "provided on a confidential basis" requires a "good cause" showing under Article 6.5 if it is to be withheld from respondents.[244] According to the Appellate Body, "'[g]ood cause' must be assessed and determined objectively by the investigating authority, and cannot be determined merely based on the subjective concerns of the submitting party."[245] In the present case, there was no evidence presented to the Panel that MOFCOM objectively assessed the "good cause" alleged for confidential treatment by petitioners.[246] Accordingly, according to the Appellate Body, the Panel did not err in its determination.[247]

The Appellate Body also rejected China's contention that the Panel's determination was inconsistent with DSU, Article 11—requiring an "objective

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[241] Anti-Dumping Agreement, *supra* note 183, art. 6.5 (emphasis added).

[242] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.82.

[243] *See id.* ¶ 5.86 (citing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.290, n. 460).

[244] Appellate Body Report, *European Communities—Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China*, ¶¶ 536-37, WT/DS397/AB/R (*adopted* Jul. 28, 2011) [hereinafter Appellate Body Report, *EC—Fasteners (China)*].

[245] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.95 (citing Appellate Body Report, *EC—Fasteners (China), supra* note 244, ¶ 537).

[246] *Id.* ¶ 5.98 (citing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.299, n. 482).

[247] *Id.* ¶ 5.100.

assessment of the facts.[248] It also rejected the assertion that the Panel acted inconsistently with Article 17.6(i).[249] That Article states that if "the establishment of the facts [by the investigating authority] was proper and the evaluation was unbiased and objective, even though the panel might have reached a different conclusion, the evaluation shall not be overturned."[250] The Appellate Body reasoned that the Panel could not have violated this provision in the instant given the lack of evidence on the record that MOFCOM had objectively assessed good cause.[251] In other words, it was not simply the case of a different conclusion, but the absence of any conclusion by MOFCOM at all.

Finally, the Appellate Body rejected China's contention that the Panel had made the case for the EU and Japan. In so finding, it noted that the complainants are not "precluded the complainants from further elaborating on the claims identified in their panel requests in response to the Panel's questioning," and that "panels are entitled to ask questions of the parties that they deem relevant to the consideration of the issues before them."[252]

6. Disclosure of Essential Facts Concerning MOFCOM's Dumping Determination under ADA Article 6.9

According to the EU, in the course of the proceeding MOFCOM failed to adequately disclose the essential facts, including the calculation methodology,[253] connected with the data on which the determination of dumping for SMST and Tubacex was based, as required by ADA Article 6.9. That article provides that "the authorities shall, before a final determination is made, inform all interested parties of the essential facts under consideration which form the basis for the decision whether to apply definitive measures. Such disclosure should take place in sufficient time for the parties to defend their interests." When the Panel rejected the EU claims, the EU appealed.[254]

The Panel rejected the EU contentions, finding with reference to the Appellate Body's report in *China—Broiler Products* that "a narrative description of the data used cannot ipso facto be considered insufficient disclosure, provided the essential facts the authority is referring to are in the possession of the

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[248] *Id.* ¶ 5.102.

[249] *Id.*

[250] Appellate Body Report, *China—HP-SSST*, *supra* note 15.

[251] *Id.*, ¶ 5.102.

[252] *Id.* ¶ 5.116 (citing Appellate Body Report, *Thailand—Anti-Dumping Duties on Angles, Shapes and Sections of Iron or Non-Alloy Steel and H-Beams from Poland*, ¶ 135, WT/DS122/AB/R (*adopted* Apr. 5, 2000). (quoting Appellate Body Report, *Canada—Measures Affecting the Export of Civilian Aircraft,* ¶ 185, WT/DS70/AB/R, (*adopted* Aug. 20, 1999) [hereinafter Appellate Body Report, *Canada—Aircraft*])).

[253] *See id.* ¶ 5.127.

[254] *Id.* ¶ 5.119.

respondent."[255] Further, the Panel concluded that Article 6.9 does not require the investigating authority to "'prepare disclosures containing the entirety of the essential facts under consideration' in cases where the relevant essential facts are in the possession of the respondent."[256]

The Appellate Body observed that, "[e]ssential facts are, therefore, 'those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome.'"[257] It is the responsibility of the authority to disclose such facts in a "coherent way" that permits "an interested party to understand the factual basis for each of the intermediate findings and conclusions reached by the authority, such that it is able properly to defend its interests."[258] Further, the Appellate Body noted that the authority "must disclose the essential facts under consideration that '*form the basis for the decision* whether to apply definitive measures.'"[259] As the EU contended, it is not sufficient to disclose selective facts among those provided by the interested party because the party "has no way of knowing which facts have been selected."[260] On this ground, the Appellate body reversed the Panel's ruling and after a review of MOFCOM's dumping disclosures, found them lacking and held that China had acted inconsistently with ADA Article 6.9.[261]

7. MOFCOM's Determination of Injury

Noting that all three parties had appealed various aspects of the injury finding, the Appellate Body began by emphasizing its earlier conclusions that ADA, Article 3.1 is an "overarching provision that sets forth a Member's fundamental, substantive obligation" with regard to the injury determination, and "informs" the more detailed obligations in the ADA, Articles 3.2, 3.4 and 3.5,[262] as part of a logical progression. Article 3.1 states that:

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[255] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.123 (quoting Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.235 (referring to Panel Report, *China—Anti-Dumping and Countervailing Duty Measures on Broiler Products from the United States*, ¶ 7.95, WT/DS427/R (*adopted* Sep. 25, 2013))).

[256] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.123 (quoting Panel Report, *China—HP-SSST, supra* note 225, ¶ 7.235).

[257] *Id.* ¶ 5.130 (quoting Appellate Body Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel ("GOES") from the United States*, ¶ 240, WT/DS414/AB/R, (*adopted* Nov. 16, 2012) [hereinafter Appellate Body Report, *China—GOES*]).

[258] *Id.* ¶ 5.130.

[259] *Id.* ¶ 5.133 (emphasis in original).

[260] *Id.* (quoting Annex B-4, Executive Summary of the European Union's Other Appellant's Submission, ¶ 189, WT/DS460/AB/R/ (Oct. 14, 2015) (internal citations omitted)).

[261] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.135.

[262] *Id.*, ¶ 5.137.

> A determination of injury for purposes of Article VI of GATT 1994 shall be based on positive evidence and involve an objective examination of both (a) the volume of the dumped imports and the effect of the dumped imports on prices in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products.

The Appellate Body recalled that it had found in *US—Hot Rolled Steel,* that "the term 'positive evidence' focuses on the facts underpinning and justifying the injury determination."[263] It further noted that in *China—GOES*, it had found that the term "objective examination" requires that an injury investigation "conform to the dictates of the basic principles of good faith and fundamental fairness" and to be conducted "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation."[264] Article 3.1 thus is elaborated upon by Article 3.2 (content of the authority's considerations regarding the volume of dumped imports and their effects on domestic prices); Article 3.4 (setting out the economic factors that must be evaluated in determining the impact of dumped imports on the domestic industry) and Article 3.5 (demonstrating that dumped imports are causing injury to the domestic industry).[265] Thus, according to the Appellate Body, "[t]he interpretation of Articles 3.2, 3.4, and 3.5 should therefore be consistent with the role they play in the overall framework of an injury determination."[266]

a. Price Effects under ADA, Articles 3.1 and 3.2

Many of the complexities of MOFCOM's injury finding relate to the fact that there are three grades of HP-SST, designated Grades A through C, and disagreement existed with regard to the extent to which imports of one grade affect domestic sales of other grades. This difference of views includes the extent to which a "cross-grade" analysis is required in light of the fact that different quantities of different products, at significantly different import prices, and of domestic production, were addressed in the investigation. Japan and the EU had argued that MOFCOM injury determination was defective because the price of Grade C dumped imports were improperly compared with the price of domestic grade C products, despite significant differences in quantities. The determining of

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[263] *Id.* ¶ 5.138 (quoting Appellate Body Report*, US—Hot-Rolled Steel*, *supra* note 238, ¶ 193.).

[264] *Id.* ¶ 5.138 (quoting Appellate Body Report, *China—GOES*, *supra* note 257, ¶ 126 (which had quoted the Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 238, ¶ 193)).

[265] *Id.* ¶ 5.139. Article 3.3 in the Anti-dumping Agreement addresses accumulation of dumped imports from multiple country sources, but is not at issue in this appeal. *See* Anti-Dumping Agreement, *supra* note 183.

[266] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.141.

price undercutting—where imported products sell below the price of competing domestic products—was allegedly flawed by MOFCOM's assumption without more evidence that the lower imported prices of Grade C were putting downward pressure on domestic prices. Finally, the Complainants contended that MOFCOM had improperly extended, without any analysis, its finding of price undercutting by imports of Grades B and C to the domestic like product as a whole, including domestic Grade A.[267]

These arguments were rejected by the Panel, along with the EU's contention that the Panel erred in its "assessment of whether MOFCOM's findings of price undercutting in respect of Grades B and C were sufficient to comply with MOFCOM's obligation to consider whether or not the prices of the dumped imports had a significant effect on the prices of the domestic product as a whole, including Grade A."[268] There, the Panel concluded that the investigating authority was not required to show that price undercutting by dumped imports resulted in depressed or suppressed domestic price. Because Article 3.2 refers to three separate price effects, and distinguishes between price undercutting and price depression/suppression, examination of one of these does not require considering the existence of the other.[269] For the Panel, price undercutting by imports to may lead to lost sales, but Article 3.2 does not require demonstrating of the other phenomena. Therefore, MOFCOM was justified by failing to consider whether Grade C dumped imports undercut the price of Grade C domestic prices, in the sense of exerting downward pressure on such domestic prices because the import sales were at lower prices.[270]

The Appellate Body began its analysis noting that the second sentence of ADA, Article 3.2 provides as follows:

> With regard to the effect of the dumped imports on prices, the investigating authorities shall consider whether there has been a significant price undercutting by the dumped imports as compared with the price of a like product of the importing Member, or whether the effect of such imports is otherwise to depress prices to a significant degree or prevent price increases, which otherwise would have occurred, to a significant degree.

Because of this language the investigating authority must consider whether there has been a significant price undercutting by dumped imports when compared with the domestic like product or whether the effect of the imports is to depress prices "to a significant degree."[271] To take an example, if domestic steel

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[267] *See id*. ¶. 5.141 (referring to Panel Reports, *China—HP-SSST*, *supra* note 225, ¶¶ 7.105, 7.132).

[268] *Id.* ¶ 5.145.

[269] *Id.* ¶ 5.149 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, n. 251).

[270] *Id.* ¶¶ 5.149-5.150 (referencing Panel Reports, *China—HP-SSST*, *supra* note 225, ¶¶ 7.129-7.130).

[271] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶¶ 5.154-5.155.

is sold at $400/ton and the imported steel marketed at $350/ton, two results may occur. First, the cheaper imported steel may "undercut"—and thus possibly take sales from—the more expensive domestic steel (although this does not necessarily occur in practice). Second, the lower price of the imported steel may force the domestic steel producer either to lower its price to $350—to "depress" that price—or cause the domestic producer to lose the sale if it refuses to do so.

The Appellate Body further noted that it is necessary only for the authority to show the existence of significant price undercutting, without necessarily demonstrating that the undercutting under Article 3.2 has resulted in evidence of price suppression.[272] Still, the language of Article 3.2 suggests a pattern of conduct that occurs over time, not simply an isolated incident, thus requiring a "dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire period of investigation (POI)."[273] In the present case, the Panel erred because it failed to determine whether MOFCOM had gone beyond simply determining that imports were selling at lower prices than comparable domestic products in assessing significant price undercutting.[274] It was insufficient for MOFCOM to make a finding of price undercutting based only on a "mathematical difference" in prices, effectively assuming that the difference constituted price undercutting. Under the circumstances, MOFCOM acted inconsistently with ADA Articles 3.1 and 3.2 by failing to provide a "meaningful basis" for its injury analysis because it did not consider evidence on the record that indicated that, "trends in domestic prices by grade had no apparent relationship in terms of magnitude or direction with trends in import prices."[275]

The EU and Japan had also complained before the Panel that China also acted inconsistently with ADA, Articles 3.1 and 3.2 because it extended its finding of price undercutting in regards to grades B and C HP-SSST to the domestic product as a whole including Grade A.[276] The Panel essentially agreed with China, reasoning that MOFCOM was not required to establish price undercutting for the entire range of goods making up the domestic like products (the different grades of HP-SSST).[277]

The Appellate Body noted that MOFCOM had conducted grade-by-grade price comparisons and had found price undercutting in respect of Grades B and C, but had made no finding with regard to Grade A because it had been imported in very small quantities.[278] But the authority must undertake a "dynamic assessment of price developments and trends in the relationship" between dumped imports and domestic like products so that it can provide a "meaningful basis" for

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[272] *Id.* ¶ 5.156.
[273] *Id.* ¶ 5.159.
[274] *Id.* ¶ 5.164.
[275] *Id.* ¶¶ 5.169-5.171.
[276] Panel Report, *China—HP-SSST*, *supra* note 225, ¶¶ 7.105, 7.172.
[277] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶¶ 5.175 (quoting Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.141).
[278] *Id.* ¶¶ 5.179 (quoting Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.137).

determining injury. Consequently, the Panel erred by indicating that MOFCOM was not required to assess the significance of the price undercutting with regard to "the significance for the proportion for which no price undercutting was found."[279] In the present case, the majority of Chinese domestic production was in Grade A HP-SSST while the market share of Grade A imports was only 1.45% and none occurred after 2008. Moreover, Grade B HP-SSST was twice the price of Grade A product and Grade C triple the Grade A prices. Accordingly, an objective examination of the significance of price undercutting should have taken into account the relevant market shares and the price differences.[280] On these grounds, the Appellate Body reversed the Panel and found that MOFCOM had acted inconsistently with ADA, Articles 3.1 and 3.2.[281]

b. MOFCOM's Impact Analysis under ADA Articles 3.1 and 3.4

The EU and Japan argued that the Panel should have required MOFCOM to undertake a segmented (product-by-product) analysis on the impact of the dumped imports on the domestic industry, given that there was no significant increase of the dumped imports and price effects occurred only with regard to Grades B and C.[282] The complainants had also objected to the manner in which MOFCOM had weighed the positive and negative injury factors (because the analysis was not based on positive evidence or an objective evaluation of dumped import volume and its impact on prices). The Panel agreed that MOFCOM failed to evaluate the magnitude of dumping as required by ADA Articles 3.1 and 3.4.[283] Japan and the EU objected to the failure of MOFCOM to analyze dumped imports only on the segment of the domestic industry producing grades B and C of HP-SSST rather than on the domestic industry as a whole, while China argued that the two domestic producers who make all here grades result in a domestic industry where the part producing only Grade A cannot be distinguished.[284]

The Panel had generally supported China, reasoning that because the two domestic producers accounted for the major proportion of production constituted the domestic industry the evaluation of the domestic industry under ADA Article 3.4 "must therefore consider the state of those two producers, with respect to their production of all types of HP-SSST." Thus, it was not necessary to limit the evaluation to the state of the producers with regard to only grades B and C HP-SSST.[285]

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[279] *Id.* ¶ 5.180.
[280] *Id.* ¶ 5.181.
[281] *Id.* ¶ 5.182.
[282] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.183.
[283] *Id.* ¶¶ 5.184, 5.188.
[284] *Id.* ¶ 5.195.
[285] *Id.* ¶ 5.196 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.152).

On appeal the complainants contended that the Panel and MOFCOM had failed out to take into account the "logical progression" in the various paragraphs of ADA Article 3.1-3.4. Thus, as Japan argued:

> If an investigating authority, pursuant to the inquiry under Article 3.2, finds no increase in the volume of imports, and finds price effects only for certain, but not all, grades of the product, the investigating authority should conduct its analysis under Article 3.4 on the premise that those grades for which no price effects were found were not impacted by the dumped imports.[286]

Otherwise, the investigating authority would have also failed to make an objective examination of the impact of the dumped imports, based on positive evidence. The Appellate Body begins its analysis by setting out ADA Article 3.4:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic prices; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[287]

The "logical progression of inquiry" in ADA Article 3 means the investigating authority's investigation of the impact of the dumped imports must include the evaluation of all relevant factors. The analysis must further reflect the "objective examination" requirements of Article 3.1.[288] While Article 3.2 focuses on prices, Article 3.4 addresses the state of the domestic industry, an analysis that may be conducted sector-by-sector although there is "no exclusive methodology." However, the "investigating authority's examination of the relationship between the dumped imports and the state of the domestic industry must be one that enables the investigating authority to derive an understanding about the impact of the dumped imports on the domestic industry *as a whole*."[289] The causation analysis comes later, under ADA Article 3.5.

Reverting to its discussions of different grades of HP-SSST in the context of price undercutting, the Appellate Body observes that MOFCOM found

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[286] *Id.* ¶ 5.199.

[287] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.202.

[288] *Id.* ¶ 5.203 (citing Appellate Body Report*, US—Hot-Rolled Steel*, *supra* note 238, ¶¶ 196-197).

[289] *Id.* ¶ 5.204.

that Grades B and C each held a market share of about 90% of the total market of those grades, but that the majority of domestic sales were of the lower priced Grade A, where the import market share was only 1.45% even in the last year of sales (2008).[290] Moreover, the Appellate Body, unlike the Panel, believes that volume and prices are relevant not only for causation under ADA Article 3.5 but also for the impact analysis under Article 3.4, noting its report in *EC—Pipe Fittings*.[291] Under these circumstances, the Panel erred in considering the inquiry under Article 3.2 not relevant to the inquiry under Article 3.4 when reviewing MOFCOM's determination.[292]

c. MOFCOM's Causation analysis under ADA Articles 3.1 and 3.5[293]

The final major aspect of the injury analysis, causation, reads in pertinent part as follows:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports. Factors which may be relevant in this respect include . . . contraction in demand or changes in the patterns of consumption . . . [294]

The Panel had found MOFCOM's causation analysis under Article 3.5 to be flawed partially because of inadequacies in MOFCOM's price and effects analysis. The Panel also determined that MOFCOM acted inconsistently with Articles 3.1 and 3.5 because MOFCOM failed to ensure that injury resulting from decreased domestic consumption and increased domestic production capacity was

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[290] *Id.* ¶ 5.208.

[291] *Id.* ¶ 5.209 (citing Appellate Body Report, *EC—Tube or Pipe Fittings*, *supra* note 229, ¶ 115).

[292] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.212.

[293] Marginal issues include whether Japan met its burden of providing a sufficiently detailed summary of the claim under DSU, Article 6.2 (which it did) and whether the Panel made the case for the claimants rather than themselves under DSU, Article 11 (which they did).

[294] Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.175.

not attributed to dumped imports.[295] The most telling statistic to the Panel was the fact that MOFCOM did not account for the fact that the import market shares had fallen from 90% in 2009 to about 50% in 2010 and the first half of 2011, with corresponding increases in the domestic market share, requiring MOFCOM among other factors to consider whether the declining imports mean that any price effects are "somewhat attenuated."[296] The Panel also noted that MOFCOM had made no meaningful analysis with regard to the degree of impact of high-end and low-end grades of product, and had failed to analyze the impact of price movements of the more expensive B and C grades might have had on the prices of domestic Grade A HP-SSST.[297] Nor did MOFCOM, according to the Panel, consider the logical possibility that the Grade B and C prices declined in response to a decline in Grade A prices in 2009-2010 so as to maintain the price differential (rather than vice versa). Accordingly, MOFCOM's causation analysis was inconsistent with ADA Articles 3.1 and 3.5.[298]

The Appellate Body agrees with the Panel that although an investigating authority "might properly" determine that high market shares exacerbate the price effects of dumped imports, the authority to be objective and impartial must consider the effects of the market decline on price attenuation. Since there is no explanation in MOFCOM's final determination as to whether the price effects result in attenuation, the Panel did not fail to make an objective assessment under DSU Article 11.[299] The Appellate Body also faults MOFCOM for assuming that price correlation between different grades of like product is a "normal feature" for a single product with high end and low-end grades. It was not sufficient for MOFCOM simply to state that the prices of different grades "were to a certain extent correlated with one another" without any analysis or explanation, or supporting evidence of the degree of impact that imported Grades B and C prices might have on the price of domestic Grade A.[300] A "mere statement" of a "certain extent" of price correlation among different grades, without further explanation, does not provide a "meaningful basis" for the causation of injury analysis under ADA Article 3.1 and 3.4.[301]

According to the Appellate Body, it failed to find that "any explanation or reasoning indicating that MOFCOM actually examined the degree of impact that movements of prices of imported Grades B and C might have on prices of domestic Grade A, including whether the effect would be sufficiently pronounced to cause prices for domestic Grade A to fall by the amounts that they did."[302] This is important, because:

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[295] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.213 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.204).

[296] Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.181.

[297] *Id.* ¶ 7.185.

[298] *Id.* ¶¶ 7.187, 7.188, 7.205.

[299] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.249.

[300] *Id.* ¶ 5.256.

[301] *Id.* ¶ 5.256.

[302] *Id.* ¶ 5.258.

> An analysis of "substitutability" or "price correlation" may well be required in cases, such as here, involving a dumped product and a like domestic product consisting of a range of different product types that are distinguished by considerable price differences. We note, in particular, that, in order to make a finding of present material injury under Article 3.5 of the Anti-Dumping Agreement, the investigating authority must demonstrate that the dumped imports (consisting of Grades B and C) have the "effect" of causing material injury to the domestic industry (producing mainly Grade A). We do not see how such a finding could be made if the relevant imports are not substitutable for the domestic like products.[303]

In the present case, according to the Appellate Body,

> Given the considerable price and physical differences between the different product grades at issue, MOFCOM should, at the very least, have assessed the existence and the extent of substitutability of lower- and higher-end HP-SSST in order to show that "alleged substitutability demonstrates price correlation" between each product type.[304]

Also with regard to the causation analysis, China had objected to the Panel's finding that MOFCOM had failed to account for or explain evidence on the record suggesting that trends in domestic prices by grade had "no apparent relationship in terms of magnitude or direction with trends in import prices." In particular, the Panel had noted that Grade A domestic prices "increased by 9.35% from 2010 to [the first half of] 2011, whereas the price of imported Grade B fell by 10.63% during that same period."[305] The Appellate Body supports the Panel, concluding that "the contrary price movements that MOFCOM had determined to exist between import and domestic prices of HP-SSST would have called for some explanation as to why MOFCOM nonetheless considered that the prices of the three types of HP-SSST "to a certain extent correlated."[306] In concluding, the Appellate Body upholds the Panel with regard to its treatment of ADA Articles 3.1 and 3.5, agreeing that:

> MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining a causal link between dumped imports and material

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[303] *Id.* ¶ 5.262.

[304] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.263 (quoting Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.184).

[305] *Id.* ¶ 5.268 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.186).

[306] *Id.* ¶ 5.271.

> injury to the domestic industry, and made no finding of cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST.[307]

d. MOFCOM's Non-Attribution Analysis under ADA Article 3.5

As noted earlier, the complainants argued that MOFCOM failed to account for other known factors, the decline in apparent consumption and increases in domestic production capacity, without considering that such factors might have influenced different segments of the market differently. In particular, imported and domestic HP-SSST were concentrated in different segments of the market with there being an absence of cross-grade price effects of Grades B and C dumped imports on domestic Grade A production. In the view of the EU and Japan, the non-attribution analysis is flawed if the causal link is also flawed.[308] The Panel agreed that under the circumstances MOFCOM could not have determined whether injury caused by other factors could break the wrongly determined causal link.[309]

The Appellate Body began by reviewing the examination and assessment obligations of the authority under Article 3.5 (as quoted above), including the requirement for the injurious effects of other factors than the dumped imports to be separated and distinguished. Otherwise the authorities have no basis to conclude that the dumped imports are causing injury.[310] Given its earlier support of the Panel regarding China's improper reliance on the market share of dumped imports, flawed price effects and impact analysis in determining a causal link, the Appellate Body similarly rejected MOFCOM's non-attribution analysis.[311] Furthermore, "China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that injury caused by the decrease in apparent consumption and increase in domestic production capacity was not attributed to the dumped imports."[312]

e. Independent Claims Under ADA Articles 3.1 and 3.5

Japan and the EU had advanced certain other claims under relating to MOFCOM's price effects and impact analyses. China argued that they were

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[307] *Id.* ¶ 5.277.

[308] *Id.* ¶ 5.278.

[309] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.279 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.201).

[310] *Id.* ¶ 5.283.

[311] *Id.* ¶ 5.284.

[312] *Id.* ¶ 5.286.

independent while the claimants argued that they were merely consequential.[313] The Appellate Body noted that Complainants had challenged China's causation allowance on several grounds and raised many of the same arguments under ADA Article 3.5 as they had under Articles 3.2 and 3.4. These, however, were not contended to be independent violations of Article 3, and the Panel, in upholding the Claimants, did not act inconsistently with its obligations under DSU, Articles 6.2 and 11.[314]

8. Additional Working Procedures Concerning Business Confidential (BCI) Information under ADA Article 6.5

The Panel had developed additional working procedures so as to provide proper protection for BCI that was submitted to the Panel as part of the proceeding. By direction of the Panel, this was to include BCI information that had been supported to MOFCOM as part of the underlying administrative proceeding. BCI information was to be treated as such in order to avoid prejudice to the person who supplied the information to the Party. The BCI procedures noted that BCI treatment does not apply to information available in the public domain or to information where the person agrees in writing in the course of the investigation to make the information publically available.[315]

The EU argued that WTO Members should be the ones to request BCI treatment for documents they submit to a panel, and for the panel to rule on the requests. In this manner the Member could indicate whether prior BCI is no longer sensitive, or whether information submitted by another Member should be designated as confidential.[316] The EU also objected to having to seek further authorization from the person owning the BCI, arguing that under the ADA a Member is not required to do so.[317] China countered that an authorizing letter from the person owning the BCI to the investigating authority is necessary to assure compliance with ADA Article 6.5 and is common practice in disputes settlement proceedings.[318]

The Appellate Body sought to clarify matters by noting that one framework exists for dealing with BCI in municipal anti-dumping proceedings in ADA Article 6.5, where the responsibilities are with the investigating authorities to assess a request for treatment of information as confidential. Different procedures apply under DSU Article 18.2 in dispute settlement proceedings, where "[w]ritten submissions to the panel or the Appellate Body shall be treated

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313 *Id.* ¶ 5.287.

314 Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.298.

315 *Id.* ¶ 5.279 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.10).

316 *Id.* ¶ 5.301.

317 *Id.* ¶ 5.302 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.713, n. 33).

318 *Id.* ¶ 5.303 (referencing Panel Report, *China—HP-SSST*, *supra* note 225, ¶ 7.715).

as confidential, but shall be made available to the parties to the dispute."[319] This and any confidential information, including technical information and advice, "that is provided to a panel under Article 13.1 . . . 'shall not be revealed without formal authorization from the individual, body, or authorities of the Member providing the information.'"[320]

In the instant case, the Appellate Body opines that the Panel conflated confidentiality obligations under the ADA with those applicable in dispute settlement proceedings. The Panel also conflated the normal WTO confidentiality requirements and an additional layer of protection of sensitive business information for a particular dispute. In the latter instance additional confidential treatment should be determined in each case by the panel.[321] In the instant case the issue is moot.

9. Commentary

a. Limited Usefulness of the Report

The *China—HP-SSST* case breaks little or no new ground in the broad realm of Appellate Body reports on the properly application by investigating authorities of the ADA.[322] However, it reaffirms the Appellate Body's consistent jurisprudence of applying the procedural requirements of the ADA strictly against investigating authorities.[323] It held such authorities to a consistently high standard of performance whether the authority was MOFCOM, the U.S. Department of Commerce or U.S. International Trade Commission, the EU Commission or some other entity. That being said, an argument could be made that appeals of well-settled issues are among the causes of the backlog of cases before the Appellate Body, as discussed in the Introduction.

b. Relegating Parties' Arguments to Appendices

The Appellate Body's recent practice of relegating the arguments of the parties and arguments of third parties to annexes[324] is a

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[319] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶ 5.313 (quoting Understanding on Rules and Procedures Governing the Settlement of Disputes art. 18.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401 [hereinafter DSU]).

[320] *Id.* ¶ 5.314.

[321] *Id.* ¶ 5.316.

[322] More than 20 AD reports are cited by the Appellate Body in this report alone. *See generally id.* at 7-10.

[323] *Id.*

[324] Appellate Body Report, *China—HP-SSST*, *supra* note 15, ¶¶ 2.1, 3.1.

welcome change from earlier practice, and has had the effect of shorting, sometimes significantly, the often excessive length of Appellate Body reports. While a detailed recitation of the Parties' claims may be essential to satisfying the Appellate Body that its members have paid close attention to all of their respective claims, they are seldom of much use to readers of the reports, as the arguments are recited in detail (sometimes more than once) in the body of the reports.

c. The Appellate Body's Paragraph Numbering System

In our view the change in the paragraph numbering system in recent reports is a step that to some degree may increase rather than decrease confusion for the analyst of either or both types of reports. In the past through 2013, the paragraphs of Appellate Body Reports were number consecutively, e.g., from 1 to 500. Beginning in 2014, the Appellate Body adopted the Panel numbering system for its reports, e.g., from 1.1 to 5.300. There is nothing inherently wrong with this system except for the fact that it is used by panels, which means that some confusion may arise as to whether someone is referring to a paragraph of the panel report or of the Appellate Body report in a particular case. While there may well be some good reason as to why this change was made it is not immediately evident. We preferred the numbering system in which the paragraph numbering immediately made it clear to the reader that the reference was either to a panel report or to an Appellate Body Report in a specific case.

F. Trade Remedies—Countervailing Duty Law and China

1. Citation

Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, 11, WT/DS437/AB/R (adopted Jan. 16, 2015) [hereinafter Appellate Body Report, *US—Countervailing Duty*].[325]

[325] At the appellate stage, there were 12 third-parties: Australia, Brazil, Canada, the European Union, India, Japan, Korea, Norway, Russia, Saudi Arabia, Turkey, and Viet Nam. Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, 11, WT/DS437/AB/R (Dec. 18, 2014) (*adopted* Jan. 16, 2015) [hereinafter Appellate Body Report, *US—Countervailing Duty*].

2. Background[326]

The dispute arose in May 2012, following several initiation decisions, as well as preliminary and final determinations in 17 countervailing duty (CVD) investigations conducted by the U.S. Department of Commerce (USDOC) between 2007 and 2012. With respect to 14 of said CVD investigations, China's claims related to four determinations by the USDOC, which are that:

(1) Chinese SOEs are public bodies;

(2) the provision of certain inputs by Chinese SOEs conferred a benefit;

(3) subsidies arising from the provision of certain inputs for less than adequate remuneration are specific; and

(4) there was sufficient evidence with respect to the specificity of the alleged subsidies to justify the initiation of the underlying countervailing duty [(CV)] investigations.[327]

In regards to four of those particular investigations, China also challenged the treatment of Chinese SOEs as public bodies for the purposes of the initiation of the relevant investigation by the USDOC. The remaining sets of claims by China were as follows:

(1) In regards to seven of the 17 CVD investigations by the USDOC, China challenged that the determinations by the USDOC that subsidies in the form of the provision of land-use rights are specific under Article 2.1 of the *SCM Agreement*.

(2) In regards to 15 of the 17 CVD investigations, China's claims related to the use of "adverse" facts available by the USDOC during such investigations.

(3) In regards to two of the 17 CVD investigations, China's claims related to the initiation of investigations into export restraints and the determinations made by the USDOC that such export restraints constituted financial contributions.[328]

The subject merchandise exported from China included aluminum extrusions, citric acid, drill pipe, kitchen shelving, lawn groomers, line pipe, magnesia bricks, oil country tubular goods, pressure pipe, print graphics, seamless

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326 *See generally id.* ¶¶ 1.1-1.6.
327 *Id.* ¶ 1.3.
328 *Id.*

pipe, steel cylinders, steel sinks, solar panels, thermal paper, wind towers, and wire strand.[329]

The wide range of products included in the dispute is due to the scope of the legal questions involved. Put simply, since 2006, the USDOC has initiated approximately 40 CVD investigations against Chinese goods, and applied rules based on the idea that the Chinese market is distorted, and that the Chinese Government has control over the exporting enterprises. As a result, the USDOC has, in many instances, determined the provision of inputs for less than adequate remuneration. China disagrees with the approach adopted by the US and decided to take action before the WTO after what it claims to be over five years of WTO-inconsistent treatment by the USDOC.[330] In its Report, the Panel made the following five findings in favor of China:[331]

(1) With respect to 12 CVD investigations, the USDOC acted inconsistently with U.S. obligations under Article 1.1(a)(1) of the *SCM Agreement* when it determined that SOEs are public bodies;

(2) The USDOC's application of a "rebuttable presumption" that a majority government-owned entity is a public body is inconsistent "as such" with Article 1.1(a)(1) of the *SCM Agreement*;

(3) With respect to 12 CVD investigations, the USDOC acted inconsistently U.S. obligations under Article 2.1(c) of the *SCM Agreement* by failing to take into account the two factors listed in the last sentence of Article 2.1(c) when it made "specificity" determinations;

(4) With respect to six CVD investigations, the USDOC acted inconsistently with U.S. obligations under Article 2.2 of the *SCM Agreement* by making positive determinations of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the granting authority; and

(5) With respect to two CVD investigations, the DOC acted inconsistently U.S. obligations under Article 11:3 of the *SCM Agreement* by initiating investigations in regards to certain export restraints.

However, the Panel also sided with the United States in six of its findings, namely:

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[329] *See id.* at 5.

[330] *See* U.S. International Trade Commission, *Antidumping and Countervailing Duty Investigations,* (Apr. 25, 2016), https://www.usitc.gov/trade_remedy/731_ad_701_cvd/investigations.htm (last visited May 3, 2016).

[331] Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶ 1.7.

(1) With respect to four CVD investigations, China had failed to establish that the DOC acted inconsistently with U.S. obligations under Article 11 of the *SCM Agreement* by initiating the investigations without sufficient evidence of a financial contribution;

(2) With respect to 12 CVD investigations, China had failed to establish that the DOC acted inconsistently with U.S. obligations under Article 14(d) or Article 1.1(b) of the *SCM Agreement* by rejecting in-country private price benchmarks in China during its benefit analysis;

(3) With respect to 12 CVD investigations, China had failed to establish that the DOC acted inconsistently with U.S. obligations under Article 2:1 of the *SCM Agreement*:

   (a) By failing to apply the first of the "other factors" under Article 2.1(c)—that is, "use of a subsidy program by a limited number of certain enterprises"—in the light of a prior "appearance of non-specificity" resulting from the application of subparagraphs (a) and (b);

   (b) By failing to identify a "subsidy program;" or

   (c) By failing to identify a "granting authority."

(4) With respect to 14 CVD investigations, China had failed to establish that the DOC acted inconsistently with U.S. obligations under Article 11 of the *SCM Agreement* by initiating the investigations without sufficient evidence of specificity;

(5) With respect to 13 CVD investigations, China had failed to establish that, in 42 instances, the DOC acted inconsistently with U.S. obligations under Article 12.7 of the *SCM Agreement* by not relying on facts available on the record; and

(6) With respect to one CVD investigations, China had failed to establish that the DOC acted inconsistently with U.S. obligations under Article 2.2 of the *SCM Agreement* by making a positive determination of regional specificity while failing to establish that the alleged subsidy was limited to certain enterprises located within a designated geographical region within the jurisdiction of the "granting authority."[332]

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[332] *Id.* ¶ 1.9.

Broadly speaking, there were four issues raised on appeal. According, in its Report, the Appellate Body was tasked with analyzing the following questions:

(1) Whether the Panel erred in finding that China's panel request, as it relates to its claims under Article 12.7 of the *SCM Agreement*, is not inconsistent with Article 6.2 of the DSU;
(2) With respect to the Panel's findings on the USDOC's determinations of benefit in respect of the Pressure Pipe, Line Pipe, Lawn Groomers, Kitchen Shelving, OCTG, Wire Strand, Seamless Pipe, Print Graphics, Drill Pipe, Aluminium Extrusions, Steel Cylinders, and Solar Panels countervailing duty investigations, whether the Panel erred in finding that China had failed to establish that the USDOC acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) of the SCM Agreement and specifically:

    (a) whether the Panel erred in its interpretation of Article 14(d) of the SCM Agreement in finding that China's claims rested on an erroneous interpretation of that provision;

    (b) whether the Panel acted inconsistently with Article 11 of the DSU in finding that China had failed to establish the factual premise for its claims in respect of the OCTG, Solar Panels, Pressure Pipe, and Line Pipe CVD investigations; and

    (c) whether the Panel erred in its application of Article 14(d) and Article 1.1(b) and of the SCM Agreement in finding that China had failed to establish that the USDOC's benefit determinations in the relevant countervailing duty investigations are inconsistent with these provisions;

(3) with respect to the Panel's findings on the USDOC's determinations of *de facto* specificity under Article 2:1(c) of the *SCM Agreement* in regards to 12 CVD investigations, whether:

    (a) the Panel erred in finding that the DOC did not act inconsistently with U.S. obligations under Article 2.1 of the *SCM Agreement* by analyzing specificity exclusively under Article 2.1(c) (*i.e.*, whether the sequence of the USDOC's specificity analysis was appropriate);

    (b) the Panel erred in rejecting China's claims that the USDOC acted inconsistently with U.S. obligations under Article 2.1(c) of the *SCM Agreement* by failing to identify a "subsidy program;" and

(c) the Panel erred in rejecting China's claims that the USDOC acted inconsistently with U.S. obligations under Article 2.1 of the *SCM Agreement* by failing to identify a granting authority; and

(4) with respect to the Panel's findings under Article 12:7 of the *SCM Agreement* regarding the instances of the use of "adverse" facts available by the USDOC challenged by China in the 12 CVD investigations whether the Panel failed to make an objective assessment of the matter before it and therefore acted inconsistently with Article 11 of the DSU.[333]

Unfortunately, the Appellate Body could not, or chose not to, complete the legal analysis with respect to a number of issues raised on appeal.[334]

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[333] *Id.* ¶ 3.1.

[334] In particular, although the Appellate Body was able to complete the analysis regarding the sequencing issue relating to the specificity analysis under Article 2.1 of the *SCM Agreement*, it chose not to complete the legal analysis regarding the questions dealing with the unwritten "subsidy schemes" and "granting authority," respectively, under Article 2.1 of the *SCM Agreement*. In addition, the Appellate Body chose not to complete the legal analysis relating to the issues surrounding "adverse" facts available under Article 12.7 of the *SCM Agreement*. On said issues, the Appellate Body found as follows:

(1) With respect to the unwritten subsidy schemes, the Appellate Body reversed the Panel's finding that China had not established that the USDOC acted inconsistently U.S. obligations under Article 2.1 of the SCM Agreement by failing to identify a "subsidy program." During a textual analysis of Article 2.1, the Appellate Body observed that the term "use of a subsidy program" suggest that an adjudicator may consider whether subsidies have been provided to recipients pursuant to an unwritten plan or scheme, and that evidence of such a scheme may include a systematic series of actions pursuant to which financial contributions have been provided to certain recipients. However, the Appellate Body found that the Panel failed to properly apply Article 2.1(c) of the *SCM Agreement* because it did not perform a case-by-case analysis of China's challenges. The Appellate Body also found that China and the United States failed to provide sufficient evidence on the issue at hand, and thus it was unable to complete the legal analysis. *See generally id.* ¶¶ 4.133-4.157.

(2) With respect to the question concerning "granting authorities," the Appellate Body also reversed the Panel's finding that China had not established that the USDOC acted inconsistently with U.S. obligations under Article 2.1 of the *SCM Agreement* by failing to identify a "granting authority" in each of the specificity determinations at issue. In opposition to China's contention, in the view of the Appellate Body, a proper identification of "the jurisdiction of the granting authority" requires conjunctive consideration of the "granting authority" and its "jurisdiction." However, given the findings of the Panel on other related issues, the Appellate Body saw "limited value" in completing the legal analysis on the issue at hand. *See generally id.* ¶¶ 4.158-4.173.

Accordingly, the review of the dispute herein will expand upon the findings and conclusions of major significance (i.e., where the Appellate Body was able to complete its legal analysis). Those include the issues relating to the: 1) determination and calculation of a "benefit" under Article 1:1(b) and Article 14(d) of the *SCM Agreement*; and 2) the sequence of the specificity test under Article 2:1 of *SCM Agreement*.[335]

3. Determination and Calculation of a "Benefit" and Article 1:1(b) and Article 14(d) of *SCM Agreement*[336]

The first major issue addressed by the Appellate Body in the dispute at hand concerned in-country private price benchmarks and the determination of a "benefit" under Article 1:1(b) of the *SCM Agreement*, in conjunction with Article 14(d) of said *Agreement*. Broadly speaking, Article 1:1 of the *SCM Agreement* defines the term "subsidy" as a "financial contribution" (or "any form of income or price support in the sense of Article XVI of GATT 1994") where a benefit is thereby conferred. The text of Article 1:1 of the *SCM Agreement* provides, in relevant part:

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(3) With respect to the issue dealing with the "adverse" facts available, the Appellate Body found that the Panel acted inconsistently with its obligations under Article 11 of the *DSU* during its analysis of China's claims under Article 12.7 of the *SCM Agreement*. The Appellate Body reversed the Panel's finding that China had not established that the USDOC acted inconsistently with U.S. obligations under Article 12.7 by not relying on facts on the record in 42 "adverse" facts available determinations across the 12 relevant CVD investigations. With respect to China's claim of error under Article 11 of the *DSU*, the Appellate Body found that the Panel failed to address each of the 42 instances of the USDOC's use of "adverse" facts available that China challenged, and that where the Panel did address the use of "adverse" facts, it failed to perform an adequate examination of whether the USDOC complied with Article 12.7 of the *SCM Agreement*. Nonetheless, the Appellate Body again found that China and the United States had failed to provide sufficient evidence on the issues at hand, and that, here, completing the legal analysis would raise due process concerns. *See generally* Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶¶ 4.174-4.209.

[335] Given the procedural nature of the issue relating to the Panel's terms of reference, this review will not address the claim by the United States on appeal that the Panel erred in concluding that China's panel request, as it relates to China's facts available claims under Article 12.7 of the *SCM Agreement*, was consistent with Article 6.2 of the *DSU*. The Appellate Body found that China's panel request was clear in challenging all of the instances where the USDOC used "facts available," and thus it upheld the Panel's conclusion in favor of China. *See generally* Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶¶ 4.1-4.28.

[336] The discussion herein draws on *id.* ¶¶ 4.29-4.107.

> For the purpose of this Agreement, a subsidy shall be deemed to exist if:
>
> (a)(1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this Agreement as "government") […]
>
> or
>
> (a)(2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred.[337]

Article 14 is found in Part V of the *SCM Agreement*, and concerns CVD investigations. In particular, said provision concerns the calculation of the amount of a subsidy in terms of the "benefit" to the recipient. Article 14(d) of the *SCM Agreement*, including the chapeau to Article 14, states as follows:

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

China appealed the findings by the Panel concerning the decision by the DOC not to use the in-country private prices in China as benchmarks for

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[337] Agreement on Subsidies and Countervailing Measures, Marrakesh Agreement Establishing the World Trade Organization, 1869 U.N.T.S. 401 [hereinafter SCM Agreement].

calculating the benefit conferred by the provision of inputs to the companies scrutinized as part twelve CVD investigations, including those dealing with pressure pipe, line pipe, lawn groomers, kitchen shelving, oil country tubular goods, wire strand, seamless pipe, print graphics, drill pipe, aluminum extrusions, steel cylinders, and solar panels. The DOC chose to reject the in-country private price benchmarks because it found that such prices were distorted. Eventually, the DOC determined that Chinese SOEs provided inputs for less than adequate remuneration, as potentially envisaged under Article 14(d) of the *SCM Agreement*.

At the panel stage, China argued that the DOC "premised its recourse to an out of-country benchmark in each of the twelve investigations under challenge on an impermissible equation of SOEs with the government."[338] As China put it, "the [DOC's] equation of SOEs with the government [was] explicitly or implicitly based on its interpretation that entities majority-owned and controlled by the government are public bodies."[339] Namely, China's claims were that each challenged determination by the DOC treated SOEs as public bodies, in the collective sense, as part of its benefit analysis.

The Panel effectively said that China's assertion was disingenuous given the evidence presented in the dispute, considering that the DOC referred to the SOEs as public bodies "only in a few cases" where it found the Chinese government to have a predominant role in the relevant market.[340] The Panel also rejected China's assertion that the DOC applied the "same framework" in each relevant CVD investigation, finding instead that the analysis by the DOC in each relevant CVD investigation was "somewhat different" depending on the facts at hand.[341] Moreover, the Panel agreed with the use of "adverse facts" by the DOC in several CVD investigations because China had failed to provide relevant information relating to domestic production or consumption. The Panel also found support in the Appellate Body Reports in *U.S.–Anti-Dumping and Countervailing Duties (China)*,[342] which it found to contain very similar circumstances to those in the dispute at hand. There, in regards to the analysis under Article 14(d) of the *SCM Agreement*, the Appellate Body focused solely on whether the SOE involvement in the marketplace supported the determination that the use of out-of-country benchmarks was appropriate because prices in the domestic market were distorted. Said another way, the Appellate Body was not concerned with whether the SOEs were public bodies. The Panel thus found in

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[338] Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶ 4.31 (citing Panel Report, *United States—Countervailing Duty Measures on Certain Products from China*, ¶ 7.179, WT/DS437/R (July 14, 2014) [hereinafter Panel Report, *US—Countervailing Duty*]).

[339] *Id.* ¶ 4.31 (citing Panel Report, *US—Countervailing Duty*, *supra* note 338, ¶ 7.180).

[340] *Id.* ¶ 4.32 (citing Panel Report, *US—Countervailing Duty*, *supra* note 338, ¶ 7.179).

[341] *Id.* (citing Panel Report, *US—Countervailing Duty*, *supra* note 338, ¶ 7.186).

[342] *See* Appellate Body Report, *US—Anti-Dumping Duties (China)*, *supra* note 65, ¶¶ 459-464.

favor of the United States, concluding that China had not established that the DOC acted inconsistently with U.S. obligations under Article 14(d) or Article 1:1(b) of the *SCM Agreement*.

On appeal, China contended that the legal standard for determining what constitutes "government," and specifically a "public body," under the "financial contribution" analysis necessary under Article 1:1(a)(1)(iii) of the *SCM Agreement* should also apply when determining what constitutes "government" for purposes of the selection of a benefit benchmark under Article 14(d) of the *SCM Agreement*. Effectively, China was arguing that, based on previous WTO jurisprudence,[343] if government ownership and control serve as an insufficient basis to deem the provision of goods by an SOE to be "governmental" conduct under Article 1:1(a)(1)(iii) of the *SCM Agreement*, then such factors must also serve as an insufficient basis for finding that the provision of goods by an SOE constitutes "governmental" conduct under Article 14(d) of the *SCM Agreement*.

The United States contended that China was misinterpreting previous WTO jurisprudence, including *U.S.—Softwood Lumber IV*. Instead, the U.S. countered that in *U.S.—Softwood Lumber IV* and *U.S.—Anti-Dumping and Countervailing Duties (China)*, the Appellate Body emphasized that the "financial contribution" and "benefit" elements of a subsidy under Article 1.1 of the *SCM Agreement* are distinct and play different roles.

The Appellate Body sided, at least in part, with China. It agreed that there is a single legal standard that defines the term "government" under the *SCM Agreement*, noting that the term "government" encompasses both the government in the "narrow sense" and "any public body within the territory of a Member."[344] However, the Appellate Body went on to state that the proper analysis for selecting a benefit benchmark under Article 14(d) of the *SCM Agreement* is not dependent on whether any relevant entities in the market fall within the definition of "government," including on the basis of a finding that an SOE is a public body.[345] In the view of the Appellate Body, China missed the core issue. As it put:

> 4.43 China's argument that there is a single standard for defining the term "government" does not answer the question of whether the prices of goods provided by private or government-related entities in the country of provision are to be considered as market determined for purposes of selecting a benefit benchmark. We observe, in this respect, that the term "government"

[343] *See* Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶¶ 93,101, WT/DS257/AB/R (Jan. 19, 2004) (*adopted* Dec. 20, 2005).

[344] *See* Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶ 4.42 (citing Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 65, ¶ 286).

[345] *Id.* ¶ 4.43.

> appears *only* in the first sentence of Article 14(d), which establishes that "the provision of goods . . . by a *government* shall not be considered as conferring a benefit unless the provision is made for less than adequate remuneration." The first sentence of Article 14(d) thus provides guidance for assessing whether the provision of goods confers a benefit, following a previous affirmative determination that such provision of goods constitutes a financial contribution under Article 1.1(a)(1)(iii) that was carried out by a "government" as defined in Article 1.1(a)(1).[346]

An important aspect of this paragraph is a footnote omitted from the quote above. In footnote 509, the Appellate Body states that it used "the term 'government-related entities' to refer to all government bodies, whether national or regional, public bodies, and any other government-owned entities for which there has not been a 'public body' determination."[347] This appears to be the first time that WTO adjudicators have used the term "government-related entities," and it is particularly important because it raises the question of whether there now three types of entities—"government," "public body," and "government-related"—for purposes of a market benchmark analysis.

Returning to the analysis by the Appellate Body, it next summarized previous Appellate Body Reports on the relationship between Article 1:1(b) and Article 14(d) of the *SCM Agreement*. Broadly speaking, the "benefit" analysis under Article 1:1(b), and in turn under Article 14(d), of the *SCM Agreement* implies a comparison a needed because, as famously put by the Appellate Body in *Canada–Aircraft*,[348] no benefit is conferred to a recipient "unless the 'financial contribution' makes the recipient 'better off' than it would otherwise have been, absent that contribution."[349] Accordingly, under Article 14(d) of the *SCM Agreement*, a determination on the adequacy of remuneration therefore requires the use of a market benchmark to be used in comparison of the price of the government-provided good in question. As stated by the Appellate Body in *U.S.—Carbon Steel (India)* regarding the analysis under Article 14(d), said adequacy "shall be determined in relation to prevailing market conditions for the good or service in question in the country of provision or purchase."[350]

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[346] *See id.*

[347] *Id.* n. 509.

[348] Appellate Body Report, *Canada—Aircraft*, *supra* note 252.

[349] Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶ 4.44 (citing Appellate Body Report, *Canada—Aircraft*, *supra* note 252, ¶ 4.149).

[350] *Id.* ¶ 4.45 (quoting Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.419, WT/DS436/AB/R (Dec. 8, 2014) (*adopted* Dec. 19, 2014) [hereinafter, Appellate Body Report, *US—Carbon Steel (India)*].

Indeed, the Appellate Body appeared to find its Report in *U.S.—Carbon Steel (India)* to be highly persuasive. Much of its analysis focused on summarizing the relevant findings in said Report, in particular regarding the primary objective of relating the prices of the goods in question to the prevailing market conditions in the country of provision, and the responsibility of the investigating authorities in the country of import to conduct the necessary analysis of whether the proposed benchmark prices are market-determined such that they can be used to assess whether remuneration is less than adequate. The summary of relevant WTO jurisprudence by the Appellate Body continued to reiterate one point, synthesized as follows: a determination under Article 14(d) of the *SCM Agreement* does not hinge on whether or not the relevant entities constituted "public bodies" within the meaning of Article 1:1(a)(1) of the *SCM Agreement* but, rather, on whether investigating authorities in the country of import correctly reach the conclusion that price distortion in the market, due to governmental intervention, warranted recourse to an alternative benchmark. In the dispute at hand, and put in an informal manner, the Appellate Body effectively told China that "it doesn't matter what you call the entities in question; what matters is whether the investigating authority adequately evaluates, on a case-by-case basis, whether the market is distorted given the evidence available."

Having sided with the Panel's interpretation of Article 14(d) of the *SCM Agreement*, the Appellate Body next addressed the Panel's application of said provision to the facts in question.[351] In particular, China took issue with the Panel's reliance on the Appellate Body Report in *U.S.—Anti-Dumping and Countervailing Duties (China)*. In China's view, the Appellate Body's reasoning in said dispute "cannot provide a lawful basis" for the Panel's conclusion that China failed to establish that the relevant benefit determination by the DOC were inconsistent with Article 14(d) and Article 1:1(b) of the *SCM Agreement*.[352] China specifically requested that the Appellate Body reverse two of the Panel's findings, as follows:

(1) Upholding the DOC's rejection of private prices as potential benchmarks in the challenged CVD investigations on the grounds that such prices were distorted.

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[351] In actuality, prior to addressing the Panel's application of Article 14(d) of the *SCM Agreement*, the Appellate Body addressed China's procedural claim under Article 11 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (i.e., the *DSU*). In particular, China claimed that the Panel acted inconsistently with Article 11 of the DSU when it concluded that China failed to establish the "factual premise" for each of its "as applied" claims on a collective basis, even though, according to China, the Panel had already found different factual circumstances to be present in the CVD investigations on oil country tubular goods and solar panels. However, the Appellate Body saw no need to make additional findings under Article 11 of the *DSU*, given that it had already rejected China's arguments concerning the legal predicate of China's claims. Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶¶ 4.674.-4.674.

[352] *Id.* ¶ 4.75.

(2) That China failed to establish that the DOC acted inconsistently with U.S. obligations under Article 14(d) or Article 1:1(b) of the SCM Agreement by rejecting in-country private prices as benefit benchmarks in regards to the CVD investigations on oil country tubular goods, solar panels, pressure pipe, and line pipe.

The Appellate Body first stated that the reasoning supplied by the Panel was in line with the findings of the Appellate Body in *U.S.—Anti-Dumping and Countervailing Duties (China)*. As recognized by the Appellate Body, "the Panel understood these findings as indicating that the selection of a benchmark for the purposes of Article 14(d) cannot, at the outset, exclude consideration of in country prices from any particular source, and that a proper finding that recourse to an alternative benchmark is justified requires an investigating authority to properly evaluate whether the proposed benchmark prices are market determined or distorted by governmental intervention."

However, the Appellate Body went on to find in favor of China. Even though it found that the Panel properly understood the findings of previous WTO jurisprudence, it also found that the Panel did not properly apply the standard required by Article 14(d) of the *SCM Agreement* to the determinations challenged by China. The Appellate Body specified that, in its view, the Panel failed to conduct a case-by-case analysis of whether the DOC had properly examined whether the relevant in-country prices were market determined, or whether they were distorted by governmental intervention. Instead, the Panel simply assumed that, because the Appellate Body had faced a similar situation in *U.S.—Anti Dumping and Countervailing Duties (China)*, China had failed to establish that the DOC acted inconsistently with U.S. obligations under Article 14(d) of the *SCM Agreement*. Accordingly, the Appellate Body reversed the relevant findings of the Panel listed above.

The Appellate Body was now tasked with completing the legal analysis under Article 14(d) or Article 1:1(b) of the *SCM Agreement*. China requested that the Appellate Body find that the DOC determinations that relevant SOEs provided inputs for less than adequate remuneration in the CVD investigations were inconsistent "as applied" with Article 14(d) and Article 1:1(b) of the *SCM Agreement*. In particular, with respect to the DOC determinations regarding oil country tubular goods, solar panels, pressure pipe, and line pipe. The Appellate Body completed the analysis regarding said goods as follows:

(1) *Oil Country Tubular Goods*: The Appellate Body found that the DOC did not consider whether the prices of Chinese-owned or -controlled firms "as such" were or were not market determined. Instead, the DOC accepted, without examination, that the relevant prices were distorted by government intervention. As recognized by the Appellate Body, contrary to its findings in *U.S.—Carbon Steel (India)*, the Panel assumed that any entity "owned or controlled" by the Chinese government could be treated

as a "public body" (in the context of Article 1:1(a)(1) of the *SCM Agreement*).[353]

(2) *Solar Panels*: The Appellate Body noted that the findings by the DOC were that 37 producers out of the 47 producers of polysilicon in China were the entities through which the Chinese government influenced and distorted the market of polysilicon. Although such circumstances could suggest a significant or predominant presence in the market of said government-related entities, the Appellate Body found that the DOC failed to explain whether and how the relevant 37 producers possessed and exerted market power in a manner that distorted other in-country prices.

(3) *Pressure Pipe*: The Appellate Body recalled that the Panel found that SOEs accounted for approximately 82% of the relevant pressure pipe production in China during the period of investigation (POI). On this basis, the DOC found that it would be impossible for relevant private transactions in China to be sufficiently free from the effects of China's actions. Again, here, the Appellate Body found that the Panel rushed to judgment and, consequently, assumed that the prices of government-related entities were automatically distorted due to the relationship with the Chinese government.

(4) *Line Pipe*: In regards to the DOC's CVD investigation concerning line pipe, the Appellate Body called to mind that the DOC applied "adverse facts" available after determining that it was unable to rely on the aggregate production data supplied by the Chinese government during the course of the investigation. On this limited basis, the DOC found, as it did in regards to pressure pipe, that pricing from private transactions within China could not give rise to a price that was sufficiently free from the effects of China's actions. However, the Appellate Body reasoned that, "the relevant inquiry for purposes of finding a proper benchmark under Article 14(d) of the *SCM Agreement* is whether or not certain in-country prices are distorted, rather than whether such prices originate from a particular source (e.g., government-owned entities)."[354]

As a result of its analyses of oil country tubular goods, solar panels, pressure pipe, and line pipe, the Appellate Body found that the DOC acted inconsistency with U.S. obligations under Articles 14(d) and Article 1:1(b) of the *SCM Agreement* in each of the relevant CVD investigations. The findings of the

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[353] *Id.* ¶ 4.92 (quoting Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 350, ¶ 4.10, "mere ownership or control over an entity by a government, without more, is not sufficient to establish that the entity is a public body").

[354] *Id.* ¶ 4.105.

Appellate Body were therefore, insofar as they relate to the determination and calculation of a "benefit" under the *SCM Agreement*, a victory for China.

4. Sequence of Specificity Test and Article 2:1 of *SCM Agreement*[355]

The Appellate Body next turned to the issue relating to specificity under Article 2:1 of the *SCM Agreement*. Article 2:1 contains three subparagraphs, of which (a) and (b) apply to instances of *de jure* specificity, and (c) applies to instances of *de facto* specificity. In full, Article 2:1 of the *SCM Agreement* reads as follows:[356]

> In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this Agreement as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply:
>
> (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific;
>
> (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification; and
>
> (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in subparagraphs (a) and (b), there are reasons to believe that the subsidy may in fact be specific, other factors may be considered. Such factors are: use of a subsidy program by a limited number of certain enterprises, predominant use by certain

355 *See id.* ¶¶ 4.108-4.132.
356 *See* SCM Agreement, *supra* note 337.

> enterprises, the granting of disproportionately large amounts of subsidy to certain enterprises, and the manner in which discretion has been exercised by the granting authority in the decision to grant a subsidy. In applying this subparagraph, account shall be taken of the extent of diversification of economic activities within the jurisdiction of the granting authority, as well as of the length of time during which the subsidy program has been in operation.

On appeal, China challenged the analysis by the Panel regarding determinations of *de facto* specificity by the DOC in 12 CVD investigations dealing with exports from China of pressure pipe, line pipe, lawn groomers, kitchen shelving, oil country tubular goods, wire strand, seamless pipe, print graphics, drill pipe, aluminum extrusions, steel cylinders, and solar panels.

During the relevant CVD investigations, the DOC based its determinations of *de facto* specificity on the first factor listed in Article 2:1(c) of the *SCM Agreement* (i.e., the "use of a subsidy program by a limited number of certain enterprises"). China contends, *inter alia*, that the Panel erred in its interpretation and application of Article 2:1 when it found that the DOC did not act inconsistently with U.S. obligations under Article 2:1 by analyzing specificity exclusively under Article 2:1(c) of the *SCM Agreement*. As explained by the Appellate Body:

> 4.116. China's appeal raises the question of whether, in certain circumstances, it may be permissible for an investigating authority to proceed directly to a specificity analysis under Article 2:1(c), or whether an application of the principles set out in subparagraphs (a) and (b) is always required before an analysis can be conducted under subparagraph (c). . .

In particular, China argued that the evaluation of the "other factors" referred to in the first sentence of Article 2:1(c) of the *SCM Agreement* is conditional on the appearance of non-specificity following the application of subparagraphs (a) and (b) of said provision. China rationalized this approach by stating that in normal circumstances, governments administer subsidies pursuant to adopted legislation, and therefore any specificity analysis should begin by evaluating the relevant written legal instruments.

The Panel disagreed with China's stance. The Panel recognized that the order of the subparagraphs found in Article 2:1 of the *SCM Agreement* suggests a sequenced application of the provision, found that such a "logical structure" does not "translate into procedural rules that investigating authorities must follow in

each specificity analysis under that provisions."[357] The Panel found the Appellate Body Report in *U.S.—Anti-Dumping and Countervailing Duties (China)* persuasive in this regard. There, the Appellate Body recognized flexibility in the application of Article 2:1, preferring a case-by-case approach to analyzing specify under the provision.[358] The Panel found that in the case at hand, the DOC considered the use of "other factors" under Article 2:1(c) due to the "unwritten nature" of the subsidies that it found to exist.[359] As a result, the Panel concluded that the DOC did not act inconsistently with U.S. obligations under Article 2:1 of the *SCM Agreement*.

The Appellate Body agreed with the relevance of its Report in *U.S.—Anti-Dumping and Countervailing Duties (China)*, but also looked to its Report in *U.S.—Large Civil Aircraft (2nd complaint)*.[360] In particular, the Appellate Body focused on the portion of its analysis in *U.S.—Anti-Dumping and Countervailing Duties (China)* where it discussed the effect of the chapeau of Article 2:1 of the *SCM Agreement*. The chapeau of Article 2:1 refers to the "principles" set out in subparagraphs (a) through (c), as distinguished from the potential alternative of "rules." The Appellate Body found that the use of such term (i.e., "principles") "suggests that subparagraphs (a) through (c) are to be considered within an analytical framework that recognizes and accords appropriate weight to each principle."[361]

Looking to its Report in *U.S.—Large Civil Aircraft (2nd complaint)*, the Appellate Body highlighted its use of the term "ordinarily" when addressing the same sequencing issue under Article 2:1 of the *SCM Agreement* in that dispute.[362] That is to say, in *U.S.—Large Civil Aircraft (2nd complaint)*, the Appellate Body agreed that normally an application of subparagraph (a) and (b) of Article 2:1 should precede the application of subparagraph (c) of said provision, investigating authorities are not required to follow a strict sequential order. The Appellate Body went on to spend numerous paragraphs performing its own textual analysis that in large part mirrored its previous Reports, but the take-away is that, in effect, the Appellate Body agreed with the Panel that a case-by-case approach is best.

Upon application to the facts of the dispute at hand, the Appellate Body turned to China's claim that the Panel erred when it concluded that "unwritten

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[357] Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶ 4.111 (citing Panel Report, *US—Countervailing Duty*, *supra* note 338, ¶ 7.229).

[358] *Id.*

[359] *Id.* ¶ 4.112 (citing Panel Report, *US—Countervailing Duty*, *supra* note 338, ¶ 7.230).

[360] Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft—Second Complaint*, WT/DS353/AB/R (Mar. 12, 2012) (*adopted* 23 March 2012), [hereinafter Appellate Body Report, *US—Large Civil Aircraft (2nd complaint)*].

[361] Appellate Body Report, *US—Countervailing Duty*, *supra* note 325, ¶ 4.117 (citing Appellate Body Report, *US—Anti-Dumping and Countervailing Duties (China)*, *supra* note 65, ¶ 366).

[362] *Id.* ¶ 4.118 (citing Appellate Body Report, *US—Large Civil Aircraft (2nd complaint)*, *supra* note 360, ¶ 873).

nature" of the alleged input subsidies at issue was a circumstance that allowed the DOC to skip the application of subparagraphs (a) and (b) Article 2:1 of the *SCM Agreement*, and instead analyze the issue under subparagraph (c) of said provision. The Appellate Body found the approach by the Panel to reasonable. Given the implication that a *de jure* analysis will normally involve the analysis of written measures, the application of subparagraphs (a) and (b) of Article 2:1 would serve no purpose in the dispute at hand. As a result, the Appellate Body upheld the findings of the Panel, concluding that the DOC did not act inconsistency with U.S. obligations under Article 2:1 of the *SCM Agreement*.

5. Commentary

a. "Government-Related Entity"

With respect to the calculation of a "benefit" Article 14(d) of the *SCM Agreement*, the Appellate Body, for the most part, reinforced previous jurisprudence, indicating that use of alternative benchmarks under Article 14(d) must be based on a finding that in-country prices are not market-determined. However, it also expanded the body of WTO "law" by, in a footnote, explaining the use of the term "government-related entity." It appears as though said the Appellate Body has not used by previous panels or term, and thus arguably creates a new type of entity to use during an analysis under Article 14(d). Time will tell, but as it stands, it appears as though there are now three types of entities—"government," "public body," and "government-related"—for purposes of a market benchmark analysis.

b. Completion of the Legal Analysis

In the dispute at hand, there were three issues raised on appeal where the Appellate Body did not complete the legal analysis, and thus was unable to fully analyze the questions before it. In at least one instance, the Appellate Body chose not to complete the legal analysis because it saw "little value" in doing so.[363] Such uses of judicial economy are understandable, especially given the increasing caseload of the WTO DSB. However, the repeated failure to complete legal analyses in Appellate Body Reports has been noticeable in recent years, and accentuates the need for a reformed WTO dispute settlement mechanism. Disputes have become more complicated, and participants to disputes are likely finding it difficult to predict what evidence a panel (or, in CVD disputes, the investigating authorities) and the Appellate Body will find persuasive and relevant. WTO Members have failed to agree on reforms to the DSU, but it is

[363] Appellate Body Report, *India—Poultry*, *supra* note 102, ¶ 3.1(d)(i)

becoming increasingly evidence that a procedure for remand is needed in the mechanism.

WTO Members must come together, and at the very least, agree to this change, or parties may begin to question its effectiveness, and whether pursuing disputes is worth the financial expense incurred.