WTO CASE REVIEW 2016[1]

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[1] This *WTO Case Review* is the 17th 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 2015*, 33 ARIZ. J. INT'L & COMP. L. 505–629 (2016).
- *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).

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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.

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TABLE OF CONTENTS

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 subsequently in modified form in the INTERNATIONAL TRADE LAW textbook and/or other publications. Special thanks are owed to Eric Witmer, J.D., University of Kansas School of Law, 2017, who as a Research Assistant at KU Law School provided a careful review and corrections. *See also Raj Bhala*, WIKIPEDIA, http://en.wikipedia.org/wiki/Raj_Bhala (last visited May 4, 2017).

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INTRODUCTION

Over 20 years ago, the WTO Dispute Settlement Body (DSB) adopted its first Appellate Body Report, in *US—Gasoline*.[6] As of the end of 2016, WTO Members have requested consultations under the WTO dispute settlement system 517 times, of which 150 have resulted in Appellate Body Reports.[7] Five of those Appellate Body Reports were adopted in 2016, plus a compliance proceeding Appellate Body Report under Article 21.5 of the Dispute Settlement

[6] Appellate Body Report, *United States—Standards for Reformulated and Conventional Gasoline*, 22, WTO Doc. WT/DS2/AB/R (Apr. 29, 1996) (*adopted* May 20, 1996) [hereinafter Appellate Body Report, *US—Gasoline*].

[7] Gorgio Sacerdoti et al., *The WTO in 2016: Systemic Developments at the WTO and at the Dispute Settlement System and Review of the Appellate Body's Reports* 2 (Bocconi Legal Studies Research Paper, 2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2940107&download=yes.

Understanding (DSU). While the DSB was performing its core functions, there was significant discourse—and related actions—taking place inside and outside of the walls of Rue de Lausanne 154 in Geneva.

Internally, major developments pertaining to the WTO dispute settlement system centered on the blocking of a second term for an Appellate Body Member and the subsequent appointment of two new members. The shortage of available experienced lawyers in the Secretariat from 2015 continued to affect the speed at which panel reports were released, which was also a factor in the delay of Appellate Body Reports in 2016.[8] Such staff shortages within the WTO DSB were compounded by the fact that for more than six months of 2016, the WTO Appellate Body consisted of only five of its standard seven-seat Membership.

In May 2016, the United States refused to approve the renewable of Mr. Seunt Wha Chang of South Korea, who had been serving as an Appellate Body Member for four years. The United States explained that it had been "troubled . . . about the disregard for the proper role of the Appellate Body" and criticized the Appellate Body for excessive discussion of non-appealed issues in AB reports, as well as other *obiter dicta*.[9] The United States specifically criticized Mr. Chang for "the manner in which he had conducted oral hearings," which the United States tied to language in relevant Appellate Body Report that it used to justify its decision.[10]

The reactions by other WTO Members and the media against the United States for its decision to block Mr. Chang from a second term were fierce. In actuality, this is not a novel move by the United States, which has twice blocked its own judges from sitting on the Appellate Body. In 2011, the United States blocked the reappointment of Jennifer Hillman, and in 2013–2014, it blocked the appointment of James Gathii.[11] The decisions to block judges for what appear to be political reasons raises questions about the judicial independence of Appellate Body Members. Reports even indicate that the United States may have approached a violation of WTO rules by requesting to meet with Appellate Body Members who were up for renewal while said individuals were sitting in disputes in which the United States was a party (i.e. *ex parte* meetings).[12]

The DSB also expected to appoint a new Member to its Appellate Body in mid-2016, due to the expiration of Ms. Yuejiao Zhang's second term on May 31, 2016. At its meeting on January 25, 2016, the DSB agreed to begin the process of replacing Ms. Yuejiao Zhang by establishing a Selection Committee and setting a deadline for candidate nominations of March 15, 2016, with the

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[8] *Id.* at 4.

[9] *Id.* at 4–5.

[10] *Id.* at 5.

[11] *See* Manfred Elsig et al., *The U.S. Is Causing a Major Controversy in the World Trade Organization. Here's What's Happening.*, WASH. POST (June 6, 2016), https://www.washingtonpost.com/news/monkey-cage/wp/2016/06/06/the-u-s-is-trying-to-block-the-reappointment-of-a-wto-judge-here-are-3-things-to-know/?utm_term=.bf61329dc749.

[12] *Id.*

expectation that the new Member would be appointed on May 23, 2016.[13] At the DSB's meeting of January 25, 2016, it also agreed that the DSB Chairman[14] should carry out consultations for the possible reappointment of Mr. Chang, whose first term was also set to expire on May 31, 2016.[15]

On March 23, 2016, the DSB announced that it had received seven nominations for the open Appellate Body seat of Ms. Yuejiao Zhang, including candidates from Australia, China, Japan, Malaysia, Nepal, and Turkey.[16] After its meeting on May 23, 2016, the DSB regretfully announced that it was unable to recommend a candidate to replace Ms. Yuejiao Zhang that would receive the full consensus of WTO Membership, and that the United States did not support the renewal of Mr. Chang as an Appellate Body Member.[17] The result was a decision in July 2016 by the DSB to launch a new selection process, with candidate nominations expected by September 14, 2016, and the hope that both open vacancies would be filled by November 2016.[18] Finally, on November 23, 2016, the DSB announced the appointment of Ms. Zhao Hong of China and Mr. Hyun Chong Kim of Korea as Appellate Body Members, whose terms would later begin on December 1, 2016.[19]

Although it was eventually successful in filling the two vacancies of the Appellate Body, the DSB unfortunately exposed some of its weaknesses during the six-month ordeal. It seems unquestionable that the DSU is in need of reform regarding various procedures since its adoption over 20 years ago. With respect to Appellate Body membership, options include extending the term length of Members, or amending the DSU so as to 'auto-renew' members absent a 'negative consensus' to the contrary, similar to the process used by the DSB to adopt Panel and Appellate Body Reports. Regardless, the WTO has been negotiating the reform of the DSU for years, and there does not appear to be an end in sight. Perhaps the notable embarrassment following the vacancies in 2016 and the revived concerns regarding impartiality will be enough to spur new reform efforts in 2017.

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[13] *DSB Launches Selection process for Appellate Body Vacancy*, WTO: 2016 NEWS ITEMS (Jan. 25, 2016), https://www.wto.org/english/news_e/news16_e/dsb_25jan16_e.htm

[14] At the time, the DSB Chair was Ambassador Harald Neple of Norway, but he was replaced by Ambassador Xavier Carim of South Africa on February 26, 2017. *See id.*

[15] *Id.*

[16] *WTO Receives Seven Nominations for Appellate Body Post*, WTO: 2016 NEWS ITEMS (Mar. 23, 2016), https://www.wto.org/english/news_e/news16_e/dsb_23mar16_e.htm.

[17] *WTO members Debate Appointment/Reappointment of Appellate Body Members*, WTO: 2016 NEWS ITEMS (May 23, 2016), https://www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm.

[18] *Members Agree to Launch Selection Process to Fill Appellate Body Vacancy*, WTO: 2016 NEWS ITEMS (July 21, 2016), https://www.wto.org/english/news_e/news16_e/dsb_21jul16_e.htm.

[19] *WTO Appoints Two New Appellate Body Members*, WTO: 2016 NEWS ITEMS (Nov. 23, 2016), https://www.wto.org/english/news_e/news16_e/disp_28nov16_e.htm.

Externally, the political climate—particularly in the Western world—has shifted in many WTO Members' territories away from establishment, or globalist, ideals to political philosophies that have been labeled populist, nationalist, and anti-globalist, all of which appear to support protectionist trade policies. Notable developments in this regard include the referendum in the United Kingdom calling on it to withdraw from the EU (commonly referred to as "Brexit") and the election of President Donald Trump in the United States. Leaders of these movements regularly call into question the value of international institutions, like the WTO, including the effectiveness of the WTO dispute settlement system.

Throughout Europe, there has been a steady rise in populist parties and their candidates for government office, including in the United Kingdom, Italy, the Netherlands, Germany, and France. In the Netherlands and Germany, candidates of populist parties were unsuccessful in recent, highly-publicized elections, but their parties gained seats in their respective parliamentary bodies.[20] In the United Kingdom, the first of two major electoral surprises occurred in June 2016, when its citizens voted in favor of withdrawing from the European Union. Although some of the discourse in Europe has addressed perceived disadvantages to international trade, most has appeared to be focused on immigration policy and sovereignty of individual EU Member States.

The second of such major electoral surprises occurred in November 2016, when Donald Trump won the US Presidential Election. The election of President Donald Trump in the United States appears, in part to be due to his nationalist and anti-globalist rhetoric that he repeated throughout his campaign. In this regard, the rhetoric has focused on international trade in addition to immigration policy, included promises to withdraw from the WTO.[21] Following his inauguration, President Trump nominated Robert Lighthizer to serve as US Trade Representative. With respect to the DSB, reports suggest that USTR Lighthizer "will try to put pressure on the WTO to rein in some of [its] outlier decisions."[22]

To date at least, this sentiment is not uniform in Europe. Thus, despite the rise in support for the nationalist presidential candidate in France, Marine Le Pen, a centrist, pro-EU candidate Emmanuel Macron defeated Le Pen with 66% of the vote on May 7, 2017.[23]

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[20] *See* Lauren Said-Moorhouse et al., *Dutch Election: Europe's Far-Right Populists Fail First Test*, CNN WORLD (Mar. 16, 2017), http://www.cnn.com/2017/03/16/europe/netherlands-dutch-results/.

[21] John Brinkley, *Trump May Withdraw U.S. from WTO, Outside Advisor Says*, FORBES (Feb. 13, 2017), https://www.forbes.com/sites/johnbrinkley/2017/02/13/trump-may-withdraw-u-s-from-wto-outside-advisor-says/#3fb973a333bb.

[22] Adam Behsudi, *The Man Getting Ready to Take on the WTO*, POLITICO (Feb. 15, 2017), http://www.politico.com/agenda/story/2017/02/robert-lighthizer-wto-000304.

[23] Anne-Sylvaine Chassany and Ben Hall, *Emmanuel Macron Sweeps to Victory in French Presidential Election,* FINANCIAL TIMES, May 8, 2017, *available at* https://www.ft.com/content/9663719e-3325-11e7-99bd-13beb0903fa3 (last visited May 8, 2017).

Still, coupled with the internal issues visible within the DSB in 2016, the rise in anti-globalist sentiment in the Western world is troubling and may challenge the legitimacy of the WTO and the effectiveness of the WTO dispute settlement system. Interestingly, in the 20 years that the DSB has been active, the European Union and the United States have been the respondent or complainant in 80% of WTO disputes, while developing countries as a whole have only accounted for 46% of disputes.[24] Delving further into the data, the European Union initiated disputes as the complainant 97 times (18.5% of disputes), while the United States has been the complainant 122 times (23.3% of disputes). Together, they have thus brought almost 42% of disputes since the DSB was established. Moreover, the developing countries that take advantage of the WTO dispute settlement system most often are Argentina, Brazil, India, and Mexico, countries that "are among the most advanced and most active in international trade."[25] On the other hand, it may be expected that a large percentage of disputes have been brought by the European Union and United States (or developed countries in general), given that the two economies account for almost 26% of exports and almost 31% of imports in the world.[26] Nonetheless, it is clear that they have played a major role in enforcing international trade rules, particularly through the advantages brought by the WTO dispute settlement system.

Despite the noise surrounding the DSB, the Appellate Body was still able to complete five regular and one Article 21.5 Appellate Body Reports, continuing a trend of relatively high levels of output in 2014 and 2015.[27] From a practical standpoint, the Appellate Body also continued its efforts to shorten the length of Reports by annexing sections pertaining to third-party submission, and removing much of the repetitive language and style found in previous years' Reports. With a full slate of Appellate Body Members in 2017—and hopefully an enlarged staff—the Appellate Body is poised to pick up speed, a trait which may be especially useful if the world sees a rise in protectionist measures.

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[24] Navneet Sandhu, *Member Participation in the WTO Dispute Settlement Process: Can Developing Countries Afford Not to Participate?*, 5 U.C. LONDON J. L. JURIS. 146, 151 (2016).

[25] *Id.* at 152.

[26] WORLD TRADE ORGANIZATION (WTO), INTERNATIONAL TRADE STATISTICS 2015 45 (2015), https://www.wto.org/english/res_e/statis_e/its2015_e/its2015_e.pdf.

[27] During 2014, the DSB adopted four regular Appellate Body Reports, and during 2015, the DSB adopted six regular and two Article 21.5 Appellate Body Reports.

DISCUSSION OF THE 2016 CASE LAW FROM THE APPELLATE BODY

I. GATT OBLIGATIONS AND EXCEPTIONS—ARTICLE II:1 TARIFF BINDINGS, ARTICLE XX(A) PUBLIC MORALITY EXCEPTION, AND ARTICLE XX(D) ADMINISTRATIVE NECESSITY EXCEPTION

A. Citation

Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel, and Footwear*, WTO Doc. WT/DS461/AB/R (June 7, 2016) (adopted June 22, 2016) (short name: *Colombia Money Laundering*)[28]

B. Facts: Colombia's Compound Tariff[29]

Textiles and apparel (T&A), along with footwear, classified under Chapters 61–64 of the Harmonized Tariff Schedule (HTS), were the merchandise exported by Panama affected by a Colombia-adopted measure.[30] The measure was a compound tariff that Colombia introduced by Presidential Decree Number 456 of March 30, 2014. This Decree was extended through July 30, 2016, and in turn was the replacement for previous two-year Decrees dating back to January 23, 2013. The Compound Tariff worked as follows:

(1) An *ad valorem* levy (i.e., percentage of the customs value of merchandise) of 10%, plus
(2) A specific levy (i.e., a duty in units of currency per measurement), which depended on the type of merchandise and its declared free on board (FOB) price, namely:

> For Merchandise in Chapters 61-63 (that is, T&A), and for merchandise in Chapter 64, under the six-digit Sub-Heading 6406.10

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[28] The Panel Report in *Colombia Money Laundering* is Panel Report, *Colombia—Measure Relating to the Importation of Textiles, Apparel, and Footwear*, WTO Doc. WT/DS461/R (June 7, 2016) [hereinafter Panel Report, *Colombia Money Laundering*]). At the Appellate Stage, there were eight Third Parties: China, Ecuador, El Salvador, European Union, Guatemala, Honduras, Philippines, and United States.

[29] *See* Appellate Body Report, *Colombia—Measures Relating to the Importation of Textiles, Apparel, and Footwear*, ¶¶ 1:1–1:14, WTO Doc. WT/DS461/AB/R (June 7, 2016) (*adopted* June 22, 2016) [hereinafter Appellate Body Report, *Colombia Money Laundering*].

[30] HTS Chapter Titles, and Headings (4-digit) and Sub-Headings (6-digit) are standard for all WTO Members, thanks to the Harmonized System (HS), and references or quotes herein are from the HTS for the United States. *See* HARMONIZED TARIFF SCHEDULE, https://hts.usitc.gov/ (last visited May 4, 2017).

> (that is, "parts of footwear . . . uppers and parts thereof, other than stiffeners") –
>
> A specific levy of US $5.00 per kilogram ("kg") if the price is $10 kilos or less, or a specific levy of $3.00/kg if the price is greater than $10/kg.
>
> For all other merchandise classified in Chapter 64 (that is, Footwear), except for the four-digit Heading 64.06 (that is, "parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof:") –
>
> A specific duty of $5 per pair of footwear if the price is $7 per pair or less, and a specific duty of $1.75/pair if the price exceeds $7 per pair.

Expressed algebraically, the Compound Tariff formula was:

- Compound Tariff for T&A and Footwear Uppers:

[(Customs Value) x (10%)]	+	$5/kg, if price < or = $10/kg
	or	
	+	$3/kg, if price > $10/kg

- Compound Tariff for Footwear:

[(Customs Value) x (10%)]	+	$5/pair, if f.o.b. price < or = $7/kg
	or	
	+	$1.75/pair, if f.o.b. price > $7/pair

The first term in each equation is the *ad valorem* duty, while the second is the specific duty.

For example, a 100 kg shipment of T&A valued at $1,000, which implies a price of $10/kg, would attract a Compound Tariff of:

	[($1,000) x (10%)]	+	[($5) x (100)]
=	$100 *ad valorem* duty	+	$500 specific duty
=	$600		

For a 100 kg shipment of T&A valued at $900, implying a price of $9/kg, the Compound Tariff would be:

	[($1,000) x (10%)]	+	[($3) x (100)]
=	$100 *ad valorem* duty	+	$300 specific duty
=	$400		

Note the inverse relationship between the specific levy and FOB price, based on the threshold of $10/kilo for T&A and uppers, and $7/pair for footwear. The levy was lower for shipments above the threshold, and higher for shipments below it.

Suppose multiple articles of merchandise subject to the Compound Tariff were imported in the same shipment, with some articles above and others below the price threshold. Then, Colombia applied the 10% *ad valorem* tariff along with the highest specific levy applicable ($5/kg or $5/pair) to the entire shipment.

In three instances, Colombia did not apply the compound tariff:

(1) To countries with which it had a free trade agreement (FTA), such as the United States.
(2) To imports of goods into designated "Special Customs Regime Zones."
(3) To imports of goods under its "Special Import-Export Systems for Capital Goods and Spare Parts" (i.e., its "Plan Vallejo," covering production inputs used to make goods for export).

In its WTO Schedule of Concessions, Colombia's bound *ad valorem* tariff on merchandise under Chapters 61-63 and Sub-heading 6406.10 was 35%. For merchandise in Chapter 64, it was 40%.

C. Key Substantive GATT Issues and Panel Holdings

At the Panel stage, Panama argued the Compound Tariff violated Article II:1(a) and (b) of the General Agreement on Tariffs and Trade (GATT). Article II is entitled "Schedules of Concessions" (referring, of course, to tariff concessions on goods as distinct from a "Schedule of Concessions" on services trade liberalization under the General Agreement on Trade in Services (GATS). Article II:1 contains a pillar obligation of GATT, namely tariff bindings in Paragraph 1(b). But, this obligation is preceded by a lesser-known but vital obligation concerning those bindings. Paragraph 1(a) states:

> Each contracting party shall accord to the commerce of the other contracting parties *treatment no less favorable* than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.[31]

[31] General Agreement on Tariffs and Trade art. 2, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT] (emphasis added).

Paragraph 1(a) is a Most Favored Nation (MFN) rule, enjoining tariff treatment for exports from any WTO Member (e.g., Panama) that is less favorable than the treatment in the importing Member's Schedule of Concession of the importing Member (e.g., Colombia).

Paragraph 1(b) is the renowned tariff binding obligation:

> 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.[32]

Paragraph 1(b) mandates adherence to bindings for both ordinary customs duties (OCD) and other duties and charges (ODC).

The gist of Colombia's defense on Article II:1 grounds was two-fold. First, Colombia said its Compound Tariff was a measure to fight illegal trade operations, and is thus not covered by Article II:1. In particular, the Tariff was a device to combat money laundering. Second, Colombia said Panama failed to adduce evidence that the Tariff breached its bound rates. These were manifestly weak arguments: there is no exemption in Article II:1 for duties intended to combat unlawful trade—no such crack in that pillar, as it were. Moreover, respondents never have to show actual injury to make out a colorable case. That a tariff binding could breach is potentially enough.

Perhaps predictably, but rather sloppily, the Panel did not even bother to rule on Colombia's claim that GATT Article II:1(a)-(b) is inapplicable to illicit trade. That was because nothing in the *Decree* establishing the Compound Tariff made that distinction. The Tariff applied to all T&A and footwear products with no delineation between "licit" and "illicit" merchandise. Moreover, nowhere else does Colombian trade law ban importation of merchandise whose declared FOB prices were below the thresholds in the Tariff. Simply put, if Colombia did not make the licit-versus-illicit distinction in its legal system, this distinction seemed like a *post hoc* rationale, and the Panel saw no need to decide the legal question of whether Article II:1 allows for such a distinction.

The Panel further held that the Compound Tariff was an OCD that exceeded Colombia's bound tariffs in its Schedule of Concessions, and thus violated Article II:1(b) and the Article II:1(a) MFN rule by according treatment

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

less favorable than envisaged by that Schedule to Panamanian merchandise. To reach this result, the Panel had to compute the *Ad Valorem* Equivalent (AVE) of the Compound Tariff, which it did, and found the AVE exceeded Colombia's bound rates in five instances, summarized in Table I below:

TABLE I:
FIVE INSTANCES IN WHICH AVE OF COLOMBIA'S COMPOUND TARIFF EXCEEDED BOUND RATE, THUS VIOLATING ARTICLE II:1(B) BINDING AND ARTICLE II:1(A) MFN RULE

Merchandise Classification	**Merchandise Price Thresholds (declared fob., in US dollars)**	**Compound Tariff Formula (Ad Valorem Rate plus Specific Duty)**	**Does AVE of Compound Tariff Exceed Bound Ad Valorem Rate (35% or 40%), and Treat Panamanian Merchandise Less Favorably?**
(1) Chapters 61, 62, 63 (T&A), and Chapter 64, Sub-Heading 6406.10 ("parts of footwear . . . uppers and parts thereof, other than stiffeners")	$10/kg or less	10% plus $5/kg	Yes
(2) Chapters 61, 62, 63 (as in (1)), and Chapter 64, Sub-Heading 6406.10 (as in (1))	Some prices in shipment are above, and others below, $10/kg (for merchandise imported under same Sub-Heading)	10% plus $5/kg	Yes
(3) Chapter 63, Sub-Heading 6305.32 ("sacks and bags of the kind used for the packing of goods")	Above $10/g but below $12/kg	10% plus $3/kg	Yes
(4) Chapter 64 (Footwear), except for Heading 64.06 ("parts of footwear")	$7/pair or less	10% plus $5/pair	Yes
(5) Chapter 64, except for 64.06 (as in (4))	Some prices in shipment are above, and others below, $7/pair (for merchandise imported under same Sub-Heading)	10% plus $5/pair	Yes

Colombia likely anticipated the weaknesses of its Article II:1 contentions, so Colombia put up the defense of GATT with Article XX(a) and (d) in the event the Panel found the Compound Tariff violated Article II:1(a) or (b). Article XX(a) and (d) are the general exceptions for Public Morality and Administrative Necessity, respectively:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) *necessary to protect public morals*;
> . . .
> (d) *necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement*, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices;[33]

Unfortunately for Colombia, the Panel rejected both Article XX defenses.

Applying the well-established Two Step Test of provisional justification under an itemized general exception (Step One), such as Article XX(a) or (d), followed by final justification under the chapeau to Article XX, the Panel held the Compound Tariff flunked both Steps. The Panel said the Compound Tariff was not "necessary to protect public morals." The Tariff also was unnecessary to secure compliance with Colombia's law, particularly Article 323 of its *Criminal Code*. Even if Colombia had proven entitlement to Paragraph (a) or (d), it still could not have passed the chapeau requirements because Colombia applied the Compound Tariff in a manner that was arbitrarily or unjustifiably discriminatory, or a disguised restriction on trade.

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[33] *Id.* art. 20 (emphasis added).

D. Holding and Rationale on Article II:1 Tariff Binding Obligation: Do Not Use Tariff Policy to Fight Money Laundering[34]

Colombia's appeal failed miserably on all substantive issues, but not before the Appellate Body chastised the Panel for not rendering a finding about the scope of Article II:1(a)-(b). When the Panel said it was unnecessary for it to interpret that scope, it was wrong, said the Appellate Body. The Panel should have decided whether Article II:1(a)-(b) apply to illicit trade, and the Appellate Body proceeded to do so—to complete the legal analysis at the request of Colombia.

Colombia argued unsuccessfully that the terms "commerce" in Article II:1(a) and "importation" in Article II:1(b) do not include illicit trade. It also said GATT Articles VII:2(a)-(b), and provisions of other WTO agreements, such as Article 1:1 of the *Customs Valuation Agreement*, support its view that those terms refer to lawful trade. Likewise, Colombia pointed to decisions of investment tribunals that refused to extend protection of bilateral and regional foreign direct investment (FDI) treaties to illegal investments. Colombia urged that the main point of GATT, as reflected in the *Preamble*, is to encourage licit trade. In other words, these three points Colombia offered followed from Articles 31–32 in the 1969 *Vienna Convention on the Law of Treaties*: text; context; and object and purpose.

The Appellate Body interpreted Article II:1(a)-(b) under the same standard three principles from the Vienna Convention, but unfortunately for Colombia, with the opposite result. Colombia lost in all three respects and the result was clear, novel jurisprudence: the scope of the Article II tariff binding and MFN obligations encompasses all trade, whether licit or illicit.

First, the text of Article II:1(a)-(b) does not suggests a distinction between legal and illegal trade, or that its MFN and tariff binding obligations apply only to lawful trade. "Commerce" and "importation" are used in Article II:1(a) and (b), respectively, without qualification. Predictably, the Appellate Body turned to the *Shorter Oxford English Dictionary* (*Shorter OED*), which defines "commerce" as "buying and selling; the exchange of merchandise or services, especially on a large scale."[35] All exchanges count as "commerce," and their nature, type, reason, or function—licit or illicit—is irrelevant. Likewise, the *Shorter OED* teaches that "importation" refers to "the action of importing or bringing in something, specifically goods from another country."[36] Under this definition, goods are imported, plain and simple, whether those goods are legal or illegal to produce or consume, buy or sell.

Second, the context of Article II:1(a)-(b) does not suggest exclusion of illegal trade from these obligations. GATT Articles II:2 and VII:2 provide that context. Article II:2 states:

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[34] *See* Appellate Body Report, *Colombia Money Laundering*, *supra* note 29, ¶¶ 4:1(a), 5:1–.47, 6:2–.3.

[35] *Id.* ¶ 5:34, n.100.

[36] *Id.* ¶ 5:35, n.102.

> 2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:
>
> (a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III [*Ad Article II*, Paragraph 2(a) omitted] in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;
>
> (b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI; [*Ad Article II*, Paragraph 2(b) omitted]
>
> (c) fees or other charges commensurate with the cost of services rendered.

The Appellate Body said this provision cuts against the Colombian argument:

> Article II:2 of . . . GATT . . . provides immediate context for the obligations contained in Article II:1 by setting out instances in which the obligations of Article II:1 do not apply. Article II:2 provides that nothing in Article II, including Article II:1(b), shall prevent a Member from imposing on the importation of a product: (i) a charge equivalent to an internal tax imposed consistently with Article III:2 of . . . GATT . . . in respect of a like domestic product; (ii) an anti-dumping or countervailing duty applied consistently with Article VI of . . . GATT . . . ; or (iii) fees or other charges commensurate with the cost of services rendered. *The three instances identified in Article II:2, in which the obligations set out in Article II:1 do not apply, constitute a closed list*. . . . *[T]he fact that Article II:2 sets out a closed list of instances in which bound tariff rates may be exceeded provides further support for a reading of Article II:1 that does not exclude what Colombia considers to be illicit trade*.[37]

In other words, the Appellate Body drew an inference about Article II:1(a)-(b) by contrasting it with Article II:2. Paragraph 2 is the narrow list, so Paragraph 1 must be the open one.

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[37] *Id.* ¶ 5:36 (emphasis added).

Similarly, GATT Article VII, entitled "Valuation for Customs Purposes," undermines the Colombian point about context. Paragraph 2 thereof says:

> (a) The value for customs purposes of imported merchandise should be based on the actual value of the imported merchandise on which duty is assessed, or of like merchandise, and should not be based on the value of merchandise of national origin or on arbitrary or fictitious values. [*Ad Article*, Paragraph 2, omitted.]
>
> (b) "Actual value" should be the price at which, at a time and place determined by the legislation of the country of importation, such or like merchandise is sold or offered for sale in the ordinary course of trade under fully competitive conditions. To the extent to which the price of such or like merchandise is governed by the quantity in a particular transaction, the price to be considered should uniformly be related to either (i) comparable quantities, or (ii) quantities not less favorable to importers than those in which the greater volume of the merchandise is sold in the trade between the countries of exportation and importation. [*Ad Article*, Paragraph 2, omitted.]
>
> (c) When the actual value is not ascertainable in accordance with sub-paragraph (b) of this paragraph, the value for customs purposes should be based on the nearest ascertainable equivalent of such value. [*Ad Article*, Paragraph 2, omitted.]

Fruitful interpretative context also is provided by Article 1:1 of the *Agreement on Customs Valuation*, which says "[t]he customs value of imported goods shall be the transaction value, that is the price actually paid or payable for the goods when sold for export to the country of importation adjusted in accordance with the provisions of Article 8 [of the *Agreement*]."

The Appellate Body explained why neither that *Agreement* nor GATT Article VII:2 help the Colombian contention:

> While Article VII:2 of . . . GATT . . . provides that the value of a product for customs purposes should be based on "actual value" and not on "arbitrary or fictitious values" or sales on other than "fully competitive conditions," these provisions do not support a reading of Article II:1 of . . . GATT . . . that excludes from its disciplines transactions that are at "artificially low prices," "do not result from market operations," or are otherwise classified as illicit trade. Rather, *Article VII:2 of . . . GATT . . . and the Customs Valuation Agreement have a*

> *different focus than Article II:1 of the GATT . . . in that they set out conditions in which customs authorities may adjust or reject the declared value of goods and instead rely upon alternative methods for determining the value of those goods for customs purposes*. Thus, where a declared value of a transaction is rejected because it is unduly low, the result under the *Customs Valuation Agreement* would be that the value for customs purposes would be adjusted or determined in an alternative manner. This value would subsequently serve as the basis for any imposition of a tariff in accordance with Article II:1 of . . . GATT . . . . *The existence of such alternative methods for determining the customs value under these provisions confirms that the underlying transaction remains subject to the bound tariff rates pursuant to Article II:1 of . . . GATT . . . and the relevant part of a Member's Schedule*. This further supports our understanding that the scope of Article II:1(a) and (b) . . . does not exclude what Colombia considers to be illicit trade.[38]

Nothing in this *Agreement* nor in the related GATT Articles suggest the scope of Article II:1(a)-(b) is limited to legal trade. To the contrary, these other provisions concern differences in declared values, but regardless of those differences, all imports with which those values are associated with remain subject to GATT disciplines, including the tariff binding and MFN rules in Article II:1.

Third, the objects and purposes of GATT do not suggest the scope of Article II:1(a)-(b) should be circumscribed to exclude illegal trade. The pillar obligation of tariff bindings, and the extension of them to all WTO Members on an MFN basis, are vital to promote trade:

> 5:40. Colombia further contends that the object and purpose of . . . GATT . . . , as reflected in the *Preamble*, supports its interpretation of Article II:1(a) and (b). Specifically, Colombia points out that the criminal activities associated with illicit trade reduce standards of living, generate economic distortions that hurt employment, and reduce real income. . . . *[T]he Appellate Body has previously stated that . . . GATT . . . strikes a balance between Members' obligations, on the one hand, and their rights to adopt measures seeking to achieve legitimate policy objectives, on the other hand*. [The Appellate Body cited Paragraph 156 of its 1998 *Turtle Shrimp* Report.[39]] To effectuate such

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[38] *Id.* ¶ 5:39 (emphasis added).

[39] *See* Appellate Body Report, *United States—Import Prohibition of Certain Shrimp and Shrimp Products*, WTO Doc. WT/DS58/AB/R (Oct. 12, 1998) (*adopted* Nov. 6, 1998),

> a balance, Article XX of . . . GATT . . . contains a number of exceptions that reflect important societal objectives other than trade liberalization, which may be relied upon in seeking to justify an otherwise GATT-inconsistent measure . . . . GATT . . . thus preserves the right of Members to pursue legitimate policy objectives, including addressing concerns relating to, *in casu* [in this case], money laundering, through the general exceptions set out in Article XX.
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> 5:41. . . . [C]olombia's interpretation would allow a Member to exclude from the scope of Article II:1(a) and (b) of . . . GATT . . . trade activities that it has *unilaterally* determined to be illicit under its domestic law. Such an interpretation would mean that, in respect of concessions inscribed in a Member's Schedule, the scope of a Member's obligation could vary depending on what is defined as illicit or asserted to be illicit under that Member's domestic law. . . . [S]uch an approach to the interpretation of Article II:1(a) and (b) would *create uncertainty* as to the scope of coverage of tariff concessions undertaken by Members.[40]

If a WTO Member could decide on its own what is or is not illicit trade, and thereby determine whether GATT-WTO disciplines apply to that trade, then that Member would undermine the object and purpose of GATT, which is to reduce barriers to trade and eliminate discrimination. That freedom would be a slippery slope toward protectionism.

The above-quoted portions of the Appellate Body Report concerning application of the three *Vienna Convention* principles (text, context, and purpose) is an excellent example of how opposing sides can draw radically different interpretations about basic terms like "commerce" and "importation." No less interesting is a final argument Colombia made, again unsuccessfully, to support a narrow interpretation of GATT Article II:1(a)-(b). This argument was about a "legislative ceiling."

In sum, Colombia sought to write a law enforcement exception into Article II that simply does not exist, and has no justification. Moreover, a WTO Member seeking to address money laundering concerns can avail itself of the general exceptions in Article XX. In the *obiter dicta* of the Appellate Body:

> [W]e wish to remark that our analysis set out above should not be understood to suggest that Members cannot adopt measures

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treated in RAJ BHALA, INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK Vol. 1 Ch. 16, Vol. 2, Ch.92 (4th ed., 2015).

[40] Appellate Body Report, *Colombia Money Laundering*, *supra* note 29, ¶¶ 5:41–.42 (emphasis added).

> seeking to combat money laundering. This aim, however, cannot be achieved through interpreting Article II:1 of . . . GATT . . . in a manner that excludes from the scope of that provision what a Member considers to be illicit trade. A Member's right to adopt and pursue measures seeking to address concerns relating to money laundering can be appropriately preserved when justified, for example, in accordance with the general exceptions contained in Article XX of . . . GATT.[41]

This *dicta* is redolent of what the Appellate Body stated at the conclusion of its 2000 *Foreign Sales Corporation* case, namely that it was not telling the United States to abolish its unitary (worldwide) taxation system and adopt a European-style value added tax (VAT); rather, it was merely instructing the United States to avoid tax measures that are Red Light subsidies.[42] The problem with that *dictum*, in that case and here, is that it is mildly disingenuous.

Realistically, it would be difficult to re-design the United States Internal Revenue Code and avoid a subsidy challenge, as the Trump Administration and Congress are learning. Likewise, and while perhaps blunt-edged or indirect, using trade to fight money laundering is not an outrageous proposition. The Appellate Body would have done well to round out its dicta with a concession to reality: appropriate law enforcement and bank regulatory treaties are less blunt, more direct ways to fight money laundering, whereas using tariff policy is too susceptible to protectionist abuse.

Given this solid rejection of the Colombian position, the Appellate Body left untouched the Panel holding that the Compound Tariff causes Colombia to levy an AVE that exceeds its bound rate, in violation of Article II:1(b), and that this discrimination afflicts Panama, in violation of Article II:1(a). Indeed, there was no reason to disturb this holding. Colombia did not challenge the Panel holding concerning the instances in which its Compound Tariff necessarily exceeds the bound rates in its Schedule of Concessions.

E. Three Step Moral Necessity Test, and Saudi Women Drivers Hypothetical

The Appellate Body agreed with the Panel that Colombia failed to prove its Compound Tariff was "necessary to protect public morals." Like the Panel, the Appellate Body said the Tariff failed Step One of the Two Step Test under GATT Article XX(a). In so doing, the Appellate Body provided a clear and practical explanation of its jurisprudence on the morality exception, and specifically what is needed to prove successfully that a disputed measure is "necessary" to protect public morals. It cited five precedents:

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41 *Id.* ¶ 5:47.

42 *See* Appellate Body Report, *United States—Tax Treatment for "Foreign Sales Corporations,"* WTO Doc. WT/DS108/AB/R (Feb. 24, 2000) (*adopted* Mar. 20, 2000), analyzed in the *WTO Case Review 2000*, *supra* note 1.

> 5:102. . . . [A] necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure. [The Appellate Body cited its case law in 2001 *Korea Beef* (at Paragraph 164),[43] 2005 *Antigua Gambling* (at Paragraph 306),[44] 2007 *Brazil Retreaded Tires* (Paragraph 182),[45] and 2014 *Fur Seals* (at Paragraph 5:169).[46]] . . . [E]ach of these factors must be demonstrated with sufficient clarity in order to conduct a proper weighing and balancing exercise that may yield a conclusion that the measure is "necessary." In most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken. [Here the Appellate Body cited *Fur Seals* (at Paragraph 5:169), which in turn cited *Antigua Gambling* (at Paragraph 307), and *Korea Beef* (at Paragraph 166)].
>
> 5:103. The weighing and balancing process begins "with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure." The more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as "necessary." [Here, the Appellate Body cited its case law in 2001 *Korea Beef* (at Paragraph 162).] Turning to the contribution of the measure to the objectives pursued by it, we recall that "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary.'" [Here, the Appellate Body again cited *Korea Beef* (at

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[43] *"Korea Beef"* is the common name for Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WTO Doc. WT/DS161/AB/R (Dec. 11, 2000) (*adopted* Jan. 10, 2001) [hereinafter Appellate Body Report, *Korea Beef*], analyzed in the *WTO Case Review 2001*, *supra* note 1.

[44] *See* Appellate Body Report, *United States—Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTO Doc. WT/DS285/AB/R (Apr. 7, 2005) (*adopted* Apr. 20, 2005) [hereinafter Appellate Body Report, *Antigua Gambling*], analyzed in the *WTO Case Review 2005 supra* note 1.

[45] *See* Appellate Body Report, *Brazil—Measures Affecting Imports of Retreaded Tires*, WTO Doc. WT/DS332/AB/R (Dec. 3, 2007) (*adopted* Dec. 17, 2007), analyzed in the *WTO Case Review 2007*, *supra* note 1.

[46] *See* Appellate Body Reports, *European Communities—Measures Prohibiting the Importation and Marketing of Seal Products*, WTO Doc. WT/DS400/AB/R, WT/DS401/AB/R (May 22, 2014) (*adopted* June 18, 2014) [hereinafter Appellate Body Report, *Fur Seals*], analyzed in the *WTO Case Review 2014*, *supra* note 1.

> Paragraph 163).] For this reason, the Appellate Body has emphasized that "in an analysis of 'necessity,' a Panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution." [Here the Appellate Body cited its 2016 *Argentina Financial Service*s Report, discussed in this Review.] The nature of the analysis for ascertaining a measure's contribution to the objective pursued by it can be contrasted with the type of analysis that a Panel must undertake in the context of assessing the "design" of the measure under Article XX(a). Indeed, whereas an assessment of whether the measure is "designed" to protect public morals focuses on determining whether the measure is or is not incapable of protecting public morals, an examination of the measure's contribution to the protection of public morals focuses on determining the degree of such contribution, in a qualitative or quantitative manner.
>
> 5.104. Turning to an assessment of the restrictive impact of the measure on international commerce, the Appellate Body has stated [in 2001 *Korea Beef* (at Paragraph 163)] that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." Consequently, [as per 2016 *Argentina Financial Services* (at Paragraph 6:234)] in assessing a measure's trade-restrictiveness "a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade."[47]

As the above quote indicates, there are three parts, or steps, in the "necessity" test for the Article XX(a) Public Morality exception. The Appellate Body fairly characterizes the test as an exercise in "weighing and balancing." However, the exercise could more aptly be dubbed the "Three Step Moral Necessity Test," to highlight the specific issues.

The key points of the Three Step Moral Necessity Test are as follows:

(1) Weighing and Balancing

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[47] Appellate Body Report, *Colombia Money Laundering*, *supra* note 29, ¶¶ 5:102–.104 (emphasis added).

The Test is a process of "weighing and balancing." Panels and the Appellate Body must evaluate a series of non-exclusive factors, just like any Common Law adjudicator. The Appellate Body has identified three such factors, hence the rubric "Three Step Moral Necessity Test." But future cases could add additional factors, and thereby steps.

(2) Step One: Importance

Step one concerns the importance of the value at stake to the importing WTO Member whose measure is in dispute. The Appellate Body does not ask whether the value is moral or not; rather, it defers to the sovereignty of the Member in defining what is "moral" versus "immoral" for its public. So, if Saudi Arabia wants to ban as "immoral" imports of lumbar supports designed for a car seat that women drivers would use, then the Appellate Body probably will not say there is nothing "immoral" about women driving. (The Kingdom already invoked Article XX(a) in its 11 December 2005 terms of accession to forbid alcohol imports, so that is an easy case.)

Rather, in Step One, the Appellate Body asks how much the importing Member truly cares about the value. The more vital the value that the measure pursues, the more likely that measure is "necessary." Is banning women from driving, and thus banning all accoutrements women drivers might use, really important to Saudi society? To ask that question is to show how fraught with difficulty it can be to answer. There is no one "societal interest," even in a rather homogeneous place like the Kingdom. Different Saudis think differently about the topic.

(3) Step Two, Part One: Design

The Second Step has two sub-parts. First, the importing Member must show that its disputed measure is designed to fulfill the moral goal at stake. The inquiry is about the design, architecture, and structure of the measure—that is, whether the measure is concocted to promote the public moral interest at stake. To continue the Saudi hypothetical, a restriction on lumbar support imports that women drivers would use probably is designed to avoid the moral scandal of women driving in the Kingdom.

(4) Step Two, Part Two: Contribution

In Part two of the Second Step, the importing Member must prove that the disputed measure contributes to the moral objective at stake. The greater the contribution, the more likely the measure is "necessary." Proving that some contribution exists, without greater certainty, is insufficient. Qualitative and quantitative metrics that point to the degree

> of contribution are needed. In other words, in the second sub-part, proof is needed not about "whether?" a contribution is made, but about "how much?" it contributes to the moral end at stake. In the hypothetical, the import restriction probably does not make much of a contribution to keeping women from taking the steering wheel. Other, far stronger laws and penalties achieve that goal.

(5) Step Three: Trade Restrictiveness

> The Third Step concerns trade-restrictiveness. How much of a restriction on trade is the disputed measure? The less the impact on trade, the more easily it is to uphold the measure as "necessary." The broader or more intense that impact, the more difficult it is to say that measure is "necessary," as distinct from being disguised protectionism. The broadest and most intensely trade restrictive measure is an outright prohibition. As with Step Two, in this final step, qualitative and quantitative metrics that point to the degree to which cross-border trade is adversely affected are needed. So, to finish the Saudi Hypothetical, an import ban on car lumbar supports used by women drivers might be "unnecessary" under Step Three.

It cannot be overstated that this Test evolved through the jurisprudence of (at least) five cases spanning fifteen years (2001–16).

Unfortunately for Colombia, it flunked Steps Two and Three of the Test.[48] The Appellate Body held that a proper weighing and balancing of factors was impossible because there was insufficient clarity as to the degree to which the Compound tariff contributed to the objective of combatting money laundering (Step Two, second subpart), and as to the trade restrictiveness of the Tariff (Step Three). Without a proper weighing and balancing, the Tariff could not be held "necessary" to protect Colombian public morality.

To be clear, the Appellate Body reversed the Panel holding that Colombia failed to demonstrate the Compound Tariff was designed to combat money laundering (i.e., that Colombia flunked Step One, and thus that the Tariff was unnecessary to fight money laundering). The Appellate Body took the Panel to task for failing to engage in the weighing and balancing process, and instead prematurely ceasing its analysis at Step One, without going through Steps Two and Three.[49] At Colombia's request, but with an outcome to its chagrin, the Appellate Body completed the legal analysis by re-doing Step One and carrying through on Steps Two and Three.

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[48] *See id.* ¶¶ 6:6–.7.

[49] *See id.* ¶¶ 6:4–.7.

F. Holding and Rationale on Article XX(a) Public Morality Exception: Designed, Yes; Necessary, No[50]

No party in the case—not even Panama—doubted that combatting money laundering was an important policy objective for Colombia. Money laundering is criminal conduct under Article 323 of its *Criminal Code*. Moreover, money laundering is linked to drug trafficking, other criminal activities, and Colombia's internal armed conflicts. Panama did not contest that point, before the Panel or on appeal. So Colombia passed Step One: money laundering is a moral interest to Colombian society that is "vital and important in the highest degree."[51]

On Step Two, however, Colombia only fulfilled the first sub-part, concerning the design, architecture, and structure of its Compound Tariff. Colombia showed the Tariff was "not incapable" of fighting money laundering (*i.e.*, it showed that there was a "relationship" between this measure and protecting public morality); specifically, the anti-money laundering objective.[52] That was because importing T&A and footwear at prices below the thresholds of the Compound Tariff—artificially low prices that do not reflect market conditions—could facilitate money laundering. Money launderers do, in fact, undervalue imports. Thus they might price some of this merchandise at artificially low prices to conceal the illicit origin and extent of their revenue.

But showing that "there may be *at least some* contribution" of a disputed measure to its moral objective is not enough.[53] In the second sub-part, "the *degree* of such contribution" must be proven. Here, Colombia came up short. It gave no indication about the amount or proportion of T&A and footwear imported at prices at or below the Compound Tariff thresholds (was it low, high, or in between?), nor any suggestion about the frequency or scope of undervaluation of this merchandise for money laundering (was it just one of various methods they used, along with smuggling, and were other illegalities at stake, such as tax evasion?).[54] Indeed, the Tariff was a poor weapon to fight money laundering. On the one hand, the Tariff was under-inclusive because it targeted only T&A and footwear. Other merchandise can be, and is, used to launder funds. On the other hand, it was over-inclusive, because it was not limited to direct targeting of under-valued imports. Any import at below-threshold prices, regardless of under-valuation, and regardless of the purpose of the transaction, was covered.

In brief, the second part of Step Two was clouded in ambiguity. There was insufficient clarity about the proportionality of T&A and footwear imports that actually are used to launder money. There was insufficient clarity about the efficacy of the disincentive of the Compound Tariff to combat money laundering. However, in agreeing with the Panel that Colombia failed to provide sufficient clarity about the degree of contribution of its Tariff to its anti-money laundering

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50 *See id.* ¶¶ 4:1(b), 5:48–.117, 6:4–.7.

51 *Id.* ¶ 5:105.

52 Appellate Body Report, *Colombia Money Laundering*, *supra* note 29, ¶ 5:106.

53 *Id.* ¶ 5:107.

54 *Id.*

goal, the Appellate Body passed up an opportunity at humor: that those imports themselves—T&A and footwear—typically get cleaned.

As for Step Three, here again, Colombia did not provide sufficient clarity. While the Compound Tariff was less restrictive on cross-border trade in T&A and clothing as opposed to an import ban, the degree of trade-restrictiveness was still uncertain. How much less restrictive was the Tariff than a ban? Colombia's answer was non-responsive: Colombia said that the trade-restrictiveness was "modest," which in any event the Panel rightly doubted.

In a passage indicative of the weakness (dare it be said, sloppiness) of Colombia's Step Three assertion, the Appellate Body said,

> despite acknowledging that the measure is less restrictive than an import ban, the Panel also raised the possibility that the compound tariff can be highly trade restrictive, and *in some circumstances as restrictive as a ban*. Indeed, the Panel stated that, "[b]y its very nature, a tariff can reduce the capacity of imports to compete in the domestic market of the country of importation, by increasing the price of the products. *If the tariffs are too high, they can have a very restrictive, even prohibitive effect*." The fact that the Panel did not or could not determine whether the higher specific duty had such a prohibitive effect further supports our view that the Panel was unable to determine the degree of trade-restrictiveness of the measure.[55]

Undoubtedly, the Compound Tariff affected international trade by cutting the capacity of the impacted merchandise to compete in the Colombian market because the imports were more expensive thanks to the Tariff. Moreover, the Tariff caused an increase in import prices, and a diminution in import volumes and values. But how big were these effects? Without some clarity, it was impossible to juxtapose the Tariff against other possible measures, which might be reasonably available to Colombia and less restrictive than the Tariff.

G. Comparison of Necessity Test for Article XX(a) and (d)

The Appellate Body agreed with Panama that Colombia failed to prove under GATT Article XX(d) its Compound Tariff was a measure "necessary to secure compliance" with its GATT-consistent laws—namely, Article 323 of its *Criminal Code*. In other words, the Appellate Body said Colombia flunked Step One of the standard Two Step Test used to justify (or not) a disputed measure under Article XX. With this finding, the Appellate Body said there was no need

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[55] *Id.* ¶ 5:112 (emphasis added).

to consider Step Two, and thus it exercised judicial economy as to whether Colombia met the Article XX *chapeau* requirements.[56]

The Appellate Body's analysis under GATT Article XX(d) paralleled its approach under Article XX(a). The "necessity" test under both is the same, except for an additional step under Article XX(d). Its sameness is logical because the operative term ("necessity") is the same, and it is set in the same provision (Article XX) of the same treaty (GATT). Textual and contextual sameness demands interpretative sameness (absent some extraordinary reason or situation, perhaps). Their difference (the extra Step) reflects the specific language of one provision versus the other.

Table II summarizes the Tests under both provisions.[57] Note the list of precedents on which the Tests are based is nearly identical, which again is unsurprising.

[56] *See id.* ¶¶ 4:1(d), 5:151–.153, 6:11.

[57] The Appellate Body provided no such Table, but did discuss the similarities. Appellate Body Report, *Colombia Money Laundering*, *supra* note 29, ¶¶ 5:131–.132.

TABLE II:
SYNOPSIS OF GATT ARTICLE XX(A) AND (D) "NECESSITY" TESTS

Three Step Moral Necessity Test for Article XX(a)		**Four Step Administrative Necessity Test for Article XX(d)**	
Issue: Is the disputed measure "necessary to protect public morals"?		**Issue:** Is the disputed measure "necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement?"	
General Answer: Process of "weighing and balancing" a series of factors (non-exclusive), namely Steps One, Two, and Three …		**General Answer:** Process of "weighing and balancing" a series of factors (non-exclusive), namely Steps Two, Three, and Four …	
Step One	**How important is the societal interest or value at stake?** This inquiry is a relative one, weighing and balancing the interest or value against others. The more vital the interest or value, the more likely the measure is "necessary."	**Step One**	**Is the underlying law or regulation of the importing WTO Member (i.e., the respondent whose measure is disputed) consistent with GATT?**

Step Two	**To what degree does the disputed measure contribute to the moral objective it pursues?** This inquiry allows for both qualitative and quantitative evidence. **There are two sub-parts:** **First, Design, Architecture, and Structure, and Expected Operation –** Is the measure designed to protect public morals? The measure must be "designed" to pursue this objective, or at least is not incapable of doing so. The analysis must not be prematurely truncated. Only if it is found that the measure is not designed to protect public morality, that it is incapable of doing so, may the analysis be terminated. **Second, Degree? –** To what extent does the measure protect public morality? The greater the extent, the more likely the measure is "necessary."	**Step Two**	**How important is the societal interest or value at stake?** This inquiry is a relative one, weighing and balancing the interest or value against others. The more vital the interest or value, the more likely the measure is "necessary." (Same as Step One under Article XX(a))

Step Three	**To what degree is the disputed measure trade restrictive?** This inquiry allows for both qualitative and quantitative evidence, and for an evaluation of the disputed measure relative to other possible, reasonably available measures. A measure with a relatively slight impact on international commerce, specifically, imported goods, is more likely to be "necessary" than a measure with broader or more intense restrictive effects, and an import ban typically has the broadest and most intense effects.	**Step Three**	**To what degree does the disputed measure contribute to securing compliance with the underlying GATT-consistent law?** This inquiry allows for both qualitative and quantitative evidence. **There are two sub-parts:** **First, Design, Architecture, Structure, and Expected Operation –** Is the measure designed to secure compliance with the underlying GATT-consistent law? The measure must be "designed" to pursue this objective, or at least is not incapable of doing so. The analysis must not be prematurely truncated. Only if it is found that the measure is not designed to protect public morality, that it is incapable of doing so, may the analysis be terminated. **Second, Degree? –** To what extent does the measure secure compliance with the underlying GATT-consistent law? The greater the extent, the more likely the measure is "necessary." (Same as Step Two under Article XX(a))

		Step Four	**To what degree is the disputed measure trade restrictive?** This inquiry allows for both qualitative and quantitative evidence, and for an evaluation of the disputed measure relative to other possible, reasonably available measures. A measure with a relatively slight impact on international commerce, specifically, imported goods, is more likely to be "necessary" than a measure with broader or more intense restrictive effects, and an import ban typically has the broadest and most intense effects. (Same as Step Three under Article XX(a))
Case Law?	Five Supporting Precedents cited by the Appellate Body in Colombia Money Laundering: 2001 Korea Beef 2005 Antigua Gambling 2007 Brazil Retreaded Tires 2014 Fur Seals	**Case Law?**	Five Supporting Precedents cited by the Appellate Body in Colombia Money Laundering: 2001 Korea Beef 2005 Antigua Gambling 2007 Brazil Retreaded Tires 2014 Fur Seals 2016 Argentina Financial Services

H. Holding and Rationale on Article XX(d) Administrative Necessity Exception: Necessary, No.[58]

The Appellate Body said the Panel failed to assess "necessity" with a proper weighing and balancing exercise. The Panel prematurely ended its inquiry, without considering the degree of contribution of the Compound Tariff to its objective, securing compliance with Article 323t of the *Criminal Code*, and without assessing other "necessity" factors. The Panel simply stated that the Tariff was "not incapable of securing compliance" with this Article, "such that there is a relationship between" the Tariff and securing compliance—hence, the Tariff passed muster under Article XX(d).[59] That reasoning was too thin to justify the Tariff as administratively "necessary," said the Appellate Body. In effect, the Panel committed the same blunder under Step One of the Two Step Article XX Test with respect to Paragraph (d) as it did for Paragraph (a). So the Appellate Body reversed the Panel's holding that the Tariff was "designed" to secure compliance with the *Criminal Code*, and its follow-on holding that the Tariff was "necessary" to secure compliance with that *Code*.

But, as was true under the Public Morality Exception (under the Administrative Necessity Exception), when the Appellate Body completed the legal analysis at the behest of Colombia, Colombia lost:

> [O]ur assessment of the Panel's findings reveals the Panel's consideration that there was a lack of sufficient clarity with respect to several key aspects of the "necessity" analysis concerning the defense that Colombia presented to the Panel under Article XX(d). In particular, *there was a lack of sufficient clarity regarding the degree of contribution of the measure at issue to securing compliance with Article 323 of Colombia's Criminal Code, and the degree of trade-restrictiveness of the measure*. *Without sufficient clarity in respect of these factors, a proper weighing and balancing that could yield a conclusion that the measure is "necessary" could not be conducted*. In the light of these considerations, the Panel's findings support the conclusion that Colombia has not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is "necessary" to secure compliance with Article 323 of Colombia's *Criminal Code*.[60]

In completing the GATT Article XX(d) legal analysis, the Appellate Body made the following four points.

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58 *See id.* ¶¶ 4:1(c), 5:118–150, 6:8–.10.

59 *Id.* ¶ 6:8.

60 *Id.* ¶ 6:10 (emphasis added).

First, the specific provision of Colombian law with which the Compound Tariff sought to secure compliance was the criminal prohibition on money laundering in Article 323 of the *Criminal Code*. This provision is consistent with GATT-WTO rules. Certainly, its consistency was agreed by the Panel, and not challenged on appeal. Hence it was understandable for Colombia to invoke Article XX(d) to justify the Compound Tariff as necessary to secure compliance with the *Code*.

Second, it is true that the Compound Tariff was "not incapable of securing compliance with Article 323 . . . such that there is a relationship between that measure and securing such compliance." Some T&A and footwear priced at or below the thresholds of the Tariff might be imported at artificially low prices for money laundering purposes. They would be subject to the disincentive of the higher specific duties imposed on that merchandise. So Colombia constructed the Tariff, which was "designed" to secure compliance with the GATT-consistent Article 323. Note that this finding is not akin to that of Step One under the Three Step Public Morality Necessity Test: instead of inquiring about the value pursued by the challenged measure, the Appellate Body asks about the consistency with GATT of the importing Member's law. The GATT-consistency inquiry is a Step in itself, which logically makes sense: if the underlying law is illegal under GATT, then attempting to justify a disputed measure as administratively necessary to facilitate enforcement of that law would be nonsense.

Third, turning to the heart of the Article XX(d) necessity analysis, the Appellate Body weighed and balanced a series of factors, "including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure." The Appellate Body repeated what it has said with respect to Article XX(a)—namely, the fight against money laundering is of vital importance "in the highest degree."[61] Indeed, the point was uncontested, but the degree to which the Compound Tariff contributed to securing compliance with the anti-money laundering law of Article 323 of the *Criminal Code* was indeterminate. There was uncertainty as to what volume or value of T&A and footwear imported at prices below the Tariff thresholds entails money laundering. Likewise, there was a lack of clarity as to the trade-restrictiveness of the Tariff. It was less restrictive than an outright import ban, but the degree was uncertain. Without such clarity, it was impossible to consider the Tariff against other possible, reasonably available alternatives.

Finally and implicitly from the above four points, the Appellate Body used a similar but not identical Three Step Test under GATT Article XX(d) as it did under Article XX(a). Step One under Article XX(d) concerns the GATT-consistency of the underlying law in the importing Member's legal system, not the moral value at stake. Thereafter, the Appellate Body follows the same three Steps. This Test can easily be called the "Four Step Administrative Necessity

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61 *Id.* ¶ 5:144.

Test." In other words, there is one additional hurdle under Article XX(d) vis-à-vis Article XX(a), as the above Table indicates.

I. Commentary

1. The Legislative Ceiling Question

The Panel said the Compound Tariff does not incorporate a legislative ceiling that would prevent the Tariff from resulting in duties that exceed the bound rates in Colombia's Schedule of Concessions. Colombia said Article II:1(a)-(b) does not impose an obligation on a WTO Member to ensure its bound rates are not exceeded if merchandise is imported at an artificially low price. Therefore, a legislative ceiling does not apply to merchandise that is priced at or below a threshold that is not covered by Article II:1. The Appellate Body responded:

> On the basis of our interpretation of Article II:1(a) and (b) . . . we do not find support for Colombia's argument that a legislative ceiling need not apply to imports priced at or below the thresholds incorporated in the measure at issue. We do not see that Article II:1(a) and (b) excludes from its scope transactions that Colombia considers to be illicit because they are at artificially low or below market prices for money laundering purposes. We therefore do not consider that a measure that fails to ensure that such transactions do not exceed Colombia's bound tariff rates can operate as a legislative ceiling. . . . We recall that the Appellate Body, in [the 1998] *Argentina—Textiles and Apparel* [Report, at Paragraph 54] explained that "it is possible, under certain circumstances, for a Member to design a legislative 'ceiling' or 'cap' on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents [AVEs] of the duties actually applied would not exceed the *ad valorem* duties [i.e., bound rates] provided for in the Member's Schedule." . . . [C]ontrary to the notion of a legislative ceiling articulated by the Appellate Body, the price thresholds set out in Colombia's measure do not ensure that duties imposed on certain imports do not exceed Colombia's bound tariff rates.[62]

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[62] Appellate Body Report, *Colombia Money Laundering*, *supra* note 29, ¶ 5:43. *Argentina Textiles* is also called "*Argentina Footwear*" and is cited as Appellate Body Report, *Argentina—Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, WTO Doc. WT/DS56/AB/R (Mar. 27, 1998) (*adopted* Apr. 22, 1998), treated in BHALA, *supra* note 39, Vol. 1, Ch. 21..

This portion of the Appellate Body's rationale is not sufficiently well articulated.

What Colombia argued was that it was under no obligation to have a legislative ceiling in its Compound Tariff that would avoid any breach of its Article II:1 tariff bindings. Colombia premised this argument on its view that Article II:1 did not apply to illicit trade. So, if this general tariff-binding rule was inapplicable, then the particular obligation to have a legislative ceiling also was inapplicable. Colombia also indicated that, contrary to the finding of the Panel, the price thresholds in the Compound Tariff, particularly for Subheading 6305.32 (prices above $10/kg but below $12/kg), served as a legislative ceiling to avoid violating its tariff binding. The Appellate Body did not contest the concept of a legislative ceiling, nor overturn its *Argentina Textiles* precedent. Rather, it said the Compound Tariff lacked any ameliorative mechanism—including that particular price threshold—to avoid breaching tariff bindings. As the Panel found, even for merchandise entering at above the price thresholds in the Compound Tariff, the AVE of the Tariff exceeded Colombia's bound duty rates.

2. A Precedent for GATS?

Both the Public Morality and Administrative Necessity exceptions in GATT are reincarnated nearly verbatim in the GATS. So the Appellate Body findings in this case may prove to be useful guidance, if not dispositive, in a future GATS case in which a WTO Member invokes them as respondent. Indeed, that the Appellate Body in *Colombia Money Laundering* cross-referenced its *Argentina Financial Services* Report (discussed below), with respect to a necessity analysis under the Administrative Necessity exception of GATS Article XIV(c), makes this proposition a sure bet.[63]

[63] Appellate Body Report, *Colombia Money Laundering*, *supra* note 29, ¶ 5:124.

II. GATT OBLIGATIONS AND EXCEPTIONS—SCOPE OF ARTICLE III:8(A) GOVERNMENT PROCUREMENT EXCEPTION TO NATIONAL TREATMENT, ARTICLE XX(J) SHORT SUPPLY EXCEPTION, AND ARTICLE XX(D) ADMINISTRATIVE NECESSITY EXCEPTION

A. Citation

Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, WTO Doc. WT/DS456/AB/R, (Sept. 16 2016) (*adopted* Oct. 14, 2016) (short name: *India Solar Cells*)

B. Facts: India's Solar Power Program[64]

The underlying facts of this dispute surround the Jawaharhal Nehru National Solar Mission (NSM), a program launched by the Central Government of India in 2010 "to establish India as a global leader in solar energy, by creating the policy condition for its diffusion across the country as quickly as possible."[65] In particular, the aim of the NSM is to generate 100,000 megawatts of grid-connected solar power capacity by 2022 for India. To meet this aim, the NSM has been implemented in multiple "Phases," which are sub-divided into "Batches."

In April 2014, the US requested the establishment of a Panel to address what it claimed were WTO-inconsistent domestic content requirements (DCRs) under Phase I (Batch 1), Phase I (Batch 2), and Phase II (Batch 1-A) of the NSM. The relevant measures of said Phases and Batches can be found in "Guidelines" and "Request for Selection" documents published by India, the model power purchase agreement (PPA), and individually executed PPAs between solar power developers (SPDs) and Indian Government agencies. The PPAs specify the rates for 25-year terms for guaranteed electricity transactions between the SPDs and the Central Government of India. After the Central Government purchases electricity from the SPDs, it resells it to distribution companies, which again resell it to consumers throughout India.

The measures imposed mandatory DCRs on SPDs participating in the relevant Phases and Batches, but the specifics of the DCRs varied depending on the relevant Batch of the NSM. Under Phase I (Batch 1), the NSM required all SPDs to use crystalline silicon (c-Si) modules manufactured in India for all relevant projects, however, foreign c-Si cells and foreign thin-film modules or

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[64] *See* Appellate Body Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶¶ 1.1–.15, WTO Doc. WT/DS456/AB/R, (Sept. 16 2016) (*adopted* Oct. 14, 2016) [hereinafter Appellate Body Report, *India Solar Cells*].

[65] *Id.* ¶ 1.1 (citing Panel Report, *India—Certain Measures Relating to Solar Cells and Solar Modules*, ¶ 7.1, WTO Doc. WT/DS456/R, (Feb. 24, 2016) (*adopted* Oct. 14, 2016) [hereinafter Panel Report, *India Solar Cells*], which itself is quoting Gov't of India, Ministry of New and Renewable Energy, Jawaharlal Nehru National Solar Mission, Resolution No. 5/14/2008, (Jan. 11, 2010)).

concentrator photovoltaic (PV) cells were allowed. Under Phase I (Batch 2), the NSM required all SPDs to use c-Si modules and cells manufactured in India for all relevant projects; however, domestic or foreign modules made from thin-film modules or concentrator PV cells were allowed. Under Phase II (Batch 1-A), SPDs were required to use Indian-manufactured solar cells and modules, regardless of the type of technology used by the particular project. During the Panel proceedings, the United States confirmed that its claims relate only to the specific DCRs imposed under each relevant Phase and Batch, not to any other elements of the NSM.

Accordingly, the United States brought claims under the General Agreement on Tariffs and Trade 1994 (GATT) and the Agreement on Trade-Related Investment Measures (TRIMs Agreement).

C. Key Substantive GATT Issues

The key substantive claim raised by the United States under the GATT falls under Article III:4 of the GATT, but India requested that the Panel find its measures were justified pursuant to a derogation under Article III:8(a) of the GATT. In the alternative, India also argued that the Panel find that its measures be justified under one of the General Exceptions found in Article XX of the GATT, namely, Article XX(j) or Article XX(d). The Panel did not directly address the related claims under Article 2.1 of the TRIMs Agreement due to its findings under Articles III and XX of the GATT.

The Panel found that the DCR measures were inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT and that the derogation under Article III:8(a) of the GATT did not apply. The Panel also found that the DCR measures were not justified under Articles XX(j) or XX(d) of the GATT.

On appeal, India focused its claims on Article III:8(a) of the GATT, as well as the General Exceptions contained in Articles XX(j) and XX(d). In particular, India claimed that the Panel erred under Article 11 of the DSU when it found that Article III:8(a) of the GATT was not applicable to the DCR measures in dispute. Under Article XX(j), India claimed that the Panel also erred in its interpretation and application of said general exception provision when it found that solar cells and modules are not "products in general or local short supply" in India. Under Article XX(d), India similarly claimed that the Panel erred in its interpretation and application of said general exception when it found that the DCR measures at issue in the dispute were not measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT]."[66] Under all three claims, India also requested that the Appellate Body complete the legal analysis if it finds that the Panel did err in any instance.

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[66] *Id.* ¶ 4.1(c)(i).

Ultimately, the Appellate Body upheld all of the Panel's claims, resulting in a clear loss for India on appeal.[67]

D. Holding and Rationale on Article III:8(a) Government Procurement Exception[68]

In general, Article III of the GATT covers National Treatment on Internal Taxes and Regulation. Article XIII:4, in particular, provides that:

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

The key point here—the concept of National Treatment—is that WTO Members must give "treatment no less favorable" to products imported from any WTO Member compared to "like" products produced domestically. Put another way, WTO Members may not discriminate against imported goods in favor of domestic goods. However, Article III:8(a) provides a derogation to this obligation for WTO Members. Said paragraph provides that:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental

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[67] The Appellate Body Report also includes a separate opinion of one Appellate Body Member. There, the Member in question took issue with the Division hearing the appeal's decision not to further address India's claims regarding the remaining legal elements under those provisions. The Member expressed his or her agreement with said decision, but chose to explain why it was appropriate to end the analysis without addresses further issues on appeal. Summarized in short manner, the separate opinion justifies the judicial economy practiced by the Appellate Body in large part on Article 17.12 of the DSU, which requires that the Appellate Body review the issues raised by the parties. However, the decision of how to address said raised issues must occur within the overarching principles of the WTO dispute settlement system, including "prompt settlement" and "positive solutions." In effect, fully addressing all aspects of a claim is not necessary in all instances. In the end, the separate opinion was: (1) not an opinion, or even a concurring opinion in the legal sense; and (2) may have been better placed in a legal journal than part of the official record of WTO jurisprudence.

[68] *See* Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶¶ 5.1–.44.

> purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

Essentially, the National Treatment obligation does not apply to some forms of government procurement as long as the products are not used for a commercial purpose. As recognized by the Appellate Body,[69] the keys terms on which to focus legal analyses under Article III:8(a) of the GATT are whether the measures in dispute qualify as "laws, regulations or requirements governing [. . .] procurement," whether the entity purchasing products is a "governmental agency," and whether the dispute involves "products purchased for governmental purposes," and "not with a view to commercial resale or with a view to use the production of goods for commercial sale." In the case at hand, the dispositive issue related to the "products purchased" analysis.

As summarized above, India argued on appeal that the Panel acted inconsistently with its obligations under Article 11 of the DSU (i.e., that the Panel did not make an objective assessment of the matter) when it found that the DCR measures do not fall under the scope of the derogation provided in Article III:8 of the GATT. India specifically claimed that the Panel erred by not making an objective assessment of its arguments and related evidence that:[70]

> (1) Solar cells and modules are indistinguishable from solar power generation;
> (2) Solar cells and modules can be characterized as inputs for solar power generation; and
> (3) Article III:8(a) of the GATT cannot be applied in a narrow manner that would require direct acquisition of the product purchased in all cases.

Throughout the proceedings, the parties relied heavily on arguments relying upon or distinguishing from the Appellate Body Report in *Canada—Renewable Energy*. On appeal, with respect to Article III:8(a) of the GATT, India disagreed with the Panel's interpretation and application, or rather, lack thereof, of said "case law," claiming that the Panel "mechanically applied the Appellate Body's test of competitive relationship" developed in *Canada—Renewable Energy*.[71]

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[69] *Id.* ¶ 5.18 (citing Appellate Body Report, *Canada—Certain Measures Affecting the Renewable Energy Generation Sector*, ¶ 5.74, WTO Doc. WT/DS412/AB/R (May 6, 2013) (*adopted* May 24, 2013); also citing Appellate Body Report, *Canada—Measures Relating to the Feed-in Tariff Program*, ¶ 5.74, WTO Doc. WT/DS426/AB/R (May 6, 2013) (*adopted* May 24, 2013), [hereinafter, referred to jointly as Appellate Body Report, *Canada—Renewable Energy*]; both cases were analyzed in *WTO Case Review 2013*, *supra* note 1).

[70] *Id.* ¶ 5.1 (citing India's appellant's submission, ¶ 36).

[71] *Id.* ¶ 5.12 (citing India's appellant's submission, ¶¶ 24 and 28, and responses to questioning at oral hearing).

In that decision, the Appellate Body stated that, "[w]hether the derogation in Article III:8(a) can extend also to discrimination [relating to inputs and processes of production used in respect of products purchased by way of procurement] is a matter we do not decide in this case."[72] India relied on this language, arguing that it "left space for legal reasoning on the issue of inputs."[73] The United States, also relying upon *Canada—Renewable Energy*, countered India's arguments by pointing out that the Appellate Body also found that "Article III:8(a) [of the GATT] does not apply when a [WTO Member] purchases one product, but discriminates against another, different product" and requires that the product "subject to discrimination" be in a "competitive relationship."[74] In *Canada—Renewable Energy*, the term "competitive relationship" was used to describe: "(1) identical products; (2) 'like' products; or (3) products that are directly competitive or substitutable."[75] The United States viewed this language as directly relevant because, in its view, the facts in *Canada—Renewable Energy* and in the present dispute both involved situations where a government purchased electricity but discriminated against foreign generation equipment.

As explained by the Appellate Body, the derogation in Article III:8(a) of the GATT is only relevant when the discrimination comes against foreign products that are covered under Article III in general. In *Canada—Renewable Energy*, the Appellate Body succinctly stated that:

> Because Article III:8(a) [of the GATT] is a derogation from the obligations contained in other paragraphs of Article III, . . . the same discriminatory treatment must be considered both with respect to the obligations of Article III and with respect to the derogation of Article III:8(a). Accordingly, the scope of the terms "products purchased" in Article III:8(a) is informed by the scope of "products" referred to in the obligations set out in other paragraphs of Article III. Article III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination.[76]

In the dispute at hand, the Appellate Body confirmed that the scope of the derogation cannot extend beyond the scope of the obligation from which the derogation is sought. This ran counter to India's arguments, which effectively attempted to expand the scope of Article III:8(a) to "inputs" and "processes of production," regardless of whether the product subject to discrimination is in a "competitive relationship" with the product purchased. But the Appellate Body

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[72] *Id.* ¶ 5.19 (citing Appellate Body Report, *Canada—Renewable Energy*, *supra* note 69, ¶ 5.63).

[73] Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.19 (citing India's appellant's submission, ¶ 4 and Appellate Body Report, *Canada—Renewable Energy*, *supra* note 69, ¶ 5.63).

[74] *Id.* ¶ 5.20 (citing U.S.' appellee's submission, ¶¶ 38 and 42).

[75] Appellate Body Report, *Canada—Renewable Energy*, *supra* note 69, ¶ 5.20.

[76] *Id.* ¶ 5.21.

considered the analysis of "competitive relationship" to be a threshold issue, concluding that "consideration of inputs and processes of product may only inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against."[77]

Given its finding, the Appellate Body determined that this was sufficient to address India's appellate claims under Article III:8(a) of the GATT. Nonetheless, it chose to examine India's arguments relating to the approach taken by the Panel.[78]

With respect to the Panel's approach to its analysis under Article III:8(a) of the GATT, the Appellate Body thoroughly acknowledged India's arguments pertaining to the Panel's approach, before summarily dismissing them in each case, before going on to comment on the level of reliance upon previous Appellate Body Reports that it considers appropriate. It summarized the Panel's approach in the following way:[79]

> The Panel focused its analysis on the issue of "how the Appellate Body's findings and reasoning under Article III:8(a) [of the GATT] should apply to the DCR measures at issue in this dispute," instead of "whether the Appellate Body left room for an alternative to the 'competitive relationship' standard."

The Appellate Body recognized that the Panel appeared to take such an approach due to the reliance of the parties' arguments on *Canada—Renewable Energy* and the Panel's finding that the facts of the dispute were not "distinguishable in any relevant respect" from those in that case.[80] In particular, the Panel believed that it was "not presented with the question of whether we should deviate from the Appellate Body's findings and reasoning in [*Canada—Renewable Energy*]; rather, we are presented with the question of how the Appellate Body's findings and reasoning under Article III:8(a) [of the GATT] should apply to the DCR measures at issue in this dispute."[81] The Panel cited previous WTO jurisprudence concerning "the issue of whether a panel should 'resolve the same legal question in the same way in a subsequent case' and whether it can depart for 'cogent reasons' from previous Appellate Body findings

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[77] Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.24.

[78] This decision by the Appellate Body to unnecessarily examine parts of India's appeal appears to be the type of dicta criticized by the United Statees when it justified its refusal to renew the term of (now) former Appellate Body Member Mr. Seunt Wha Chang of Korea. Indeed, although the Appellate Body should generally be commended for its efforts to shorten the length of its Reports, here, it added almost five pages of text that arguably has limited persuasive value in future disputes.

[79] Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.27 (citing Panel Report, *India Solar Cells*, *supra* note 65, ¶¶ 7.115, 7.120).

[80] *Id.* ¶ 5.27 (citing Panel Report, *India Solar Cells*, *supra* note 65, ¶ 7.135).

[81] *Id.* ¶ 5.38 (citing Panel Report, *India Solar Cells*, *supra* note 65, ¶ 7.115).

of the same issue of legal interpretation."[82] The Appellate Body disagreed with India, concluding that the Panel did not rely on previous jurisprudence as binding (recall that there is no *stare decisis* in WTO law) and did not disregard India's arguments. Instead, the Appellate Body felt that the Panel appropriately found that India's arguments were insufficient to factually distinguish the dispute at hand to those in *Canada—Renewable Energy*.

Ultimately, the Appellate Body rejected India's claim that the Panel acted inconsistently with Article 11 of the DSU in assessing its arguments under Article III:8(a) of the GATT. Having upheld the Panel's finding that the DCR measures are not covered by the derogation under Article III:8(a), the Appellate Body did not complete the legal analysis, nor did it need to address India's further claims regarding the application and interpretation of the remaining key terms under Article III:8(a).

E. Holding and Rationale on Article XX(j) Short Supply Exception[83]

After rejecting India's claims pertaining to Article III:8(a) of the GATT, the Appellate Body turned to India's conditional appeal of the Panel's finding that the DCR measures were not justified under the General Exception in Article XX(j). Article XX(j) provides as follows:

> Article XX: General Exceptions
>
> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent

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[82] *Id.* ¶ 5.39 (citing Appellate Body Report, *United States—Final Anti-Dumping Measures on Stainless Steel from Mexico*, ¶ 160, WTO Doc. WT/DS344/AB/R (Apr. 30, 2008) (*adopted* May 20, 2008) [hereinafter Appellate Body Report, *Stainless Steel Zeroing*] (this case has also been referred to as *US—Stainless Steel (Mexico)*), analyzed in *WTO Case Review 2008*, *supra* note 1; also citing Appellate Body Report, *United States—Continued Existence and Application of Zeroing Methodology*, ¶¶ 358–65, WTO Doc. WT/DS350/AB/R (Feb. 4, 2009) (*adopted* Feb. 19, 2009) [hereinafter Appellate Body Report, *Continued Zeroing*], analyzed in *WTO Case Review 2009*, *supra* note 1; also citing Panel Report, *China—Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum*, ¶¶ 7.55–.61, WTO Doc. WT/DS431/R (Mar. 26, 2014) (*adopted* Aug. 29, 2014), the Appellate Body Report of which was analyzed in *WTO Case Review 2014*, *supra* note 1; and also citing Panel Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 7.311–.317, WTO Doc. WT/DS379/R (Oct. 22, 2010) (*adopted* Mar. 25, 2011), the Appellate Body Report of which was analyzed in *WTO Case Review 2011*, *supra* note 1).

[83] *Id.* ¶¶ 5.45–.90.

> the adoption or enforcement by any contracting party of measures:
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> . . .
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> (j) essential to the acquisition or distribution of products in general or local short supply; Provided that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of the Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist.

Thus, the question at issue before the Panel was whether India's DCR measures were "essential to the acquisition or distribution of products in general or local short supply." On appeal, India claimed that the Panel erred in its interpretation and application of Article XX(j) and, again, acted inconsistently with its obligations under Article 11 of the DSU. Specifically, India argued before the Appellate Body that the lack of manufacturing capacity of solar cells and modules in India amounted to "a situation of local and general short supply" under Article XX(j) of the GATT.[84] In this regard, India argued that the terms "general or local short supply" should be read as contemplating that short supply is distinct from situations that can be addressed by international supply. In its view, interpretation of Article XX(j) is not applicable when imports subject Article XX(j) to apply only when a WTO Member applies export restraints, and not import restraints.

The Appellate Body began its analysis by recognizing its own two-tiered analysis of the general exceptions in Article XX of the GATT from previous WTO jurisprudence.[85] Step one of this analysis requires first determining whether a measure in dispute is provisionally justified under one of Article XX's paragraphs. Step Two requires determining whether the measure in dispute is consistent with the chapeau of Article XX. With respect to Step One, the respondent must show: (1) that the measure addresses the particular interest specified under the general exceptions; and (2) that there is a sufficient nexus between the measure and the interest protected, which is specified through the use of terms such as "necessary to" in Article XX(d) of the GATT or "essential to" in Article XX(j).

India Solar Cells provided the first opportunity for the Appellate Body to interpret Article XX(j) of the GATT. Given that Article XX(j) of the GATT does not include the term "necessary," as seen in Article XX(d), a key interpretive issue was whether the term "essential" in Article XX(j) introduces a more stringent

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[84] Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.51 (citing India's appellant's submission, ¶ 106).

[85] *Id.* ¶ 5.56 (citing e.g., Appellate Body Report, *US—Gasoline*, *supra* note 6, at 22).

legal threshold than its comparable counterpart. In previous Reports, the Appellate Body has explained the meaning of the term "necessary" is closer to "indispensable" than "making a contribution to."[86] Here, the Appellate Body felt that the process of "weighing and balances" factors used in relation to Article XX(d) was relevant in assessing the "essential" nature of a measure under Article XX(j). Specifically, a weighing and balancing of the extent to which the measure in dispute contributes to:[87]

(1) "[T]he acquisition or distribution of products in general or local short supply;"
(2) The relative importance of the societal interests or values that the measure is intended to protect; and
(3) The trade-restrictiveness of the challenged measure.

The Appellate Body began its textual analysis of Article XX(j) of the GATT by examining the phrase "products in . . . short supply." Referring to the *Shorter Oxford English Dictionary* (6th ed.), the Appellate Body recognized that the language refers to products "available only in limited quantity, scarce,"[88] referring also to a "shortage," defined as a "[d]efficiency in quantity; an amount lacking."[89] The Appellate Body justified its use of the term by pointing out that the official French and Spanish translations of Article XX(j) refer to "pénurie" and "penuria," respectively, the English translations of which are "shortage." With respect to the word "supply," the Appellate Body referred to its definition as the "amount of any commodity actually produced and available for purpose," emphasizing also that the ordinary meaning of the word "supply" correlates directly to "demand."[90]

Perhaps the most important analysis pertained to the question as to the extent of the geographical area or market in which the quantity of "available" supply of a product should be compared to demand. As recognized by the Appellate Body:[91]

> The dictionary definitions of "local" include "in a particular locality or neighborhood, esp. a town, county, etc., as opp. to the country as a whole" and "limited or peculiar to a particular place or places." [Citation omitted]. The word "general," in turn, is

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[86] *Id.* ¶ 5.62 (citing Appellate Body Report, *Korea Beef*, *supra* note 43, ¶ 161).

[87] *Id.* ¶ 5.63 (citing, e.g., Appellate Body Report, *Fur Seals*, *supra* note 46, ¶ 5.169).

[88] *Id.* ¶ 5.65 (citing SHORTER OXFORD ENGLISH DICTIONARY, Vol. 2, 3115 (6th ed. 2007).

[89] Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.65 (citing SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 88, at Vol. 2, 2813).

[90] *Id.* ¶ 5.66 (citing SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 88, at Vol. 2, 3118).

[91] *Id.* ¶ 5.67 (citing SHORTER OXFORD ENGLISH DICTIONARY, *supra* note 88, at Vol. 1, 1619, 1081).

> relevantly defined as "all or nearly all of the parts of a (specified or implied) whole, as a territory, community, organization, etc.; completely or nearly universal; not partial, particular, local, or sectional."

The Appellate Body understood this to mean that the phrase "products in general or local short supply" is focused on products for which a situation of short supply exists within the territory of the respondent.

Regarding the "availability" of products under Article XX(j) of the GATT, the Appellate Body noted that the phrase "products in general or local short supply" is immediately preceded by the terms "acquisition or distribution of." Accordingly, the Appellate Body determined that Article XX(j) thus does not limit the scope of potential sources of supply to "domestic" products manufactured in a particular country.

Lastly, with respect to any temporal aspect of the phrase "products of general or local short supply," the Appellate Body recognized that any measures justified under Article XX(j) of the GATT must cease once the conditioning giving rise to them are no longer present. That is to say, a measure in question is not expected to last indefinitely. In the view of the Appellate Body, "[a]n analysis of whether a respondent has identified 'products in general or local short supply' is therefore not satisfied . . . by considering only whether there is a mathematical difference at a single point in time between demand and the quantity of supply that is 'available' for purchase in a particular geographical area or market."[92]Instead, a holistic consideration of trends in supply and demand over time is required.

Overall, the Appellate Body made clear that an assessment of whether a WTO Member has identified "products in general or local short supply" requires a case-by-case analysis of the relationship between supply and demand based on a holistic consideration of all relevant facts.

On application of its interpretation, the Appellate Body considered India's argument that alleged risks inherent to the continued dependence on imported solar cells and modules relates to the issue of supply availability, but relied on the Panel's factual finding that India had not actually identified any actual disruptions in imports of solar cells and modules in its market. The Appellate Body also dismissed policy arguments put forth by India, stating that such considerations may also inform the nature and extent of supply and demand, but nonetheless, respondents are still required to actually demonstrate that imported products are not "available" to meet demand. Lastly, the Appellate Body rejected India's argument that the Panel's reading of Article XX(j) of the GATT allows only for export restraints to fall under its scope. Here, the Appellate Body again relied on the Panel's reasoning, where it pointed out that, for example, a WTO Member could "establish a temporary monopoly in respect of the sale of that product as a measure essential to the distribution of such products within its

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92 *Id.* ¶ 5.70.

territory" and that such "a monopoly could be enforced and given effect through restrictions on both the exportation and the importation by private traders of the product concerned."[93]

Accordingly, the Appellate Body rejected India's argument that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in its market, and, instead, emphasized again the case-by-case nature of the analysis and that, here, the evidence did not show a lack of "availability" to meet the demand of India's market. On a related note, with respect to India's claims under Article 11 of the DSU, the Appellate Body recognized that India's arguments were based on its interpretation of Article XX(j) of the GATT, and that its disagreement with the Panel regarding this interpretation was not sufficient to reach a violation of Article 11 of the DSU. As put simply by the Appellate Body, "India is 'merely' recasting its arguments before the Panel under the guise of an Article 11 claim."[94] On the basis of the above, the Appellate Body upheld the Panel's findings that solar cells and modules were not "products in general or local short supply" in India within the meaning of Article XX(j) of the GATT and therefore the DCR measures are not justified as a general exception to the GATT.

F. Holding and Rationale on Article XX(d) Administrative Necessity Exception[95]

The last substantive claim examined by the Appellate Body also dealt with a general exception under Article XX of the GATT. In this regard, Article XX(d) provides as follows:

> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trademarks and copyrights, and the prevention of deceptive practices[.]

On appeal, India claimed that the Panel erred in its interpretation and application of Article XX(d) of the GATT when the Panel found that the international instruments identified by India did not have direct effect in India and therefore were not "laws or regulations" under the article.

With respect to Article XX(d) of the GATT, the Appellate Body first focused on the examination of the proper interpretation of the terms "laws or

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93 *Id.* ¶ 5.82 (quoting Panel Report, *India Solar Cells*, *supra* note 65, ¶ 7.230, n.566).

94 Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.88.

95 *See id.* ¶¶ 5.91–.151.

regulations" in the context of the phrase "to secure compliance with laws or regulations."

In this regard, the Appellate Body's textual analysis began with the ordinary meaning of the terms "laws" and "regulations." The Appellate Body noted that the term "law" means "a rule of conduct imposed by authority" and that "regulation" means "[a] rule of principle governing behavior or practice; *esp.* such a directive established and maintained by an authority."[96] Relying on its own analysis in *Mexico—Taxes on Soft Drinks*,[97] the Appellate Body reiterated that the terms "laws or regulations" in Article XX(d) refer to "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system."[98] The Appellate Body similarly re-iterated that such "laws and regulations" encompass "rules adopted by a WTO Member's legislative or executive branches."[99] In *Mexico—Taxes on Soft Drinks*, the Appellate Body also explained that "to secure compliance" within the meaning of Article XX(d) of the GATT is not the same as enforcing compliance. That is to say, "absolute certainty in the achievement of a measure's stated goal, as well as the use of coercion, are not necessary components of a measure designed 'to secure compliance' within the meaning of Article XX(d)."[100] Measures qualify under Article XX(d) as long as they seek to secure observance of specific rules, regardless of the outcome.

The Appellate Body summed up its analysis here by stating that:[101]

> [I]n determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument

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[96] *Id.* ¶ 5.106 (citing *Law*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/106405 (last visited May 5, 2017); also citing *Regulation*, OXFORD ENGLISH DICTIONARY ONLINE, http://www.oed.com/view/Entry/161427 (last vistied May 5, 2017)).

[97] Appellate Body Report, *Mexico—Tax Measures on Soft Drinks and Other Beverages*, ¶ 79, WTO Doc. WT/DS308/AB/R (Mar. 6, 2006)_(*adopted* Mar. 24, 2006) [hereinafter Appellate Body Report, *Mexico—Taxes on Soft Drinks*], analyzed in *WTO Case Review 2006*, *supra* note 1.

[98] Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.106 (citing Appellate Body Report, *Mexico—Taxes on Soft Drinks*, *supra* note 97, ¶ 70).

[99] *Id.* ¶ 5.107 (citing Appellate Body Report, *Mexico—Taxes on Soft Drinks*, *supra* note 97, ¶ 69).

[100] *Id.* ¶ 5.108 (citing Appellate Body Report, *Mexico—Taxes on Soft Drinks*, *supra* note 97, ¶ 74).

[101] *Id.* ¶ 5.113.

> operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a [WTO] Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule.

The Appellate Body then turned an analysis of whether the Panel erred in assessment of the domestic instruments identified by India. There, the Panel had found that India failed to demonstrate that its DCR measures were designed to secure compliance with laws or regulations under Article XX(d) of the GATT. India proceeded to argue that: (1) the non-binding instruments at issue (i.e. the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change) still qualified as "laws" under Article XX(d) because India's legal system comprises both "binding" laws as well as policies and plans, which together India termed a "framework for executive action;"[102] (2) the Panel's interpretation of "to secure compliance" limits the scope of Article XX(d) to measures that prevent actions that would be illegal under the laws or regulations at issue; and (3) the Panel should not have considered a fourth measure (Section 3 of India's Electricity Act of 2003) in isolation of the three non-binding instruments mentioned above because, taken together, all four instruments set out an obligation to ensure ecologically sustainable growth in India, for which the DCR measures at issue secure compliance.

With respect to India's first argument, the Appellate Body disagreed with the Panel to the extent that the Panel may have suggested that the scope of "laws or regulations" under Article XX(d) is limited to "legally enforceable rules of conduct under the domestic legal system of a WTO Member.[103] With respect to India's second argument, the Appellate Body disagreed with India, stating that it did not see the Panel's Report as having found that "to secure compliance" in Article XX(d) restricts its scope to measures that prevent actions that would otherwise be illegal.

After disposing, relatively quickly, of India's first two arguments, the Appellate Body turned to India's third argument. Here, the Appellate Body recalled that the Panel had examined the four instruments individually to determine whether any of them qualified as "laws or regulations" under Article XX(d) of the GATT, ultimately concluding that Section 3 of India's Electricity Act of 2003 qualified as a "law" but also finding that the DCR measures at issue

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[102] *Id.* ¶ 5.117 (citing India's appellant's submission, ¶ 171).

[103] Appellate Body Report, *India Solar Cells*, *supra* note 64, ¶ 5.121 (citing Panel Report, *India Solar Cells*, *supra* note 65, ¶ 7.311).

were not designed to secure compliance with said law. The Appellate Body noted, however, that a respondent may be able to identify a specific provision of a single domestic instrument that contains a given rule, obligation, or requirement with which it seeks "to secure compliance" for purposes of Article XX(d). On this basis, the Appellate Body mildly chastised the Panel, stating that "it may have been appropriate for the Panel to have begun by assessing whether the passages and provisions of the domestic instruments that India identified, when considered together, set out the rule alleged by India."[104] Nonetheless, the Appellate Body found that such a consideration would not have led to a different conclusion by the Panel.

The last substantive claim put forward by India that the Appellate Body addressed was whether the Panel erred in its assessment of the international instruments identified by India, and in particular whether such instruments had direct effect in India and were thus "laws or regulations" under Article XX(d) of the GATT. India first argued that international instruments have direct effect in India because the executive branch of the Central Government has the authority to "implement" or "execute" such instruments absent any actions by the legislative. India also relied on opinions of its Supreme Court, which has recognized the principles of sustainable development under international environmental law to be part of the environmental and developmental governance of India.

The Appellate Body recalled that, "[a]n assessment of whether a given international instrument or rule forms part of the domestic legal system of a [WTO] Member must be carried out on a case-by-case basis, in light of the nature of the instrument or rule and the subject matter of the law at issue, and taking into account the functioning of the domestic legal system of the [WTO] Member in question."[105] The Appellate Body then acknowledged India's arguments and explanations pertaining to the power of its executive branch to "implement" international instruments as long as they are not in conflict with domestic legislation. However, the Appellate Body reiterated that a determination of whether such instruments fall within the scope of "laws or regulations" under Article XX(d) still has to be made on a case-by-case basis.

The Appellate Body then addressed India's argument that given the relevant jurisprudence of its Supreme Court, the relevant international instruments have direct effect in India. However, here again it did not consider the Decisions and observations of India's Supreme Court to be sufficient to demonstrate the requirements of Article XX(d) of the GATT. Instead, the Appellate Body stated that the Decisions and observations of India's Supreme Court cited by India highlighted "the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, as well as for guid[ed] the exercise of the decision-making power of the executive branch of the Central Government."[106] Accordingly, the Appellate Body upheld the Panel's

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104 *Id.* ¶ 5.128.
105 *Id.* ¶ 5.140.
106 *Id.* ¶ 5.148.

findings that India failed to demonstrate the relevant international instruments qualified as "laws or regulations" under Article XX(d).

As such, India lost on all of its claims under Article XX of the GATT. The Appellate Body did acknowledge the next step of its analysis under Article XX would involve the "essentiality" and "necessity" of the measures at issue under Articles XX(j) and XX(d), respectively, and the *chapeau* of Article XX but found it unnecessary to examine said claims any further.

G. Commentary: India's Strategy

Given the Panel and Appellate Body findings and conclusions in *Canada—Renewable Energy*, the outcome in *India Solar Cells* was predictable. Although India's claims under Article XX(j) of the GATT were novel, the underlying facts of the dispute were similar enough that there was little chance India would be successful in its arguments under Article III of the GATT and Article 2:1 of the TRIMs Agreement, with similar odds for the successful justification under a General Exception in Article XX. Instead, the most interesting questions are centered on India's decisions to: (1) continue fighting a (likely) losing dispute; and (2) wait so long to file a counter-dispute against the United States for similar measures in various US States.[107] The answers are likely time and politics, respectively, and they may be related. By dragging out a dispute India knew it would lose, it could continue implementing a WTO-inconsistent program, while simultaneously providing it more ammunition against the US in a countersuit, regardless of the findings and conclusions in *Canada—Renewable Energy*. However, the downside of such a potential plan is that this also gives programs in US states even more time to benefit US businesses.

Regardless, it seems clear that WTO Members are increasingly gaming the system, knowing that disputes can be dragged out for years given both the rules of procedures as written in the DSU, as well as the increasing delays due to staffing within the WTO Secretariat (with respect to Panel Report delays) and the WTO Appellate Body (with respect to Appellate Body Report delays). Year after year, it becomes increasingly clearer that a reform of the WTO dispute settlement system is needed, even if it has generally been successful during the past 20 years.

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[107] *See* Tom Miles, *India Takes U.S. Renewable Energy Dispute to the WTO*, REUTERS (Sept. 12, 2016), http://www.reuters.com/article/us-india-usa-trade-idUSKCN11I165.

III. TRADE REMEDIES—TARGETED DUMPING AND ZEROING

A. Citation

> Appellate Body Report, *United States—Anti-Dumping and Countervailing Duties on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R (Sept. 7, 2016) (adopted Sept. 26, 2016) (short name: *United States Targeted Dumping Zeroing*) [108]

B. AD Facts: *Nails II Methodology*, *DPM*, and Targeted Zeroing[109]

"Tedious" and "meddlesome" are not compliments. A writer whose prose—legal or non-legal, fiction or non-fiction, is tedious needs to edit that prose, typically by taking a breather and revisiting the work with fresh syntax and diction. A character in any one of these genres—much less the narrator, who "meddles" in the lives of others—wins few friends, no matter how pure-hearted the officiousness. Alas, the *Targeted Dumping Zeroing* case ranks high on the list of Appellate Body Reports that are tedious to read and in which the Appellate Body meddled in the behavior of a central character. The case consists of one hundred and seven pages of small font text, and smaller font footnotes, along with various redundancies. Moreover, as noted earlier, the result intrudes on the considered discretion of the United States Department of Commerce (DOC).

All this for two bottom line points. First, zeroing in targeted dumping cases is illegal under Article 2:4:2 of the WTO *Antidumping Agreement* and unfair under Article 2:4 thereof. Second, a subsidy is regionally specific under Article 2:2 of the WTO *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*), even if the geographic availability of the subsidy is defined negatively by excluding another region, and the region included by implication accounts for most of the territory of the granting Member. There they are: the key points, amplified as follows at the risk of begging the indulgence of the reader to persevere.

The United States imposed antidumping (AD) duties and countervailing duties (CVDs) on large residential washers (LRWs), commonly known as "washing machines," which were made in Korea by three Korean producer-

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[108] The Panel Report is Panel Report, *United States—Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/R (Mar. 11, 2016) (*adopted as modified* Sept. 26, 2016) [hereinafter Panel Report, *United States Targeted Dumping Zeroing*]. (At the Appellate stage, there were 11 Third Party participants: Brazil, Canada, China, European Union, India, Japan, Norway, Saudi Arabia, Thailand, Turkey, and Vietnam.

[109] *See* Appellate Body Report, *United States—Anti-dumping and Countervailing Duties on Large Residential Washers from Korea*, ¶¶ 1.1, 1.3, 1.4 n.10 & 13, 5.1-5–.5, 5.5 n.62, 5.6–.9, n. 77, 5.10–.13, WTO Doc. WT/DS464/AB/R (Sept. 7, 2016) (*adopted* Sept. 26, 2016) [hereinafter Appellate Body Report, *United States Targeted Dumping Zeroing*].

exporters, most notably, Samsung and LG Electronics (LGE). The original AD investigation, which the DOC undertook, was initiated on January 19, 2012. Suspecting targeted dumping thanks to allegations from the petitioning American LRW producers, the DOC used the so-called "*Nails II*" Methodology to decide if subject merchandise was being dumped with respect to a particular purchaser, geographic region, or time period, and thus to decide whether to make "W-T" price comparisons (*i.e.*, compare Weighted Average Normal Value data against Individual Transaction Export Price data).

Zeroing cases are complex enough, but when they entail targeted dumping, the technicalities skyrocket. That is because before the DOC gets to the question of zeroing, it must decide if dumping is "targeted," and that means the DOC must have a way to make that decision that is not neither arbitrary nor capricious, nor so bamboozling that respondents could tack on a charge of non-transparency to any other claim they might lodge. The test—many of them, actually, to decide whether there are price differences across purchasers, places, or periods, and if so, whether those differences are significant—the DOC concocts, however well-intentioned the testers might be, make fact patterns involving dumping to everyone, everywhere, and every time look like child's play.

To use a nasty metaphor, targeted dumping is like a sniper picking out one buyer, one region, or one time period to fire at with its dumped merchandise. Generic dumping is like carpet bombing, dropping merchandise across buyers everywhere, 24/7/365. Spotting a sniper is hard. Detecting aircraft across the skies is easy. That said, what happened in the case is genuinely interesting, at least to trade geeks, or to the adventurous seeking to draw big picture inferences from granular analysis.

The sniper search starts with the DOC reliance on the *Nails II Methodology* up until March 2013. It was a Two-Step Test using model groupings of subject merchandise, with each model given a "Control Number" or "CONNUM." (Already at this point in the Appellate Body Report—roughly page 20—the acronyms are so weighty, the jargon so thick, the reader may be forgiven to thinking the case involves Top Secret classified intelligence, with national security in the balance.) The Report fails to explain the concept of "model," but from previous zeroing cases, particularly the 2001 *EC—Bed Linen* dispute, it may be posited that different models are different types of LRWs.[110] For instance, one model might be top-loading washing machines; another model might be front-loaded machines; and a third might have remote control functionality. They are all within the class or kind of merchandise being investigated; that is, they are all like products for purposes of the trade remedy case (in comparison to what is sold in Korea, and what is produced in the United States). But certain features allow them to be grouped into categories, with the fancy and somewhat misleading label "models."

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[110] Appellate Body Report, *European Communities—Anti-Dumping Duties on Imports of Cotton-Type Bed Linen from India*, WTO Doc. WT/DS141/AB/R (Mar. 1, 2001) (*adopted* Mar. 12 2001) [hereinafter Appellate Body Report, *EC—Bed Linen*], analyzed in the *WTO Case Review 2001*, *supra* note 1.

Regardless, Step One was the "Standard Deviation Test," applied to each CONNUM. The DOC considered whether there were differences in Export Prices of subject merchandise sold to an allegedly targeted group—that is, an American customer, region of the United States, or time during the Period of Investigation (POI)—compared to a benchmark price. Note this consideration implies that in advance, a particular targeted buyer, place, or time is identified (namely, by the petitioner). For each CONNUM, the benchmark equaled one standard deviation below the weighted average mean price of subject merchandise. So the DOC checked to see if the weighted average price to one targeted group in a particular CONNUM was below that benchmark—in effect, off by more than one standard deviation from an average price. The DOC said the Test was passed whenever more than 33% of the sales to a targeted group were off by more than one standard deviation.

Step Two was the "Gap Test." The DOC used that test to decide if any price differences for subject merchandise it observed were significant. To gauge price differences in respect of each CONNUM, the DOC looked at the (1) weighted average sales price to the targeted group and (2) next highest weighted average sales price to a non-targeted group (a different customer, region, or time period). Here, too, the DOC needed a benchmark, so it calculated the average gap among weighted average prices across all non-targeted groups. If the gap between (1) and (2) for any CONNUM exceeded the average gap, then the sales of that CONNUM passed the Gap Test. The DOC only gave this passing score if the sales of subject merchandise that passed the Test accounted for more than 5% of the respondent's sales (measured by volume for the targeted purchaser, region, or time period). In other words, the price differences for that subject merchandise were significant.

Put simply (which the Appellate Body did not do), the Standard Deviation Test is about patterns: whether goods are sold at different prices to different customers, in different places, or at different times, with one standard deviation from a defined benchmark average price. The Gap Test is about significance: whether any difference matters, with a defined benchmark of average prices of regular (non-pattern) sales. Note (which the Appellate Body also failed to do) that the 33% and 5% thresholds for passage seem rather low; they appear to be an inherent pro-petitioner bias (i.e., in favor of domestic producers alleging dumping) in the way the DOC constructed the Tests.[111]

Whenever both the Standard Deviation and Gap Tests were met, the DOC computed weighted average dumping margins in two ways. First, it used W-W comparisons (i.e., comparisons of weighted average Normal Value price data for a foreign like product against weighted average Export Price data of subject merchandise), without zeroing. Second, it used W-T comparisons, with zeroing. The DOC compared the results of these two dumping margin calculations. If the DOC discovered the difference between these two results was

[111] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.5, n.62.

meaningful, then it used W-T comparisons for all export transactions of subject merchandise.

Petitioners (domestic American producers of washing machines) in the underlying AD investigation alleged Samsung and LGE engaged in targeted dumping of subject merchandise, but those respondents countered the suspect sales transactions were normal promotional practices. That defense went to intent, but dumping is a strict liability offense. The DOC said it is not obliged to consider why price differences exist, and turned immediately to its *Nails II* Methodology. In Step One, the Standard Deviation Test showed a pattern of prices across customers, regions, and time periods. The pattern was evident in all sales by the respondents. In Step Two, the Gap Test proved the pattern of differential pricing was significant. With both Tests met, the DOC tried W-W comparisons but said such comparisons concealed differences between Export Prices of subject merchandise associated with different customers, regions, and time periods, and that there was a meaningful difference between the dumping margin calculated using W-W comparisons and the dumping margin calculated using W-T comparisons. So the DOC applied W-T comparisons—and zeroing—to all Samsung and LGE sales, thus yielding a final affirmative dumping margin. Coupled with a final affirmative injury determination from the International Trade Commission (ITC), the result was automatic: an AD order from DOC to Customs and Border Protection (CBP)—the "Washers AD Order" of February 15, 2013.

At the first Administrative Review of this Order, on April 1, 2014, DOC applied the "*Differential Pricing Methodology*" (*DPM*) which replaced *Nails II Methodology* as of March 2013. Like its predecessor, the point of the *DPM* is to determine whether to apply W-T comparisons to compute dumping margins when targeted dumping is alleged. Unlike the *Nails II Methodology*, *DPM* has Three Steps.[112] Also, unlike *Nails II*, *DPM* was not concerned with prices that are targeted at a specific buyer, region, or time. *DPM* does not identify *a priori* any allegedly targeted purchasers, places, or durations. Rather, *DPM* focuses on differences in prices, regardless of whether prices are above or below an average. For any given export transaction, to any purchaser, region, or period, *DPM* looks for six possible price variations:

(1) higher prices to a specific purchaser
(2) lower prices to a specific purchaser
(3) higher prices in a specific region
(4) lower prices in a specific region
(5) higher prices in a specific period
(6) lower prices in a specific period

The DOC demarcates purchasers based on customer codes. The DOC identifies regions by United States postal zip codes, and then grouped into regions

[112] The two Tests also differed in that the DOC could self-initiate the *DPM*, whereas the DOC could not trigger *Nails II* without a targeted dumping allegation from a petitioner.

based on standard deviations it (specifically, the Census Bureau) publishes. It sets time periods by quarters (four three-month periods). The DOC considers merchandise to be comparable (i.e., subject merchandise in relation to domestic products) based on CONNUMs and sale characteristics (other than by purchaser, region, or time period).

Step One of the *DPM* is the "*Cohen's d Test*." This *Test* reveals the extent of the difference between the average price from (1) a test group of sales of subject merchandise to a particular purchaser, region, or time period, and (2) a comparison group that consists of all other sales of comparable merchandise. For the DOC to use this *Test*, there must be at least two transactions in each of the test and comparison groups, and the quantity of sales in the comparison group must be at least 5% of the total sales quantity of all comparable merchandise. The *Test* produces the so-called "*Cohen's d Coefficient*," which measures the extent to which net prices to a particular buyer or geographic area, or during a particular time frame, differ significantly from the net prices of all other sales of comparable merchandise. (The Appellate Body did not explain why the Test uses "net" prices.)[113] The DOC used three bands: (1) a "large" difference was one with a *Coefficient* of 0.8 or more; (2) a "medium" difference was above 0.2 but less than 0.8; and (3) a "small" difference was 0.2 or less. The DOC considered only a "large" difference as indicative of significant price differences—that is, as evidence of targeted dumping.

Step Two of the *DPM* is the "*Ratio Test*." It addresses the question, "How significant are the price differences for all sales measured by the *Cohen's d Test*?" The DOC examines the value of export sales of subject merchandise to purchasers, regions, and time periods that pass the *Cohen's d Test* (i.e., that are "large" in terms of price differences) in relation to the total export sales transactions of subject merchandise. If this fraction or ratio is above 66%, then the DOC calculates a dumping margin using W-T comparisons and zeroing for all export transactions (the sales that constitute the denominator of the faction)—those that fit the pattern (the numerator), and those that do not (again, the denominator). If the ratio is between 33 and 66%, then DOC uses both W-T and W-W comparisons—the "Mixed Comparisons." Only if the ratio is below 33% does the DOC stick with W-W comparisons.

The Third Step of the *DPM* is the "*Meaningful Difference Test*." Here, the DOC asked whether using W-W comparisons could account appropriately for differences found in Steps One and Two. In other words, with no particular purchaser, region, or time period picked out in advance, but having found large price differences that are significant, the DOC queried whether it could capture this targeted dumping with standard comparisons of weighted average Normal Values and weighted average Export Prices. The DOC checked the weighted average dumping margin from W-W comparisons against the weighted average dumping margin from W-T comparisons. If there was a difference between the two dumping margins, then was it "meaningful," because if so, then the DOC

[113] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.9.

inferred W-W comparisons could not account for targeted dumping. "Meaningfulness," said the DOC, was a relative change of 25% or more (i.e., if the difference between the W-W and W-T margins was 25% or more). The DOC also said any difference was meaningful (as the Appellate Body put it, sadly without explanation, leaving the point vague) "if the weighted average dumping margin moves across the *de minimis* threshold."[114]

How did the DOC then to decide whether to use W-T comparisons under the *DPM*? Assuming the *Meaningful Difference Test* was satisfied, the answer depends on the outcome of the *Ratio Test*. If the ratio exceeded 66%, then it used W-T comparisons for all export transactions of subject merchandise. If the *Ratio Test* result was between 33 and 66%, then it used W-T comparisons to sales passing the *Cohen's d Test*, and W-W comparisons to the remaining sales. If that result was below 33%, then the DOC used W-W comparisons.

As with the *Nails II Methodology*, with the *DPM*, whenever the DOC used W-T comparisons, it zeroed. That is, it re-calibrated to zero any negative W-T comparison. The DOC aggregated results from multiple comparisons between the (1) Weighted Average Normal Value of the foreign like product (i.e., prices of washing machines sold in Korea) and (2) Export Price of each Individual Transaction (i.e., prices of sales of subject merchandise in the United States). If (1) exceeded (2), then the dumping margin was positive, so DOC left that result alone. But if (2) exceeded (1), suggesting Korean washers were more expensive in the United States than Korea, then the dumping margin was negative. Across the many W-T comparisons it made, the DOC did not let a negative margin offset a positive one. Rather, the DOC set any negative margin to zero. Consequently, the final overall dumping margin was larger than it might have been, but for the zeroing.

Based on the *DPM*, the DOC issued the result of the first Administrative Review in September 2015. It said 47.12% of LGE washer sales passed the *Cohen's d Test*, between 33 and 66% passed the *Ratio Test*, and the subject merchandise passed the *Meaningful Difference Test*. So the DOC used W-T comparisons with zeroing to sales that passed the *Cohen's d Test*, and W-W comparisons without zeroing to the remaining LGE sales. DOC then combined the overall results from W-T and W-W comparisons, but disregarded the overall negative comparison results from W-W comparisons—so-called "Systematic Disregarding" (explained below).

Korea railed against the *Nails II Methodology* and *DPM* in the original investigation and Administrative Review, respectively. Buried in the details of these schemes was the devil of illegality. The United States violated Articles 2:4 and 2:4:2 of the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994* (*Antidumping* or *AD Agreement*).

Korea disputed the way in which the DOC decided whether it would apply the W-T comparisons when computing the dumping margin. True, the DOC used the *Nails II Methodology* and *DPM* to combat what it said was targeted

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[114] *Id.* ¶ 5.12.

dumping—that is, dumping of subject merchandise with respect to a particular purchaser of that merchandise, in a particular region of the United States, or in a particular time period. Both concoctions were legally problematic on several grounds (explained below). Moreover, once the DOC opted to use the W-T comparisons, it engaged in zeroing. Korea said that zeroing in the context of W-T comparisons was illegal. Korea's claims were both "as such" and "as applied."

C. CVD Facts: Tax Credits and Subsidization[115]

As for the CVDs, the DOC imposed on washing machines, Korea focused on two tax programs: the "Tax Deduction for Research and Manpower Development," and "Tax Deduction for Facilities Investment." Korea established them under Articles 10(1)(3) and 26, respectively, of Korea's *Restriction of Special Taxation Act* (*RSTA*), hence they were known as the "*RSTA* Article 10(1)(3) Tax Credit Program" and "*RSTA* Article 26 Tax Credit Program." (Though their full rubrics mentioned tax "deduction," they functioned as a credit.) The DOC found that Samsung received the Tax Credits, but Korea disputed the DOC conclusion that these Credits were specific.[116] Korea also contested the way in which the DOC computed the *ad valorem* subsidization rate for one respondent-producer exporter, Samsung Electronics Co. (Samsung Electronics).

The *RSTA* Programs were tax credits that reduced corporate income tax otherwise owed, and both depended on proof provided to Korea's National Tax Service that Samsung had made certain expenditures that rendered it eligible for the credits. Any Korean company was automatically eligible for either or both Programs. Under both Programs, a company would get a tax credit only after it had made the underlying eligible expenditure. If the company lost money in a particular tax year, then it could carry forward the credit for up to five years. If it had a leftover credit after applying it to its corporate tax bill, it could carry forward the unapplied credit for five years.

The aim of the Article 10(1)(3) Tax Credit Program was to promote investment by Korean companies in R&D pertinent to their business specialties, and thereby stimulate general economic activity across all sectors. The companies could claim a tax credit equal to 20% of their annual R&D expenses on so-called "new growth engine industries" and "core technology."

The Article 26 Tax Credit Program was designed to be an incentive for Korean companies to invest in a variety of business assets. Any Korean company could get a corporate income tax credit worth 7% of the value of all qualifying investments in such assets. To qualify for the credit, it had to make the

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[115] *See id.* ¶¶ 1.1, 1.3, 1.4 n.10 & 13, 5.1-5–.5, 5.5 n.62, 5.6–.9, n.77, 5.10–.13, 5.204–.211.

[116] Samsung and three Samsung subsidiaries (Samsung Gwangju Electronics Co., Ltd. (SGEC), Samsung Electronics Service (SES), and Samsung Electronics Logitech (SEL)) received the Article 10(1)(3) Tax Credit, while Samsung and two of its subsidiaries (SGEC and SEL) got the Article 26 Tax Credit. *See id.* ¶ 1.4, n.14.

investment outside of the "Seoul Metropolitan Area" (also called the "Seoul Overcrowding Area"). The Korean government used this Program as one tool to address congestion and urban sprawl in and immediately around Seoul. The Area excluded from the Program equaled 2% of Korea's landmass, but accounted for a large proportion of the Korean population. Thus, any company could claim for the credit, as long as its business asset investment was in the other 98% of the country.

With respect to both the Article 10(1)(3) and 26 Tax Credit Programs, when the DOC calculated the *ad valorem* subsidization rate for Samsung, it did not tie the subsidies under these Programs to the subject merchandise. Instead, the DOC attributed the subsidies to all products Samsung made in Korea—goods the DOC was investigating, and all other non-investigated products. The DOC said it could not figure out how the tax credits were tied to particular products. Consequently, when the DOC calculated the subsidization rate, the DOC "divided the total amount of tax credits received by all of Samsung's businesses units by the total value of all of Samsung's production in Korea" during the POI.[117]

Samsung countered that the DOC should have realized the majority of the tax credits under both Programs related to expenditures attributable to the non-investigated products. So, said Samsung, the DOC should have computed the *ad valorem* subsidization rate associated with these Programs "by dividing the amount of tax credits earned by the digital appliance business unit by the sales value of the products manufactured by that unit."[118]

Unsurprisingly, the subsidization rate the DOC calculated by not tying the Tax Credit Programs to subject merchandise was higher than it would have been had the DOC opted for the approach Korea sought. In turn, Korea alleged the DOC rate resulted in imposition of a CVD in excess of the actual subsidy. That was illegal under Article VI:3 of the *General Agreement on Tariffs and Trade* (GATT), which states:

> No countervailing duty shall be levied on any product of the territory of any contracting party imported into the territory of another contracting party *in excess of* an amount equal to the estimated bounty or subsidy determined to have been granted, directly or indirectly, on the manufacture, production or export of such product in the country of origin or exportation, including any special subsidy to the transportation of a particular product. The term "countervailing duty" shall be understood to mean a special duty levied for the purpose of offsetting any bounty or subsidy bestowed, directly or indirectly, upon the manufacture, production or export of any merchandise.[119]

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[117] *Id.* ¶ 5.250.

[118] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.249.

[119] Emphasis added. This provision contains an *Ad Article* on multiple currency practices, indicating that such practices, particularly currency depreciation, may be an

It also was illegal under Article 19:4 of the *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*), which states:

> No countervailing duty shall be levied on any imported product *in excess of* the amount of the subsidy found to exist, calculated in terms of subsidization per unit of the subsidized and exported product.[120]

These provisions require that the amount of any subsidy be calculated (in the language of the rest of Article 19:4) in terms of the subsidization per unit of the product that is subsidized and exported.

Specifically, in making a "per unit" computation, an investigating authority like the DOC divides the total amount of the subsidy by the total sales value of the subsidy to which the subsidy is attributable. The result is a subsidization rate, and a CVD may be imposed up to (but not "in excess of") that rate. Under the Appellate Body precedent in the 2004 *Softwood Lumber IV CVD* case, the numerator and denominator of the per unit subsidization rate must match.[121] That is, the aggregate subsidy amount in the numerator must correspond to the sales value of goods in the denominator that receive the subsidy.

D. Issues and Panel Holdings

As the meaningful difference in the AD versus CVD facts intimates, most of this detailed and technical case scrutinizes the behavior of the DOC with respect to AD duties, not CVDs. The Appellate Body considered whether the DOC violated Article 2:4:2 (second sentence) of the *AD Agreement* in using the *Nails II Methodology* and *DPM*. This provision, and the paragraph *chapeau* to it, says:

> 2:4. *A fair comparison shall be made between the export price and the normal value*. This comparison shall be made at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly

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export subsidy subject to CVDs, or a form of dumping subject to AD duties. Though not pertinent to the case at bar, this fascinating Interpretative Note is relevant to the contemporary debate about currency manipulation.

[120] Emphasis added. The footnote to this provision states: "As used in this *Agreement* 'levy' shall mean the definitive or final legal assessment or collection of a duty or tax."

[121] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.267 (citing Appellate Body Report, *United States—Final Countervailing Duty Determination with Respect to Certain Softwood Lumber from Canada*, ¶ 164 n.196, WTO Doc. WT/DS257/AB/R, (Jan. 19, 2004) (*adopted* Feb. 17 2004) [hereinafter Appellate Body Report, *US—Softwood Lumber IV*]).

as possible the same time. Due allowance shall be made in each case, on its merits, for differences which affect price comparability, including differences in conditions and terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. [Footnote omitted.] In the cases referred to in paragraph 3 [in which Constructed Export Price must be used in lieu of Export Price, because the latter is unreliable due to an affiliated relationship between the exporter and importer of subject merchandise], allowances for costs, including duties and taxes, incurred between importation and resale, and for profits accruing, should also be made. If in these cases price comparability has been affected, the authorities shall establish the normal value at a level of trade equivalent to the level of trade of the constructed export price, or shall make due allowance as warranted under this paragraph. The authorities shall indicate to the parties in question what information is necessary to ensure a *fair comparison* and shall not impose an unreasonable burden of proof on those parties.

. . . .

2.4.2. Subject to the provisions governing *fair comparison* in paragraph 4, the existence of margins of dumping during the investigation phase *shall normally* be established on the basis of a comparison of a weighted average normal value with a weighted average of prices of all comparable export transactions or by a comparison of normal value and export prices on a transaction-to-transaction basis. *A normal value established on a weighted average basis may be compared to prices of individual export transactions if the authorities find a pattern of export prices which differ significantly among different purchasers, regions or time periods, and if an explanation is provided as to why such differences cannot be taken into account appropriately by the use of a*

> *weighted average-to-weighted average or transaction-to-transaction comparison*.[122]

The first and second sentences of Article 2:4:2 demand close reading.

The first sentence of Article 2:4:2 establishes two symmetrical ways to compare data the DOC "shall normally" use to compute a dumping margin, W-W and T-T (i.e., Individual Transaction to Individual Transaction comparisons, whereby Normal Value price data for a foreign like product are compared with Export Price data of subject merchandise on a transaction-specific basis). There is no hierarchy between these two methodologies, as the Appellate Body held in its 2006 *Softwood Lumber V Compliance* Report.[123] The DOC is free to choose between the W-W and T-T comparisons, depending on which of the two is most suitable to the investigation or review to establish the dumping margin.

In contrast, the second sentence of Article 2:4:2 sets up a single, asymmetrical way to compare Normal Values with Export Prices, namely, W-T. It is asymmetrical, because the Normal Value data are a weighted average of sale transaction prices of a foreign like product in the home market of the respondent producer-exporter, but the Export Price data are individual sale transaction figures from sales of subject merchandise in the importing country of the petitioning domestic producers. Because of the asymmetry, W-T is a third choice, following W-W or T-T. The second sentence says W-T comparisons may be used only if two conditions are satisfied: the DOC (1) finds targeted dumping, which is what the phrase "find[s] a pattern of export prices which differ significantly among different purchasers, regions, or time periods" means,[124] and (2) explains why neither W-W nor T-T comparisons can "account appropriately" for targeted dumping.

Manifestly, the Uruguay Round drafters of the *AD Agreement* knew of the existence of targeted dumping, as well as the different ways investigating authorities like the DOC seek to identify, measure, and combat the phenomenon. They sought to give those authorities as much freedom as possible to do so, but at the same time ensure authorities did not unfairly disadvantage respondents alleged to engage in targeted dumping with comparisons of data sets that would skew the dumping margin computation against them, possibly leading to an artificially inflated margin. Recourse to W-T comparisons was their middle-ground solution, a point the Appellate Body recognized in its first and precedent-setting zeroing decision, the 2001 *Bed Linen* case: "[t]his provision [Article 2:4:2] allows Members, in structuring their anti-dumping investigations, to address three kinds

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[122] Emphasis added.

[123] *See* Appellate Body Report, *United States—Final Dumping Determination on Softwood Lumber from Canada—Recourse to Article 21:5 of the DSU by Canada*, ¶ 93, WTO Doc. WT/DS264/AB/RW (Dec. 5, 2006) (*adopted* Sept. 1, 2006) [hereinafter Appellate Body Report, *Softwood Lumber V Compliance*].

[124] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.17 n.86.

of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods."[125] Reinforcing the point in subsequent zeroing precedents, the 2007 *United States Zeroing and Sunset Reviews* and 2008 *Stainless Steel Zeroing* case, the Appellate Body said the point of Article 2:4:2 is to "unmask targeted dumping."[126]

The Appellate Body cited these precedents in the case at bar.[127] In few areas of multilateral trade law other than zeroing has the Appellate Body set so many precedents, so its frequent references in *United States Targeted Dumping Zeroing* are utterly unsurprising. If anything, the Appellate Body might be faulted for "overdoing it." For example, the second sentence of footnote 88 adds little in value to the text of paragraph 5:17. Footnote 89 and all of paragraph 5:18 can be consolidated into the simple point that W-T comparisons are an "exception," as the text of Article 2:4:2 indicates, and the *United States Zeroing and Sunset Reviews* (at paragraph 90) case says, or equivalently, for use "only in exceptional circumstances," as the *Softwood Lumber V Compliance* says (at paragraphs 86 and 97), to W-W and T-T comparisons. Accordingly, 25 pages into the Appellate Body Report, at paragraph 5:19 where the judges declare "We start or analysis," there is a sinking feeling the next 82 pages will be anything but breezy.

The path is less of a trudge if the findings of the Panel are in view. Interpreting the second sentence of Article 2:4:2 (italicized above), the Panel ruled against the United States on five key points:[128]

(1) The Panel held that relevant "pattern" transactions are only those that are low-priced export sales to each particular target (i.e., purchaser, region, or time period) of dumping. The Panel said higher-priced export sales that are not targeted (i.e., not directed at a particular purchaser, region, or time) are "non-pattern" transactions.

The Panel defined a "pattern" as a "regular and intelligible form of sequence discernible in certain actions or situations," and thus said "random price variation" is not a "pattern."[129] What was novel about the Panel finding was not that it used the *Oxford English Dictionary* (*OED*), but rather that it did so in a high-tech manner: the Panel used *Oxford Dictionaries Online* at www.oxforddictionaries.com, or "*ODO*" for short.

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[125] Appellate Body Report, *EC—Bed Linen*, *supra* note 110, ¶ 62.

[126] Appellate Body Report, *United States—Measures Relating to Zeroing and Sunset Reviews*, ¶ 135, WTO Doc. WT/DS322/AB/R (Jan. 9, 2007) (*adopted* Jan. 23 2007) [hereinafter Appellate Body Report, *Sunset Review Zeroing*] (this case has also been referred to as *US—Zeroing (Japan)*); Appellate Body Report, *Stainless Steel Zeroing, supra* note 82. The *WTO Case Review 2007*, *supra* note 1, and *WTO Case Review 2008*, *supra* note 1, respectively, cover these reports.

[127] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.17–.18.

[128] *See id.* ¶¶ 1.5(a)(i), (iii), 1.5(b)(i), (iii), (v), 1.5(c)(i)-(v), 4.1(a)(i)-(iv), 4.1(c), 5.9, 5.12–.19.

[129] *See id.* ¶ 5.20 (citing the Panel Report).

Applying the *ODO*, the Panel said that if particular prices differ with respect to purchasers, regions, or time periods, then they constitute a "regular and intelligible form or sequence" in that (or those) respect(s), i.e., a "pattern." This "pattern" is a subset of export transactions, ones set aside for specific scrutiny under the second sentence of Article 2:4:2. It is a "subset" because the prices that constitute a "pattern" are identified as such by contrasting them with other prices of subject merchandise sales made to other buyers, in other places, or at other times. These other prices are not part of the pattern, or simply put, there are "pattern" and "non-pattern" prices and associated transactions, and each defines the other.

However, the Panel did not distinguish pattern transactions based on how they relate to non-pattern transactions. Export Prices of subject merchandise that allegedly is dumped in a targeted way could differ significantly because those Prices are lower than other, non-pattern Export Prices. Or, Export Prices of allegedly targeted dumped merchandise might be significantly higher than other Prices. The Panel did not say whether the subset of pattern export sales the DOC sets aside for study necessarily is in one versus the other category vis-à-vis non-pattern sales. The *DPM* seeks to identify Export Prices that differ significantly, whether they are higher or lower than other Export Prices. The Panel said merely that prices that are too high, and prices that are too low, do not belong to the same pattern.

Moreover, a pattern cannot be declared in a cumulative manner, across purchasers, regions, or time periods, thanks to the preposition "among" in Article 2:4:2 (second sentence). Rather, a pattern of significant difference only can exist with respect to a particular group, with certain purchasers in that group being charged a different price from all other purchasers in that same group. Likewise, for prices to differ significantly in a region or time period, a different price must be found for particular region among the same group of regions, or a particular period with the same group of periods.

(2) The Panel held the *DPM* does not correctly establish a "pattern" of export prices that differs significantly among targets (i.e., purchasers, regions, or time periods), because it aggregates random and unrelated price variations.

(3) The Panel held that the DOC was wrong to apply the W-T comparison to all export transactions, even ones other than those that constituted the patterns of transactions the DOC had identified in connection with targeted dumping. In other words, it was illegal for the DOC to make W-T comparisons with transactions other than those that were "patterns" that the DOC said existed.

(4) Likewise, the Panel held the *DPM* was illegal under Article 2:4:2 (second sentence) for multiple reasons:

(a) The *DPM* uses W-T comparisons for non-pattern transactions whenever the aggregate value of targeted sales (to particular purchasers, regions, or time periods) pass the so-called "*Cohen's d Test*" and account for 66% or more of the value of total sales. The *Cohen's d Test* was part of the DPM, and the DOC applies it to assess the extent of price differences. As long as the values of transactions that pass the Test constitute 66% or more of the value of total sales, the DOC relies W-T comparisons for all sales (not just pattern transactions).

(b) The *DPM* contains a "*Meaningful Difference Test*," under which the DOC considers whether W-W comparisons appropriately account for differences in prices the DOC has spotted. The DOC studies the difference between the dumping margin calculated from W-W comparisons, and the dumping margin calculated from W-T comparisons.

(c) In some AD investigations, the DOC evaluates the difference between the dumping margin from W-W comparisons and the dumping margin from the so-called "mixed comparison methodology." If the value of transactions that pass the *Cohen's d Test* are over 33%, but less than 66%, of the total value of sales, then the DOC combines W-T comparisons (for transactions that pass the *Test*) with W-W comparisons for transactions that flunk the *Test*.

(d) The Panel said the *DPM* does not allow for any consideration of whether facts concerning relevant price differences might be caused by a phenomenon other than targeted dumping.

In effect, the DPM aggregates random, unrelated price variations, but does not reliably prove targeted dumping. With its *DPM*, the DOC mixes and matches comparison methodologies, but does not properly establish that a pattern of significant export prices exists across different purchases, regions, or time periods.

(5) The Panel held zeroing in the context of W-T comparisons is illegal (both as such and as applied, under Article 2:4:2 and Article 2:4 for original investigations, and as such under Article 9:3 and GATT Article).

The Panel said that targeted dumping involves a special focus on the behavior of the respondent producer-exporter. Textually, the second sentence of Article 2:4:2, "put particular emphasis on the exporter's

> pricing behavior in respect of 'pattern transactions.'"[130] The Panel thought that if targeted dumping cases, and this sentence, concentrate on the pricing behavior of the respondent, then "the entirety of the evidence of dumping in respect of that pattern [targeting] must be taken into account."[131] The word "individual" in the second sentence suggests that each individual export transaction fitting within the pattern needs to be studied "in its own right, and with equal weight, irrespective of whether the Export Price is above or below Normal Value."[132] So, the text of that sentence gives "no basis . . . to conclude that the Export Prices of certain individual transactions (e.g., those below Normal Value) should be accorded greater significance than the Export prices of other individual export transactions (e.g., those above Normal Value)."[133] Every pattern transaction needs to "should be [sic] fully taken into account" in assessing the respondent's pricing behavior with respect to the pattern.

The United States appealed all five Panel findings, and lost each appeal.

The Panel also ruled against Korea on two key points under the *AD Agreement*. The Panel held Korea failed to prove its case that the following actions of the DOC violated Article 2:4:2 (second sentence) (and with respect to point (4), Article 2:4):[134]

(1) The DOC determined the existence of "a pattern of export prices which differ significantly" using only quantitative criteria, without any qualitative assessment of the "reasons" for those price differences, and likewise that the *DPM* violated this provision because it uses only quantitative, not qualitative, metrics.

The Panel said a pattern of Export Prices that differ significantly from other non-pattern Prices can be established based solely on quantitative differences. The factual context of those Prices and their differences need not be considered. That is, a qualitative assessment that explores the reasons for price differences, such as commercial or economic factors, market or industry structure, intensiveness of competition, or product nature, need not be made.

The Panel rested its holding on the text of Article 2:4:2, which it said contained no requirement to lay out reasons for Export Prices differences when identifying a pattern. The text calls only for an examination of relevant numerical price values. They might differ "significantly" if pattern prices are notably variant from non-pattern prices. Perhaps the size or scale of a price difference may be investigated in light of overall

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130 *Id.* ¶ 5.141.

131 *Id.* ¶ 5.141.

132 Appellate Body Report, *United States—Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.141.

133 *Id.*

134 *See id.* ¶¶ 1.5(a)(ii), (iv), 1.5(b)(ii), (iv), (vi)–(vii), 4.1(a)(v)–(viii), 4.1(b).

circumstances, as where a minor numerical difference between two large prices in a non-competitive market might not be as significant as the same difference between two smaller prices in an intensively competitive market. But, that kind of inquiry concerned "how," not "why," relevant price differentiations. Nevertheless, whether, but not why, they differ is all that is needed. An investigating authority is not obliged to examine the "reasons," such as qualitative factors, that Export Prices "differ significantly" and constitute a "pattern." Indeed, the authority need not consider the "reasons" for Export Price differences when it is trying to figure out whether there is a "pattern" at all created by relevant numerical Export Price values.

Hence, the Panel rebuffed Korea's effort to have it declare illegal the DOC's purely quantitative assessments, as in the *Nails II Methodology* and *DPM*, with no qualitative analysis. Korea and America agreed the word "significantly" inherently has both a quantitative and qualitative assessment, but the Panel agreed with America that "significance" can be judged in purely quantitative terms: because the word has two dimensions does not mean both dimensions must be studied. The Panel cited by analogy the 2012 *Boeing* case. The Appellate Body interpreted Article 6:3(c) of the *SCM Agreement*, which it said does not mandate evaluation of the underlying reasons for the "significance" of lost sales allegedly due to subsidized subject merchandise.[135]

(2) The DOC did not explain why it could not take into account the pattern it observed of significant price differences using T-T, and likewise did not explain why, once it determined that W-W comparisons could not account for relevant price differences, when the DOC resorted to the *Nails II Methodology* in the original investigation and *DPM* in the Administrative Review, i.e., the DOC was obliged to articulate why both W-W and T-T comparisons were inappropriate, so it should have explained why it could not use T-T comparisons.

The Panel said that Article 2:4:2, second sentence used the indefinite article "a," along with the disjunctive "or," and the term "comparison" was in the singular form. Those grammatical points showed that an explanation is required only for one type of comparison, W-W or T-T, not both. The Panel also cited to the *Softwood Lumber V Compliance* Report precedent, in which the Appellate Body held an investigating authority may choose between the two comparison methodologies, W-W or T-T, under the first sentence of Article 2:4:2. The authority typically makes that choice "*before*" applying the second sentence, and resorting

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[135] *See* Appellate Body Report, *United States—Measures Affecting Trade in Large Civil Aircraft (Second Complaint)*, WTO Doc. WT/DS353/AB/R (Mar. 12, 2012) (*adopted* Mar. 23, 2012) [hereinafter Appellate Body Report, *Boeing*], analyzed in the *WTO Case Review 2012*, *supra* note 1.

> to W-T to combat targeted dumping.[136] So, "to avoid an overly burdensome comparison process," once the authority chooses a methodology under the first sentence (e.g., W-W), and then proceeds to the second sentence because the dumping is targeted, it would be "anomalous" for the authority to have to revert back to consider the other method (e.g., T-T).[137] Further, requiring an investigating authority to render an explanation as to why both W-W and T-T comparisons were inadequate would undermine its "initial discretion" to choose between these two symmetrical methodologies.[138]

Korea appealed both points and won each appeal.[139]

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[136] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.68.

[137] *Id.*

[138] *Id.* (citing Panel Report, *United States Targeted Dumping Zeroing*, *supra* note 108, ¶ 7.80).

[139] On a third matter, the Panel ruled against Korea. When applying the *DPM*, the DOC engaged in "systemic disregarding" meaning that the DOC combined W-T comparisons from pattern transactions with W-W comparisons from non-pattern transactions, but disregarded (i.e., set to zero) an overall negative result from a W-W comparison. Did this systematic disregard of data in the context of the *DPM* violate Article 2:4:2, second sentence? The Panel held that Korea failed to prove its case. *See id.* ¶¶ 5.78–.140.

The Appellate Body opined that an investigating authority could establish a dumping margin by comparing (in the numerator of the fraction used to compute a percentage margin) a weighted average Normal Value with Export Prices of pattern transactions, and divide the result by (in the denominator) Export Prices from all sales transactions by a respondent producer-exporter. In other words, the authority could exclude non-pattern transactions from the numerator, but have both pattern and non-pattern transactions in the denominator. Doing so is not illegal under Article 2:4:2, second sentence, or under the principle in Article 2:4 that comparisons be "fair."

What the authority cannot do is make separate comparisons for (1) pattern transactions via W-T comparisons, and (2) non-pattern transactions using W-W or T-T comparisons, and then (3) exclude the non-pattern W-W or T-T comparisons from the dumping margin calculation if they are negative (i.e., they show no dumping occurs, because the numerator is negative), or aggregate these non-pattern comparisons with the W-T comparisons if the non-pattern ones are positive (i.e., they show dumping to occur, because the numerator is positive). The Appellate Body did not say so with clarity, but it seems to have meant such a process is a kind of unfair cherry-picking designed to boost artificially the dumping margin.

However, the Appellate Body rendered the Panel findings (that Korea failed to make its case) on this issue "moot." The Appellate Body does not appear to have declared this outcome before. Throughout its history, "uphold" or "reverse" have been the verdicts in all instances in which the Appellate Body has not been able to exercise judicial economy. What did it mean by "we moot"? Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.130, .140.

Did the Appellate Body mean that it is raising the point, bringing it up, to indicate the Panel finding is debatable, as the *ODO* and *OED* suggest the verb "moot" means? Or,

As for the issues concerning CVDs, the Panel held:[140]

(1) The DOC violated Article 2:1(c) of the *SCM Agreement* in finding that the *RSTA* Article 10(1)(3) Tax Credit Program was *de facto* specific merely on the basis that Samsung received subsidies in disproportionately large amounts during the period of investigation (POI). (Article 2:1 sets out criteria for determining whether a subsidy is specific based on eligible recipients.[141]) In determining *de facto* specificity, the Panel said the DOC ought to have considered the two mandatory factors listed at the end of Article 2:1(c). On appeal, the United States did not challenge this Panel outcome.

(2) Korea failed to prove its case that the DOC violated Article 2:2 of the *SCM Agreement* when it determined that the *RSTA* Article 26 Tax Credit Program was regionally specific. In contrast to Article 2:1, which defines specificity in terms of eligible recipients (that is, by virtue of the

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did it mean the point no longer is relevant, as in the oft-used distinction by lawyers between "ripe" and "moot" points. The Appellate Body did not do the WTO community the courtesy of explaining what it meant, much less remind that community why it has the authority under the *DSU* to render a Panel finding "moot." It thus is difficult to justify wading through 62 paragraphs spanning roughly 14 pages. Perhaps the best that can be said is that the Appellate Body discussion was a harbinger of its next ruling, namely, striking down the use of zeroing in targeted dumping cases.

[140] *See id.* ¶¶ 1.6, 4.1(a)(v)–(viii), 4.1(b), 4.2(a)–(c), (e), 5.208–.216.

[141] Article 2:1 states: "2:1. In order to determine whether a subsidy, as defined in paragraph 1 of Article 1, is specific to an enterprise or industry or group of enterprises or industries (referred to in this *Agreement* as "certain enterprises") within the jurisdiction of the granting authority, the following principles shall apply: (a) Where the granting authority, or the legislation pursuant to which the granting authority operates, explicitly limits access to a subsidy to certain enterprises, such subsidy shall be specific. (b) Where the granting authority, or the legislation pursuant to which the granting authority operates, establishes objective criteria or conditions governing the eligibility for, and the amount of, a subsidy, specificity shall not exist, provided that the eligibility is automatic and that such criteria and conditions are strictly adhered to. The criteria or conditions must be clearly spelled out in law, regulation, or other official document, so as to be capable of verification. (c) If, notwithstanding any appearance of non-specificity resulting from the application of the principles laid down in sub-paragraphs (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 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 sub-paragraph, 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." Agreement on Subsidies and Countervailing Measures art. 2:1, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1869 U.N.T.S. 14 (footnotes omitted).

type of activities in which a recipient engages, and thereby that recipient eligible), Article 2:2 defines specificity in terms of "limitations on the geographical region(s) where the eligible enterprises are located."[142] Article 2:2 states:

> 2:2. A subsidy which is limited to *certain enterprises* located *within a designated geographical region* within the jurisdiction of the granting authority shall be specific. It is understood that the setting or change of generally applicable tax rates by all levels of government entitled to do so shall not be deemed to be a specific subsidy for the purposes of this *Agreement*.[143]

The "core function," as the Appellate Body put it, of Article 2:2 is "to address limitations on access to a subsidy by virtue of the *geographical location* of the enterprises eligible for that subsidy."[144] (Article 1:1(a), of course, defines "subsidy" in terms of a "financial contribution," and Article 1:1(b) sets the requirement that the contribution must benefit the recipient, i.e., "make[] the recipient better off than it would have been in the marketplace."[145]) Korea said an "enterprise" must be a distinct legal personality, and thus an entity that is not one (but, for instance, merely a factory, branch office, or other production facility) cannot be the basis for a finding of regional

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[142] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.213.

[143] Emphasis added.

[144] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.222.

[145] *Id.* ¶ 5.223. Note the reference to the "marketplace" as the benchmark for measuring benefit. For this proposition, the Appellate Body cited four of its precedents: (1) 1999 *Canada—Aircraft* (Appellate Body Report, *Canada—Measures Affecting Aircraft the Export of Civilian Aircraft*, ¶157, WTO Doc. WT/DS70/AB/R (Aug. 2, 1999) (*adopted* Aug. 20, 1999) [hereinafter Appellate Body Report, *Canada—Aircraft*], analyzed in BHALA, *supra* note 39, Vol. 2, Ch. 61, 63); (2) 2000 *Carbon Steel* (Appellate Body Report, *United States—Imposition of Countervailing Duties on Certain Hot-Rolled Lead and Bismuth Carbon Steel Products Originating in the United Kingdom*, ¶ 68, WTO Doc. WT/DS138/AB/R (May 10, 2000) (*adopted* June 7, 2000)), analyzed in the *WTO Case Review 2000*, *supra* note 1; (3) 2011 *Airbus* case (Appellate Body Report, *European Communities and Certain Member States—Measures Affecting Trade in Large Civil Aircraft*, ¶¶ 705–06, WTO Doc. WT/DS316/AB/R (May 18, 2011) (*adopted* June 1, 2011)), analyzed by the *WTO Case Review 2011*, *supra* note 1; and (4) 2013 *Canada Renewable Energy* case (Appellate Body Report, *Canada—Renewable Energy*, *supra* note 69, ¶ 5.208. *See also* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, n. 476.

specificity. Korea also said the *RSTA* Article 26 Program was not regionally specific, because rather than affirmatively designating a specific region for subsidization, it covered all of the country except for a small area.

Rejecting both arguments, the DOC decided that this Program was regionally specific. Nothing in the *SCM Agreement* suggests "certain enterprises" must be legal or natural persons, and the Program is limited to certain enterprises located in a designated geographical region, namely, outside of the congested Seoul Metropolitan Area.

The Panel decided the DOC was correct on both points, i.e., it held the DOC did not violate Article 2:2. The Panel said the rationale of this provision is to allow a WTO Member to impose CVDs against a subsidy program of another Member that encourages particular enterprises, which are not restricted in the text of the provision to legal persons, in that other Member to channel their resources to certain geographic regions. That direction of resources to a particular region interferes with the market-based allocation of resources within the overall territory of the other Member. Note, then, the Panel rationale under Article 2:2 was a market economics one.

(3) Korea also failed to prove the DOC violated Article 19:4 of the *SCM Agreement* and Article VI:3 of GATT with respect to the *RSTA* Article 10(1)(3) and Article 26 Tax Credit Programs when the DOC did not tie the subsidies Samsung claimed under these programs to particular products, namely, Samsung's washing machines. The DOC said the tax credits bestowed on Samsung under the *RSTA* Article 10(1)(3) and 26 schemes were not tied to any particular merchandise. So, the DOC allocated these subsidies across all products Samsung made during the POI.

The Panel decided the DOC was correct, i.e., that the DOC did not violate Article 19:4 of the *SCM Agreement* or Article VI:3 of GATT. That was because under neither Program was Samsung obliged to spend the proceeds from a tax credit on the future production of digital appliance products. Samsung had the discretion to use those credits, or indeed not use them at all, and if it opted to use them, Samsung could opt to use them for any of its products made in Korea. Logically then, the Panel said, the DOC treated both tax credit schemes as united, and allocated the benefits across the sales value of all goods Samsung made in Korea. In other words, the Panel agreed the DOC was correct in finding no necessary correlation between Samsung's expenditures (particularly R&D expenses) on digital appliance products (the subject merchandise) and the amount of the tax credits Samsung used for its future manufacturing of those products. The fact Samsung might have been able to identify those expenditures in each of its business units did not mean the expenditures were tied to particular products.

(4) Korea further failed in its attempt to prove the DOC violated *SCM Agreement* Article 19:4 and GATT Article VI:3 when the DOC allocated the benefit of the tax credits conferred to Samsung by the *RSTA* Article 10(1)(3) Tax Credit Program to the sales value of Samsung's production only in Korea, that is, the DOC did not act illegally by limiting the denominator of the fraction for the subsidization ratio to the sales value of products Samsung made in Korea. Conceptually, that fraction is:

$$\text{Per Unit Subsidization Ratio} = \frac{\text{Aggregate value of benefit of subsidy}}{\text{Total sales value of output benefitting from the subsidy}}$$

(Unfortunately, nowhere in the Appellate Body Report does it clearly lay out the fraction.) In the numerator, the DOC inserted the total value of the tax credits under the Article 10(1)(3) scheme, but in the denominator the DOC put the sales value of only the merchandise Samsung made in Korea.

The DOC applied a presumption that government subsidies benefit domestic production, and thus those subsidies normally should be attributed to goods made in the country in which the subsidy is granted. The DOC took pains to explain the presumption was rebuttable, namely, by an explicit statement from the subsidizing government that it bestowed the subsidy for not only domestic, but also overseas, output. Korea made no such declaration about the tax credits under Article 10(1)(3).

Samsung argued that created an unfair mismatch: a subsidy that the DOC alleged benefitted sales around the world, recorded in the numerator, should be matched with the sales value of worldwide output. So, Samsung said that the denominator of its subsidization ratio should be adjusted to include all of Samsung's worldwide products.

> In Korea's view, the denominator calculated by the USDOC did not match the numerator, which included the total amount of tax credits received by Samsung under Article 10(1)(3) of the *RSTA*. Korea submitted that, since the R&D tax credits claimed by Samsung benefitted Samsung's worldwide production of digital appliances, the denominator should have encompassed the total value of Samsung's sales of those products, regardless of where they were produced, manufactured, or sold. Moreover, according to Korea, the USDOC's presumption of attribution of a subsidy to domestic production only was impermissible.[146]

[146] *Id.*¶ 5.290.

> Obviously, accepting the Korean argument would have led to a lower subsidization ratio, and thus a lower CVD rate—but one which would not have been in excess of the amount of the subsidy. In effect, just as zeroing inflated the dumping margin and consequent AD duties, excluding non-Korean sales from the denominator inflated the subsidization rate and consequent CVDs.
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> The DOC rejected the Korean argument, did not extend the denominator of Samsung's per unit subsidization rate to Samsung's overseas production, and limited the denominator to the sales value of Samsung's output in Korea. Here again, the Panel decided the DOC was correct, i.e., that the DOC did not violate Article 19:4 of the *SCM Agreement* or Article VI:3 of GATT.

The United States did not appeal the first holding, letting that judgment stand. Korea appealed the remaining holdings, losing on the second one about regional specificity under Article 2:2 of the *SCM Agreement* but winning on the third and fourth matters.[147]

E. Holdings and Rationales under *AD Agreement* Article 2:4:2 (Second Sentence)

1. Relevant "Pattern"[148]

Does the *DPM* fail to establish a "pattern" of targeted dumping in a proper manner? According to the Panel and the Appellate Body, the answer is "yes." The United States argued unsuccessfully that the Panel wrongly interpreted the word "pattern" under Article 2:4:2 (second sentence) when the Panel restricted that word to only low-priced export transactions to each particular target (buyer, location, or time), and thus excluded high-priced transactions to other targets, calling the latter group "non-pattern" transactions. All that matters to constitute a "pattern," urged the United States, is that Export Prices differ significantly from each other. Whether Export Prices are lower or higher from each does not matter. So, as regards the *DPM*, this technique need not focus only on export sales that are priced lower than other export sales. Rather, it is fine if the *DPM* identifies a pattern by studying the Export Prices that are higher than other Export Prices.

The United States carefully and correctly explained that the comparisons are not between Export Prices and Normal Value—that comparison is about the dumping margin itself. Rather, the comparisons at issue with the *DPM* involve only Export Prices. Suppose among a particular purchaser group, region, or time

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[147] Korea also appealed a Panel holding that the *RSTA* Article 10(1)(3) tax credits are not research and development (R&D) subsidies. Because the Appellate Body found in favor of Korea, reversing the Panel on the third and fourth points (above), it exercised judicial economy and did not opine on the R&D question. *See id*. ¶¶ 5.286, 6.15.

[148] *See id.* ¶¶ 5.19–.43, 5.129–.140, 6.2–.3.

period, the Export Prices of subject merchandise include $100, $150, and $200. Suppose further that there are many Export Prices below $100 and a few above $200. There is an unmistakable pattern of Prices below $200, for which both the *DPM* and Panel holding would allow. But only the *DPM* would allow the prices above $200 to be a "pattern." The Panel would put all prices at or above $200 in the category of "non-pattern." America said prices that stand out in any discernible way from other prices can constitute a pattern—a point that Korea accepted.[149] The United States also argued the Panel was wrong to obsess about the preposition "among" in Article 2:4:2 (second sentence) and thereby preclude transcendence: a pattern can exist that transcends multiple purchasers, regions, or time periods, or any combination thereof (i.e., across the three target categories, because of the preposition "or").

Not so, said the Appellate Body:

> [A] "pattern" for the purposes of the second sentence of Article 2:4:2 comprises *all* the export prices to one or more particular purchasers which differ significantly from the export prices to the other purchasers because they are significantly *lower* than those other prices, or *all* the export prices in one or more particular regions which differ significantly from the export prices in the other regions because they are significantly *lower* than those other prices, or *all* the export prices during one or more particular time periods which differ significantly from the export prices during the other time periods because they are significantly *lower* than those other prices. . . . [W]e refer to these transactions forming the relevant "pattern" as "pattern transactions."[150]

Here was (yet another) instance of the Appellate Body telling the DOC how to go about its business, micro-managing what is versus is not a pattern. How, then, did the Appellate Body justify this conclusion?

Nowhere in any WTO text is the word "pattern" defined, nor does any such text explain what patterns constitute a "significant difference." The Appellate Body was satisfied with the *ODO*-based definition of regularity and intelligibility, but elaborated on it by emphasizing four features for a "significantly different pattern of Export Prices" to exist:[151]

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[149] *See id.* ¶ 5.23.

[150] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.36.

[151] *Id.* ¶ 5.25. For the term "pattern," the Appellate Body added to its high-tech lexicographic portfolio the *Dictionnaires de Français Larousse* online. *See* http://www.larousse.fr/dictionnaires/francais-monolingue.

(1) "Regularity" means there is "regularity" (yes, the Appellate Body engaged in circularity here) to the sequence of Export Prices in that they exhibit a significant difference.
(2) "Intelligibility" means the sequence is capable of being understood, and is not merely random price variations.
(3) The "pattern" must "differ" significantly, which (thanks to the *ODO* again) means to be contrary or diverse in tendencies or qualities relative to (thanks to the second sentence of Article 2:4:2) other prices.
(4) To identify a "significantly different pattern," all Export Prices must be studied to discern whether there is a pattern within those Prices, i.e., whether certain Export Prices are unlike or distinct from the other Prices.

Depending on Export Price data in a particular case, the result may be a set of prices of export sales that form a "pattern," and which differs significantly from all other prices from the "non-pattern" sales. If so, then "pattern" prices are those associated with targeted dumping. The focus of the word "pattern" is on a subset of differential prices, not on all prices. A "pattern" consisting of both (1) prices that differ significantly from other prices, and (2) those other prices (i.e., a pattern of all transactions to all purchasers, regions, and time periods) is not a "pattern"—it is not a regular, intelligible sequence. Rather, it is simply the whole data set. The concept of a pattern in price data inherently raises the difference between a subset of data and an entire data set—a sniper amidst all the combatants.

These four points were all part of an "interpretation" the Appellate Body assured were part of the "ordinary meaning" of the word "pattern" as used in the "context" of Article 2:4:2 (second sentence). This assurance, of course, was the Appellate Body declaring it was following Article 31 of the 1969 Vienna Convention on the Law of Treaties (albeit without citation thereto). But do pattern prices need to differ significantly on the basis of being lower than non-pattern prices? Or do the Export Prices in the subset that constitute the pattern need to differ significantly from the other Export Prices because they are higher than those other prices? Or is the question of being below or above the rest of the Export Prices irrelevant—either directional difference is acceptable? The text of Article 2:4:2 does not answer this question, so the Appellate Body needed to interpret the text and set a precedent.

The Appellate Body said the objective of the AD remedy generally is to combat injurious dumping. Only Export Prices that are lower than Normal Values are considered dumped under Article VI of GATT and Article 2:1 of the AD Agreement:

> Therefore, although we recognize that a pattern may be identified in a variety of factual circumstances, we consider that the relevant "pattern" for the purposes of the second sentence of Article 2:4:2 comprises prices that are significantly *lower* than other export prices among different purchasers, regions or time periods. We fail to see how an investigating authority could

> identify and address "targeted dumping" by considering significantly higher export prices. If the prices found to differ significantly are higher than other export prices, the other (lower) export prices would not "mask" the (higher) dumped prices found to form the pattern.[152]

This rationale makes no sense, and belies an arrogation of power by the Appellate Body.

First, it is a *non sequitur* to say that "because Export Prices must be below Normal Values to constitute dumping, therefore certain Export Prices must be below all other Export Prices for those certain Export Prices to constitute a 'pattern.'" The inquiries are connected, but distinct. The first comparison, between Normal Value and Export Price, is between the price of a foreign-like product in the home market of the respondent producer-exporter. The second comparison among Export Prices concerns subject merchandise only, and only in the importing country in which the petitioning domestic producer of a like product resides. The purpose of the first comparison is to see if dumping exists at all. The purpose of the second comparison is to see if the respondent is varying its prices to selected buyers, in selected regions, or during selected periods. If it is doing so, then it is targeting them, singling them out from other purchasers, places, or periods. That singling out could be through pricing subject merchandise below usual and/or above usual.

The Appellate Body errs in the third sentence in the above-quote. A pattern of Export Prices significantly above other Export Prices (from the second inquiry) might still be below Normal Value (from the first inquiry). Indeed, the respondent might intentionally have some Prices higher, and some lower, in its targeted dumping strategy, so as to minimize any overall dumping margin. Higher Export Prices against a pattern of lower Export Prices would "mask" targeted dumping in that the higher Prices would conceal a wide dumping margin between those lower Export Prices and Normal Value. But the reverse also may be true. Higher Export Prices against a pattern of lower Export Prices would conceal a narrow dumping margin (still a dumping margin, but a smaller one than in previous scenario).

For example, suppose the relevant, adjusted figure for Normal Value is $100. Suppose that a pattern of Export Prices shows targeted dumping at $40 in comparison with higher Export Prices of $80. The comparison between $100 and $40 is a wide dumping margin. Now suppose there is a pattern of Export Prices that is the reverse: a base line of $40, but a subset of $80. There is still targeted dumping, when the higher Export Price of $80 is compared against Normal Value of $100. Implicitly, what the Appellate Body assumed—to use this hypothetical—is that non-pattern Export Prices are above $100, that is, are not at dumped prices. In the first scenario, it considered that the lower Export Prices were at $40 in comparison with non-pattern prices of (for example) $110 (any

[152] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.29.

figure over $100 Normal Value). Here, the $110 non-pattern transactions clearly mask the lower prices. In the second scenario, the Appellate Body thought of higher Export Prices of $130, and lower Export Prices of $110 (again, any figure over $100 Normal Value). Because both the higher pattern and lower non-pattern Export Prices are above Normal Value, the Appellate Body presumed there is no reason to care about a pattern of significant difference based on some Export Prices being above all other Export Prices.

That may well be true, but it is not for the Appellate Body to decide. That is the province of the DOC. And it is true only if the non-pattern prices exceed Normal Value, which also is for the DOC to study. Thus, the label "judicial activism" properly applies here: there was no need for the Appellate Body to rule out one scenario, when it had no textual basis for doing so. It is for the DOC to look below and above what is usual, and see whether below-usual, above-usual, or both constitute a pattern that indicates targeted dumping. Nothing in the test of GATT or the *AD Agreement* justifies the Appellate Body cutting off the inquiry by the DOC. It could have offered *dicta* on the point, but should appreciate the weakness of its position by not handing down a ruling.

The Appellate Body marched on, of course. It said that the Panel was right to hold that a pattern cannot exist "across" purchasers, regions, or time periods—but only after five mind-numbing paragraphs (5:31-5:35) about the meaning of "or" and "among" in the second sentence of Article 2:4:2. The disjunctive "or" can be exclusive or inclusive, depending on the context. "Among" refers to something in relation to the rest of the group to which it belongs, and implies membership in a group based on common characteristics. The categories—purchasers, regions, or time periods—for Export Prices must be evaluated separately. That is because of the definition of "pattern," coupled with the phrase in the second sentence of Article 2:4:2: "a pattern of export prices which differ significantly among different purchasers, regions or time periods." Thanks again to the ODO, a "pattern" must be regular and intelligible. A "pattern" of Export Prices can be so, if it is in respect of one or more purchasers, regions, or time periods. But a single pattern of prices that differ significantly from other Export Prices across different categories (purchasers and regions, purchasers and periods, regions and periods, or purchasers, periods, and regions) is not a "pattern." It is not regular or intelligible, but rather random. Precedent reinforced the point:

> In *EC—Bed Linen*, the Appellate Body also understood the three categories to work independently from one another. In that case, the Appellate Body noted that there are "three kinds of 'targeted' dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods."[153]

[153] *Id.* ¶ 5.33 (citing Appellate Body Report, *EC—Bed Linen*, *supra* note 110, ¶ 62).

In brief, the three categories—people, places, or periods—cannot be considered cumulatively when searching for one single "pattern," and there is no fourth category of targeted dumping, such as "cumulative."

Yet here again the ground on which the Appellate Body stands is less firm than it might like to think. The Americans had a good point about the word "among," which the Appellate Body dismissed as follows:

> [W]e note the United States' argument that the word "among" is used once in the second sentence of Article 2:4:2 and is not repeated before each category, which would suggest that those categories may be considered collectively in identifying a pattern. According to the United States, for the Panel's reading of the word "among" to be correct, one would expect that word to appear before the mention of each category, i.e., "*among* different purchases [sic], *among* different regions or *among* different time periods." We consider, however, that this repetition would have conveyed an identical meaning to that of the existing text. We thus agree with the Panel that, "[i]f particular prices are observed to differ in respect of a particular purchaser, region or time period, those prices may be treated as a regular and intelligible form or sequence relating to that purchaser, region or time period" and that "[t]he price differences are 'regular' and 'intelligible' because they pertain only to that particular purchaser, region or time period." We further agree with the Panel that "a 'pattern' can only be found in prices that differ significantly either among purchasers, or among regions, or among time periods."
>
> Consequently, in order to find a pattern, the export prices to one or more particular purchasers must differ significantly from the prices to the other purchasers, or the export prices in one or more particular regions must differ significantly from the prices in the other regions, or the export prices during one or more particular time periods must differ significantly from the prices during the other time periods.[154]

The reality is that the placement of the word "among" leads to an ambiguity that can be read either as the United States or as Korea did. The United State's reading was no less reasonable than Korea's, and given the Article 17:6 heightened standard of review in AD cases, the Appellate Body ought to have

[154] *Id.* ¶¶ 5.34–.35 (citing United States Appellate Brief at ¶ 250, followed by *United States Targeted Dumping Zeroing*, ¶¶ 7.46, .141).

deferred to the United States.[155] The reality also is targeted dumping strategies can be quite sophisticated, involving contemporaneous different targets.

Consider the sniper again: he or she may be scoping for a variety of possible threats, some in military uniforms, others in civilian clothes, some men, some women, some young, some old. Likewise, Samsung and LGE might target a few purchasers, a few areas, and a few time periods through significantly differential Export Prices—for example, Sears in Kansas City in November and Wal-Mart in Pittsburgh in December. By viewing them all, the attack strategy emerges. To focus on just one is to mask the overall operation, the combined threat across dress, gender, and age. Why should the DOC be barred from considering the multiple target scenario when interpreting the second sentence of Article 2:4:2 to allow it this flexibility would not require extraordinary creativity?

Nonetheless, from this holding, the Appellate Body condemnation of the DPM was a foregone conclusion. The DPM looked for six possible types of Export Price variation that passed the Cohen's d Test, namely, Prices that are too high or too low to a specific purchaser, in an identifiable region, and in a particular period. Using the DPM, the DOC started with comparisons within each category, and thereafter aggregated the value of the six categories to see if a pattern of targeted dumping exists. The DOC scrupulously avoided double counting: that is, it did not count export sales in more than one category, but instead looked at each result as a different aspect of the overall pricing behavior of the exporter.

Not good enough, said the Appellate Body. Some allegedly dumped transactions that differ among purchasers cannot be taken together with other transactions that differ among regions, or with still other transactions that differ among time periods, to form a single pattern. Rather than identifying targeted among the constituents of each category (and focusing only on Export Prices that are lower than other Prices within each category), the DPM transcended and cumulated categories (and included Export Prices that are higher than other Prices). That methodology was an aggregation of random, unrelated price variations, which could not possibly establish in a proper manner (in the language of Article 2:4:2, second sentence) "a pattern of Export Prices that differ significantly among purchasers, regions or time periods."

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[155] For a critical analysis of Appellate Body behavior, indeed misbehavior, under applicable standards of review, *see* Petros C. Mavroidis, *The Gang That Couldn't Shoot Straight: The Not So Magnificent Seven of the WTO Appellate Body*, 27 EUR. J. INT'L L. 1107 (2016). Professor Mavroidis argues the Appellate Body is cautious not to intrude on the sovereignty of Members in cases involving non-discriminatory measures (e.g., especially sanitary and phytosanitary (SPS) ones), but adopts a relatively more intrusive standard of review that is less respectful of the sovereignty of Members in examining trade remedy measures (e.g., AD duties), which by the nature of those remedies are discriminatory (because they afflict only imports), and further arguing that the reason for the inconsistency in the Appellate Body's review standards is not in the standards themselves, but in a political desire to appease Members. *See id.*

2. Scope of Weighted Average-to-Transaction Comparison Methodology[156]

What is the appropriate scope of the W-T comparison method? The United States argued unsuccessfully that W-T comparisons may be applied to all transactions. Such comparisons are not restricted to those that form the relevant "pattern." To be sure, under the Nails II Methodology in the original Washers AD investigation, only certain transactions passed both the Standard Deviation and Gap Tests. Nevertheless, the DOC applied W-T comparisons to all Samsung and LGE export transactions. Likewise, under the DPM in the Administrative Review, for all export transactions that passed the *Cohen's d Test* (meaning the value of sales that passed the test accounted for 66% or more of the value of total sales), the DOC made W-T comparisons. In brief, the DOC used W-T comparisons for all export transactions, those that exhibited a "pattern" (i.e., were dumped in a targeted manner), and the other, "non-pattern" sales (those that did not follow the pattern of significant price differences among purchasers, regions, or periods).

The Panel sided with Korea, and so did the Appellate Body. Each held that the word "individual," and the phrase "individual export transactions," in Article 2:4:2, second sentence, means that W-T comparisons are not for all export transactions, but rather only individually identified transactions that fall within the "pattern" of targeted dumping. Thus, each reasoned from the word "individual" in that phrase. Surely that word meant W-T comparisons are not for all export transactions, but rather only certain ones identified individually. Transactions can be identified individually only if they form a pattern, and to use the asymmetrical W-T comparisons, it must be clear that symmetrical W-W and T-T comparisons cannot account appropriately for significant price differences. If that is the case, then W-T comparisons can be done, but only for "pattern" transactions, which are inherently exceptional and thus can be set aside for specific consideration in a manner different from the symmetrical methodologies set out in the first sentence of Article 2:4:2.

Both the Panel and Appellate Body rejected the American argument that there is neither textual nor contextual support to hold W-T comparisons are restricted only to Export Price transaction that fit the pattern of targeted dumping. The word "individual," which thanks again to the *ODO*, means "single" or "separate," and simply indicates that prices of single, separate export transactions may be compared to a weighted average Normal Value (i.e., a weighted average computed from multiple Normal Value observations). The word "individual" does not, urged the United States, operate to restrict W-T comparisons to targeted dumping transactions. The United States argued the Panel misapplied Article 31 of the Vienna Convention, because the Panel looked to the object and purpose of the second sentence of Article 2:4:2, rather than the object and purpose of the *AD*

[156] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.44–.56, 5.129–.140, 6.4.

Agreement overall, and further, the Panel misunderstood the *Sunset Reviews Zeroing* precedent.

Korea responded that the United States read the word "individual" too narrowly, parsing words but missing the whole meaning of both the first and second sentences of Article 2:4:2. The reference in this provision to "such differences" shows there are two categories of export sale transactions: one group, which meets the criteria for W-T comparisons, which are exceptional, and another group, which does not and to which the normal W-W and T-T comparisons apply, i.e., targeted dumped sales in the second sentence, and non-targeted dumped sales in the first sentence, respectively. Moreover, Korea contended, the American argument would lead to an absurd result. As soon as the DOC found a "pattern" of targeted dumping, then it could use W-T comparisons for all export transactions. That would mean the DOC could apply the exceptional asymmetric methodology to all sales, regardless of how many or few sales fit the "pattern." Surely that would bias the final dumping margin figure, artificially inflating it and the AD duty remedy.

The Appellate Body agreed with Korea and the Panel. It looked at the ODO and found that the definition of "individual" did not resolve the issue of whether W-T comparisons are limited to "pattern" transactions, or may be used for "non-pattern" transactions, too. With no plain textual meaning, the Appellate Body (like the Panel) turned to three other rationales to justify this narrow interpretation of the scope for W-T comparisons: context, object and purpose, and precedent.

First, the textual context, that is, the overall structure of Article 2:4:2. The reference in the second sentence to "such differences," is back to "Export Prices which differ significantly." Those Prices are ones that form the "pattern." The second sentence requires investigating authorities like the DOC to articulate why W-W and T-T comparisons cannot account adequately for "such differences." Otherwise, the first sentence applies, whereby the DOC must use these "normal" comparisons. The logical inference from this context is there may be instances in which the symmetrical methodologies can account adequately for those differences. When they can, they must be used; W-T comparisons are permissible only to the extent necessary to rectify the inefficacy of W-W and T-T-comparisons to reveal the "pattern."

Second, the object and purpose supports restricted use of W-T comparisons. The second sentence is designed to unmask (that is, identify and address) targeted dumping by permitting W-T comparisons where necessary. The *AD Agreement*, though lacking a preamble setting out its object and purpose, is designed to allow WTO Members to deal with injurious dumping by imposing AD duties, but in a disciplined manner to ensure that remedy is not abused. The Appellate Body, citing seven of its precedents, also rebutted the American point about Article 31 of the *Vienna Convention*:

> The ordinary meaning of a treaty term is to be ascertained in its context and in light of the object and purpose of the treaty.

> Moreover, the principles of treaty interpretation set out in the *Vienna Convention* are to be followed in a holistic fashion. (See Appellate Body Reports, *China—Publications and Audiovisual Products*, para. 348; and *US—Continued Zeroing*, para. 268) In *US—Offset Act (Byrd Amendment)*, the Appellate Body cautioned that "dictionaries are important guides to, not dispositive statements of, definitions of words appearing in agreements and legal documents." (Appellate Body Report, *US—Offset Act (Byrd Amendment)*, para. 248) Along the same lines, in *China—Publications and Audiovisual Products*, the Appellate Body held that dictionaries, however useful as a starting point, "are not necessarily capable of resolving complex questions of interpretation because they typically catalogue all meanings of words." (Appellate Body Report, *China – Publications and Audiovisual Products*, para. 348 (referring to Appellate Body Reports, *US—Gambling*, para. 164; *US—Softwood Lumber IV*, para. 59; *Canada—Aircraft*, para. 153; and *EC—Asbestos*, para. 92)).[157]

In other words, the Americans were wrong to create a zero-sum game between assessing the object and purpose of treaty language based on either the specific rule in which the disputed language is found, or the overall treaty.

The way in which the Appellate Body made the point, citing seven of its prior decisions, is another example of the operation of *de facto stare decisis* in WTO adjudication—along with the handy table of "Cases Cited in this Report" that is now standard at the front of every Appellate Body decision. Indeed, the third justification for its holding was precedent, particularly the 2007 *Sunset Review Zeroing* case. The Appellate Body referred to "individual export

[157] *Id.* ¶5.49 n.159. The full citations to those Appellate Body Reports not already cited above are: (1) Appellate Body Report, *China—Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WTO Doc. WT/DS363/AB/R (Dec. 21, 2009) (*adopted* Jan. 19, 2010) [hereinafter Appellate Body Report, *China Audiovisual Products*], analyzed in the *WTO Case Review 2010*, *supra* note 1; (2) Appellate Body Report, *Continued Zeroing*, *supra* note 82; (3) Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, WTO Docs. WT/DS217/AB/R, WT/DS234/AB/R (Jan. 16, 2003) (*adopted* Jan. 27, 2003). The "*Byrd Amendment*" Report is analyzed in the *WTO Case Review 2009*, *supra* note 1; (4) Appellate Body Report, *US—Softwood Lumber IV*, *supra* 121; (5) Appellate Body Report, *Canada—Aircraft*, *supra* note 145.*;* and (6) Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, WTO Doc. WT/DS135/AB/R (Mar. 12, 2001) (*adopted* Apr. 5, 2001) [hereinafter Appellate Body Report, *EC—Asbestos*], analyzed in the *WTO Case Review 2001*, *supra* note 1.

transactions" as ones that fall within the "relevant pricing pattern."[158] It explained that those transactions are more limited than the ones to which symmetrical comparison methodologies in the first sentence of Article 2:4:2 apply. The Appellate Body defended the Panel use of this precedent against the American challenge. The United States was correct that *Sunset Review Zeroing* did not involve the application of the text of Article 2:4:2, second sentence. But, the case did implicate that sentence as context for the question of whether zeroing is permitted in T-T comparisons (a point on which that Panel held "yes," but which the Appellate Body reversed). And, the United States put too much emphasis on the Appellate Body in that case stating it "may" limit the scope of W-T comparisons, because elsewhere in its Report (at paragraph 135) the Appellate Body made clear W-T comparisons are not for non-pattern transactions.

3. "Significant" Difference in Prices[159]

Did the United States correctly identify a "significant" difference in prices? The Panel said yes, but the Appellate Body said no. The Appellate Body began its analysis of the issue with yet another one of its innumerable redundancies:

> Turning to the issue of whether the Panel erred in finding that a pattern of export prices which differ *significantly* can be established on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences, we recall that, pursuant to the second sentence of Article 2:4:2, the relevant "pattern" is one of export prices which differ *significantly*. The term "differ" is thus qualified by the term "significantly." As the Panel correctly recognized, "significant" can be defined as "important, notable or consequential." We thus understand the word "significantly" to speak to the extent of the price differences and to suggest something that is more than just a nominal or marginal difference in prices. Under the second sentence of Article 2:4:2, the something that must be important, notable, or consequential is the difference in Export Prices.[160]

Even the careless reader would understand this point, 37 pages into the Report with 70 more to go. It is an example of how the Appellate Body remains

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[158] *See* Appellate Body Report, *Sunset Review Zeroing*, *supra* note 126, ¶ 135 (referring to Appellate Body Report, *Softwood Lumber V Compliance*, *supra* note 123, ¶ 99 n.166)

[159] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.57–.77, 5.129–.140, 6.5.

[160] *Id.* ¶ 5.60.

incapable of editing its own work. As a tip, the Appellate Body might put itself in the role of a litigator in an American trial court. If a judge would sustain the following objection from opposing counsel, then the Appellate Body should strike out the sentence at issue as redundant and move on: "Objection, asked and answered." The Appellate Body also should recall (to borrow its overused verb) that every time it repeats a point, it expands the risk of confusion about that point, and in turn, makes bad law. That is because of minor differences in the repetitions, and because of the locations of the repetition—the text and the context (to use the *Vienna Convention*).

So the Appellate Body agreed with Korea, the United States, and the Panel that the word "significantly" has quantitative and qualitative dimensions. That follows from the *OED* and *ODO*, to which the Appellate Body cited.[161] The Appellate Body disagreed, however, that a "significant difference" can be discerned from purely quantitative metrics:

> As part of the qualitative assessment, circumstances pertaining to the nature of the product or the markets may be relevant for the assessment of whether differences are "significant" in the circumstances of a particular case. The significance of differences may indeed be affected by objective market factors, such as the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. Hence, what may be deemed "significant" price differences in one instance may fail to meet the same threshold when different variables are considered. For example, . . . in a more price-competitive market, smaller differences may be significant. Unless the investigating authority considers such qualitative aspects, it will not know if and how these aspects are relevant to its assessment of whether prices differ significantly. Therefore, we disagree with the Panel to the extent it considered that an investigating authority may properly find that certain prices differ significantly within the meaning of the second sentence of Article 2:4:2 if they are notably greater in purely numerical terms.[162]

The essential rationale of the Appellate Body was precedent:

> [I]n the context of Article 6.3(c) of the *SCM Agreement*, in *US—Large Civil Aircraft (2nd complaint)* [2012 *Boeing* case], the

[161] *Id.* ¶ 5.62 n.196.
[162] *Id.* ¶ 5.63.

> Appellate Body found that "an assessment of whether a lost sale is significant can have both quantitative and qualitative dimensions." Regarding the qualitative dimension, the Appellate Body referred to the "highly price-competitive" nature of the market. We also note that the Panel in *US—Upland Cotton*, in considering a case of significant price suppression under the same provision, found that "it may be relevant to look at the degree of the price suppression . . . in the context of the prices that have been affected" to assess whether the price suppression is significant. As the Panel reasoned:
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> > The "significance" of any degree of price suppression may vary from case to case, depending upon the factual circumstances, and may not solely depend upon a given level of numeric significance. Other considerations, including the nature of the "same market" and the product under consideration may also enter into such an assessment, as appropriate in a given case.
>
> . . . .
> [W]e find that the requirement to identify prices which differ *significantly* means that the investigating authority is required to assess quantitatively and qualitatively the price differences at issue. This assessment may require the investigating authority to consider certain objective market factors, such as circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. The investigating authority is, however, not required to consider the cause of (or reasons for) the price differences.[163]

Note, then, the Appellate Body took care to distinguish the questions of whether:

(1) a qualitative analysis of "significant differences" in Export Prices and the "pattern" of those Price differences is mandatory from, or
(2) an analysis of the causes for "significant differences" that constitute a "pattern" is needed.

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[163] *Id.* ¶ 5.64 (emphasis added) (citing and quoting Panel Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/R (Sept. 8, 2004) (*adopted as modified* Mar. 21, 2005) [hereinafter Panel Report, *2005 Cotton*]). In the case, the Appellate Body found "no difficulty with the Panel's approach." Appellate Body Report, *United States—Subsidies on Upland Cotton*, WTO Doc. WT/DS267/AB/R (Mar. 3, 2005) (*adopted* Mar. 21, 2005), analyzed by *WTO Case Review 2005*, *supra* note 1.

By overturning the Panel on the first question, the Appellate Body ruled against the United States.

That the Appellate Body held in favor of the United States on the second question—as neither the Nails II Methodology nor DPM involved an assessment of causal factors—was a relatively minor victory (at least in the context of this case). On the second question, the answer from the text of Article 2:4:2, second sentence is clearly no. Nothing in that text imposes an additional requirement of identifying causal factors. In other words, as the United States correctly observed, nothing in that text requires an investigating authority to determine whether a producer-exporter acts with the intent to pattern is Exports Prices in a way that both targeted its dumped sales—and masked them. Moreover, the 2012 *Boeing* Appellate Body Report never suggested "the qualitative dimension of the significance of lost sales extends to consideration of the cause of (or reasons for) those lost sales."[164]

Nonetheless, there are three obvious problems with the Appellate Body rationale on the first question, which individually and certainly cumulatively indicate it should have let stand the American victory at the Panel stage. First, it presumes the word "significance" in the context of price depression and lost sales in a CVD case has the same meaning as that word in the context of targeted dumping in an AD case. Arguably, the texts and contexts are different. Second, citing the *Cotton* Panel is dubious. Is it persuasive for a higher authority to cite a lesser one in the endeavor of the higher one to create new law? Third, the rationale bespeaks the naked substitution of the judgment of the Appellate Body for that of the DOC. Nothing suggests the DOC was unreasonable in relying only on qualitative benchmarks. Are the Nails II Methodology and DPM narrow-minded or results-oriented? Maybe. But unreasonable? No. The Appellate Body would have been on safer ground to defer to the expertise of the DOC than stretching its own precedents to get a result it wanted.

4. Requisite Explanation[165]

Did the United States fail to give an appropriate explanation of targeted dumping and the need for the W-T methodology? Siding with Korea, and contrary to the Panel finding, the Appellate Body said "yes." The question was whether the

[164] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.65. Here, too, the Appellate Body cited the Panel Report, *2005 Cotton*, *supra* note 163, for the proposition that when investigating the significance of the degree of price suppression, there is no need under Article 6:3(c) of the *SCM Agreement* also to study the cause of that suppression.

[165] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.67–.77, 5.129–.140, 6.6.

statement in Article 2:4:2, second sentence, that "an explanation . . . as to why such differences cannot be taken into account appropriately by the use of *a* weighted average-to-weighted average *or* transaction-to-transaction *comparison*" (and thus W-T comparisons are needed), demands an explanation for either W-W or T-T comparisons, or both W-W and T-T comparisons. In using the Nails II Methodology in the original Washers AD investigation, the DOC explanation concerned W-W, but not T-T comparisons. That also was true in the Administrative Review using the DPM.

The Appellate Body accepted the Korean argument based on English grammar that the word "a," disjunctive "or," and reference to "comparison" simply mean the DOC will use a single comparison methodology, not both at the same time. These grammatical points do not mean the DOC is relieved from articulating why it needs to abandon both of the symmetrical methods, and use W-T comparisons. Moreover, the Appellate Body agreed with Korea that explaining why neither W-W nor T-T comparisons work is burdensome. Indeed, usually an investigating authority facing a targeted dumping case is considering all three methodologies (not selecting a symmetrical one, first, as the Panel opined). That is, the idea of a logical progression of selection (1) between W-W or T-T comparisons, and then to (2) W-T comparisons is, in practice, false.

The Appellate Body added that "or" can be exclusive or inclusive, depending on the context in which this disjunctive is used. In the first sentence of Article 2:4:2, "or" conveys an option between W-W and T-T comparisons. That is exclusive. But in the second sentence, the *AD Agreement* drafters had no choice but to use "or" instead of the conjunctive "and." If they had used "and" in the second sentence, then the meaning of "or" in the first sentence would be inclusive, i.e., an investigating authority would have to make both W-W and T-T comparisons. So, the Appellate Body said, the word "or" in the second sentence is inclusive:

> We note the United States' argument that the first sentence of Article 2:4:2 provides an option between the W-W and T-T comparison methodologies using the conjunction "or" and that the word "or" thus has the same meaning in the context of the explanation to be provided under the second sentence of Article 2:4:2. However, the mere fact that the conjunction "or" is used in the first and second sentences of Article 2:4:2 does not imply that it has the same meaning in both sentences. We also observe that, if the second sentence of Article 2:4:2 were to include the conjunction "and" instead of the conjunction "or," this would suggest that the authority is required to use the W-W and the T-T comparison methodologies in combination. Therefore, in the context of the second sentence of Article 2:4:2, using the conjunction "and" instead of the conjunction "or" was not viable

> to indicate that both methodologies should be addressed in the investigating authority's explanation.[166]

In an accompanying footnote, the Appellate Body says the Americans agreed that replacing "or" with "and" in the second sentence would mean the DOC would have to use W-W and T-T comparisons together in the same proceeding.[167] Nevertheless, the Appellate Body rationale is unconvincing. It amounts to grammatical gymnastics to flip over a common sense reading of the text, to achieve a result that constrains the discretion of investigating authorities.

Like most athletes, gymnasts perform better when they are confident rather than fearful. The Appellate Body continued the gymnastics, but showed its fear. It tacked on the rationale that because the asymmetrical W-T comparisons in the second sentence of Article 2:4:2 are an exception to the normal expectation of using W-W and T-T comparisons, requiring the DOC to explain why both symmetrical methodologies were inadequate "gives a proper recognition to the text and to the distinction" between the two methodologies. The Appellate Body feared that explaining only one methodology might lead to investigating authorities using W-T comparisons not as an exception, but with regularity, and that though W-W and T-T comparisons "are likely to yield substantially equivalent results," the possibility that "they might yield different results and might impact differently the possible use" of W-T comparisons "should not be entirely excluded."

Treaty interpretation is not best done out of fear. That is, basing an aggressive holding and over-ruling the expertise of the DOC, because of what the Appellate Body thinks might happen if the two sentences of Article 2:4:2 are misread, is a bad move. There are all kinds of ways a WTO Member can err in reading a text, and it is impossible to anticipate all of them. Yet, in this instance, the fear the Appellate Body expresses seems nearly paranoid. It would be quite an egregious misreading to turn W-T comparisons into normalcy. Put differently, the Appellate Body legislated based on an unlikely lowest common denominator.

The Appellate Body offered one more unconvincing rationale. It said the Panel was wrong to fret about impinging on the "initial discretion" of the investigating authority. The Appellate Body reasoned the question of choosing between W-W and T-T comparisons under the first sentence is unrelated to the question of whether these methodologies are inappropriate to unmask targeted dumping and thus W-T comparisons under the second sentence are needed. Maybe, maybe not. Obviously, an investigating authority is free to choose between W-W and T-T comparisons, if either works, regardless of whether it bears an obligation to explain why one, the other, or both do not work. But once it is apparent that W-W or T-T comparisons do not work, then the authority is entitled to move on to W-T comparisons. Going back—looking in its rear-view mirror—to explain why the other of the two comparisons cannot account appropriately for differences in Export Prices that form a pattern impinges on the

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166 *Id.* ¶ 5.72.

167 *Id.* ¶ 5.72 n.227.

subsequent work of the authority. The Appellate Body's dismissive footnote—that it is "not convinced" that the burden on an investigating authority or the sequence of selecting comparison methods is "relevant to the interpretation of the second sentence of Article 2:4:2 of the Vienna Convention," and that the authority could consider all three methodologies "in no particular order or at the same time, rather than in sequence" (as the Panel indicated)—is best characterized as *obiter dicta*, but not a solid reason to overturn the Panel and foist its preference on the DOC.

5. Zeroing[168]

Was the United States correct in using zeroing in the context of W-T comparisons? On this most interesting of issues, both the Panel and Appellate Body said "no"; that is, zeroing is not permitted for "pattern" transactions–it cannot be used against targeted dumping. They rejected the American argument that the case for zeroing is even stronger when W-T comparisons are made than in normal circumstances of symmetric comparisons. The United States urged that if the exceptional nature of W-T comparisons is to have any meaning as a tool to fight targeted dumping, then zeroing in this context must be allowed. The American loss was the death knell (at least for purposes of WTO jurisprudence) of zeroing, because with this ruling, the Appellate Body had zeroed out every possible context in which zeroing could be used. But this ruling stirred a dissent by one Appellate Body member.[169]

Korea's winning argument was predictable: precedent. The Appellate Body consistently held that an affirmative dumping margin determination must be based on a study of all export transactions, "as a whole," of subject merchandise shipped by each respondent producer-exporter. Denying "offsets"—i.e., disallowing instances in which Normal Value is less than Export Price (a negative dumping margin) to counter fully instances in which Normal Value is greater than Export Price (a positive dumping margin), by setting the negative dumping margins to zero—improperly disregards the actual prices of some export transactions (namely, those exceeding Normal Value). The precedents spanned five years of Appellate Body jurisprudence:[170]

(1) 2004 case of *Softwood Lumber V* (at paragraphs 99, 102),[171]
(2) 2006 case of *Calculating Dumping Margins* (paragraph 128),[172]

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[168] *See id.* ¶¶ 5.90–.130, 5.141–.203, 6.9–.11.

[169] *Id.* ¶¶ 5.191–.203.

[170] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.144 n.336–37.

[171] Appellate Body Report, *Softwood Lumber V Compliance*, *supra* note 123.

[172] *See* Appellate Body Report, *United States—Laws, Regulations and Methodology for Calculating Dumping Margins ("Zeroing")*, WTO Doc. WT/DS294/AB/R (Apr. 18, 2006) (*adopted* May 9, 2006) [hereinafter Appellate Body Report, *Calculating Dumping*

(3) 2006 case of *Softwood Lumber V Compliance* (paragraph 13),[173]
(4) 2007 case of *Sunset Review Zeroing* (at paragraphs 109, 140, 146),[174]
(5) 2008 case of *Stainless Steel Zeroing* (at paragraphs 85, 89–90, 94),[175] and
(6) 2009 case of *Continued Zeroing* (paragraph 283).[176]

(Just the recital of the litany of anti-zeroing precedents must have been a painful memory to counsel for the United States.)

Under this jurisprudence, the use of zeroing when using W-W or T-T comparisons, whether in the context of original investigations or reviews of previous determinations (such as Administrative or Sunset Reviews) is illegal under Article 2:4:2, first sentence, and its Article 2:4 *chapeau*. Likewise, *Calculating Dumping Margins* held zeroing with W-T comparisons for Administrative Reviews violated Article 9:3 of the *AD Agreement*, as well as Article VI:2 of GATT. *Calculating Dumping Margins* was not exactly on point. In that case, at issue was the DOC application of W-T comparisons in Administrative Reviews to assess AD duty liability on subject merchandise for each individual respondent importer, having already determined a dumping margin pursuant to Article 2 of the *AD Agreement*. In the case at bar, the relevant provision was Article 2:4:2, second sentence (not Article 9:3), and what was at stake was calculation of the margin in a way to identify targeted dumping that otherwise would be masked.

Still, in both situations, the Appellate Body explained that *AD Agreement* Article 2:1 and GATT Article VI:1 demand that dumping margins are computed for subject merchandise "as a whole," not for a sub-group of products under investigation, and for each respondent producer-exporter, by studying *all* export transactions of that merchandise vis-à-vis the foreign like product—that is, that the DOC "needs to take into account all transactions that make up the applicable 'universe of export transactions.'"[177] So extending the precedents from the symmetrical comparison methods to the asymmetrical W-T comparisons in the context of targeted dumping was not much of a stretch.

To be sure, the "universe of export transactions" for W-T comparisons in that context is limited to "pattern transactions." That is, subject merchandise still must be investigated "as a whole." But "as a whole," the phrase from prior jurisprudence under Article 2:4:2 in the first sentence, has a different meaning under Article 2:4:2 in the second sentence. Namely, it means comparing the Normal Value of foreign like product sales with Export Prices of "pattern

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Margins] (this report is also sometimes referred to as *U.S. – Zeroing (EC)*), analyzed in the *WTO Case Review 2006*, *supra* note 1.

[173] Appellate Body Report, *Softwood Lumber V Compliance*, *supra* note 123.

[174] Appellate Body Report, *Sunset Review Zeroing*, *supra* note 126.

[175] Appellate Body Report, *Stainless Steel Zeroing*, *supra* note 82.

[176] Appellate Body Report, *Continued Zeroing*, *supra* note 82.

[177] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.145–.146 .

transactions." "Non-pattern transactions" are excluded, obviously, because taking them into account would mask dumping.

So the core question was whether zeroing is permissible when comparing Normal Value with Export Prices of "pattern transactions:"

> [T]he question that we need to address is whether, in the application of the W-T comparison methodology, an investigating authority is required to aggregate the results of all the transaction-specific comparisons that arise from the consideration of "pattern transactions," or whether it can exclude those transactions within the pattern that yield negative intermediate comparison results, i.e., whether zeroing is permitted under the second sentence of Article 2:4:2.[178]

The Appellate Body responded, "no," concluding;

> [U]nder the second sentence of Article 2:4:2, dumping and margins of dumping pertaining to all export transactions of an exporter or foreign producer and to the product under investigation are limited to "pattern transactions." The exceptional W-T comparison methodology in the second sentence of Article 2:4:2 requires a comparison between a weighted average Normal Value and the entire universe of export transactions that fall within the pattern as properly identified under that provision, irrespective of whether the Export Price of individual "pattern transactions" is above or below Normal Value. While the results of the transaction-specific comparisons of weighted average Normal Value and each individual Export Price falling within the pattern will be intermediate results, the aggregation of *all* these results is required and will determine dumping and margins of dumping for the product under investigation as it relates to the identified "pattern." Zeroing the negative intermediate comparison results within the pattern is neither necessary to address "targeted dumping," nor is it consistent with the establishment of dumping and margins of dumping as pertaining to the "universe of export transactions" identified under the second sentence of Article 2:4:2.
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> . . . .
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> [To reiterate,] [w]hile the text of the second sentence of Article 2:4:2 allows an investigating authority to focus on "pattern transactions" and exclude from its consideration "non-pattern transactions" in establishing dumping and margins of dumping

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178 *Id.* ¶ 5.148.

> under the W-T comparison methodology, it does not allow an investigating authority to exclude certain transaction-specific comparison results within the pattern, when the Export Price is above Normal Value. . . . [T]he second sentence of Article 2:4:2 allows an investigating authority to exclude from its consideration "non-pattern transactions" and to establish dumping and margins of dumping based exclusively on a comparison of a weighted average normal value with all the identified "pattern transactions," in order to identify and address "targeted dumping." In so doing, however, the second sentence of Article 2:4:2 does not allow an investigating authority to exclude from the applicable "universe of export transactions" individual transactions that form part of the pattern, but that are priced above Normal Value.[179]

This conclusion, however, needs to be unpacked. What is the rationale underlying it?

The second sentence of Article 2:4:2 speaks of "individual export transactions," which means "the pattern of Export Prices identified by the individual authority which differ significantly from other Export Prices." As the Appellate Body held (earlier in the case) "individual export transactions" are "pattern transactions" with Export Prices that "differ significantly because they are significantly *lower* than other Export Prices."[180] But,

> We find *no such textual and contextual support* to conclude that the term "individual export transactions" in the second sentence of Article 2:4:2 refers only to those transactions that form part of the identified "pattern" but are priced below normal value. Rather, we agree with the Panel that the term "individual" suggests that "each pattern transaction should be considered in its own right, and with equal weight, *irrespective of whether the export price is above or below normal value*."[181]

Nothing in the text of Article 2:4:2, second sentence, or in Article 2:4 suggests the meaning of "dumping" or "margin of dumping" should be different in that sentence compared with the meaning of those terms elsewhere in the *AD Agreement*. Rather,

> Under the second sentence of Article 2:4:2, the relevant "pattern" is composed of a set of significantly lower prices to purchasers, regions, or time periods, and margins of dumping

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[179] *Id.* ¶¶ 5.160, 5.170.

[180] *Id.* ¶ 5.151 (emphasis added).

[181] *Id.* ¶ 5.151 (citing Panel Report, *United States Targeted Dumping Zeroing*, *supra* note 108, ¶ 5.151) (emphasis added).

> are established by conducting a comparison between Normal Value and those export transactions that are included in the pattern. The second sentence of Article 2:4:2 is "exceptional" because it allows investigating authorities to establish margins of dumping, while excluding from the dumping comparison those transactions that do not form part of the pattern. This exception is spelled out in the text of the second sentence of Article 2:4:2 that uses the terms "individual export transactions" and "a pattern of Export Prices which differ significantly." . . . [T]hese terms refer to the same set of Export Prices. Moreover, the reference in the second sentence to the term "individual export transactions" is in the context of highlighting the asymmetrical nature of the W-T comparison methodology, whereby a Normal Value established on a weighted average basis is compared to prices of individual export transactions as opposed to a comparison between Normal Value and Export Price on a W-W or T-T basis. Thus, we do not see any basis to read the term "individual export transactions" as permitting the exclusion of those individual "pattern transactions" that are priced above Normal Value from the establishment of margins of dumping in the application of the asymmetrical W-T comparison methodology.[182]

Nothing in those provisions indicates that, once the "universe of export transactions" is identified in a targeted dumping case and an "as a whole comparison" is made between the weighted average Normal Value of foreign like product sales and individual Export Prices of "pattern transactions," it is permissible to disregard some "pattern transactions" by setting their prices such that the dumping margin relating to them is zero:

> Zeroing within the pattern necessarily amounts to a definition of "pattern" that is limited to those export transactions to one or more particular purchasers, regions, or time periods that are below Normal Value, as it is only those sales that would be taken into account to establish margins of dumping when using zeroing. However, . . . *the second sentence of Article 2:4:2 does not define the pattern in reference to Normal Value*. Rather, the reference to purchasers, regions, or time periods indicates that, while Export Prices within a pattern must differ significantly from other Export Prices, the pattern is composed of *all* the Export Prices to one or more particular purchasers, regions, or time periods, not just those that are below Normal Value. To

[182] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.152 (emphasis added).

> allow zeroing within an identified "pattern" would disconnect the notion of pattern that is identified under the second sentence (as all export sales to one or more particular purchasers, regions, or time periods) from the pattern to which the W-T comparison methodology is applied for establishing margins of dumping in order to address "targeted dumping" (by considering only those sales to one or more purchasers, regions, or time periods that are below Normal Value). However, the text of the second sentence of Article 2:4:2 does not support an interpretation according to which the pattern to which the W-T comparison methodology applies for establishing margins of dumping is different from the pattern that triggers the application of the second sentence and that reveals the existence of "targeted dumping."[183]

This important passage illustrates two points. First, it contains the heart of the Appellate Body logic for holding zeroing in targeted dumping cases illegal. Second, it shows (again) how poorly the Appellate Body expresses its logic on vital points of law. The last sentence, for example, should be crisp, clean, and elegant, not contorted with hideous constructions like "according to which the pattern to which."[184] Fortunately, the writing quality improved slightly, with the Appellate Body stating:

> Turning to the *function* of the second sentence of Article 2:4:2, . . . the second sentence provides for an exception to the normally applicable symmetrical comparison methodologies of the first sentence in order to allow investigating authorities to identify and address "targeted dumping," whereby the "targeted dumping" coincides with the identified "pattern" of significantly different export prices. By conducting a comparison between Normal Value and all transactions included in the identified "pattern," an investigating authority is able to address the "targeted dumping" that is identified and that corresponds to that particular "pattern." Indeed, *the second sentence of Article 2:4:2 allows an investigating authority to identify and address "targeted dumping" that corresponds to a properly defined pattern, which includes sales that are both above and below Normal Value, and not to a pattern composed exclusively of sales that are below Normal Value*. We are, therefore, of the view that *there is nothing more that needs to be "unmasked" once the dumping comparison has been conducted between*

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[183] *Id.* ¶ 5.153 (emphasis on "all" original, other emphasis added).

[184] In the next paragraph, *id.* ¶ 5.154, the Appellate Body offers the argument that reference to "prices" in the plural in the second sentence of Article 2:4:2 indicates the pertinence of its *Softwood Lumber V Compliance* Report, in which it held zeroing impermissible with T-T comparisons under the same plural expression, in the first sentence.

> *Normal Value and "pattern transactions" to the exclusion of "non-pattern transactions."* . . . [W]hile *zeroing within a pattern that includes [Export Prices from] sales above Normal Value increases the margin of dumping, it does not "unmask" the "targeted dumping" that corresponds to the properly identified "pattern" of significantly lower sales, whereby such pattern includes sales below and above Normal Value*.[185]

This statement (though redundant with earlier passages) is more than an argument about the ordinary meaning of text *per se*. As the italicized language indicates, it deals with the underlying purpose of the text. The Appellate Body could not avoid that purpose, given the lack of clear direction from just the text.

The Appellate Body's best summary of its zeroing finding came later, at paragraph 5:167, in an entirely different setting, namely, concerning negotiating history:

> [U]nder the second sentence of Article 2:4:2, an investigating authority can use the W-T comparison methodology to identify and address "targeted dumping" by establishing margins of dumping based on the pattern of export prices which differ significantly and which are "targeted" at purchasers, regions, or time periods. . . . [T]his exercise would allow an investigating authority not only to identify but also address "targeted dumping" without the need to have recourse to zeroing. We have, thus, reached the conclusion that zeroing under the W-T comparison methodology is not allowed based on the *text and context* of Article 2:4:2 read in light of the *object and purpose* of the *Anti-Dumping Agreement*.[186]

Obviously, better editing would (or should) have led to placement of this synopsis far earlier in the Report (preferably before paragraph 5:141, where the Appellate Body essentially conceals its judgment for 15 paragraphs by starting off with that of the Panel).

In general, the Appellate Body would do well to consider the classic "CIRAC" method used by many American Juris Doctor (J.D.) students to resolve law school exam questions: Conclusion, Issue, Rule, Application, and Conclusion. This organizational structure is a kind of "tell them what you are going to tell them (the first "C"), then "tell them" (the "I, R, and A"), and finally, "tell them what you have told them" (the final "C"). That way, readers would know up front the point to which the Appellate Body is driving.

In any event, the Appellate Body also could not avoid an incursion into the negotiating history of the *AD Agreement*. That is because the Americans

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185 *Id.* ¶ 5.155 (emphasis added).

186 *Id.* ¶ 5.167 (emphasis added).

expressly argued this history "confirms that zeroing is permissible when applying the asymmetrical and exceptional W-T comparison methodology set forth in the Second sentence of Article 2:4:2."[187] The United States pointed to four documents concerning proposed changes to the Tokyo Round *Antidumping Code* suggested by GATT contracting parties, particularly Hong Kong and Japan:[188]

(1) Negotiating Group on MTN Agreements and Arrangements, Amendments to the Anti-Dumping Code, Communication from the Delegation of Hong Kong, Addendum, GATT Document MTN.GNG/NG8/W/51/Add.1, 22 December 1989.
(2) Negotiating Group on MTN Agreements and Arrangements, Communication from Japan, GATT Document MTN.GNG/NG8/W/30, 20 June 1988.
(3) Negotiating Group on MTN Agreements and Arrangements, Communication from Japan Concerning the Anti-Dumping Code, GATT Document MTN.GNG/NG8/W/81, 9 July 1990.

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[187] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.166. The United States also offered, with no luck, a "mathematical equivalence" argument. *See id*., ¶¶ 5.161–.165. It said that if zeroing is not allowed with W-W or W-T comparisons, then dumping margin calculations based on the same Normal Value and Export Price sales data will produce the same numerical margins. Korea pointed out mathematical equivalence is not inevitable when zeroing is barred, because the way in which Normal Value, and the adjustments to Export Prices, may differ with W-W and W-T comparisons. In other words, Korea said the mathematical equivalence argument rests on a false assumption that the method of establishing Normal Value and Export Price is the same regardless of symmetrical or asymmetrical comparison methodologies. The Appellate Body agreed with Korea, restating its conclusion that when making W-T comparisons, the transactions that constitute the "pattern" of significantly different Export Prices is a subset of all export transactions, namely, ones with Export Prices significantly lower than other Export Prices to targeted purchasers, regions, or time periods. In contrast, when making W-W comparisons under the first sentence, all export transactions are included – the universe is larger than with individual W-T comparisons that form the relevant "pattern" under the second sentence: ":[T]he 'pattern of Export Prices which differ significantly' within the meaning of the second sentence of Article 2:4:2 comprises only a subset of all the export transactions and that these significantly different Export Prices are significantly lower Export Prices, which would be used by an exporter or producer to "target" purchasers, regions, or time periods. . . . *[T]he W-W and W-T comparison methodologies are designed to operate based on different 'universes of export transactions:' the first, based on all export transactions; and the second, based on individual export transactions that form the relevant 'pattern.'* Accordingly, the second sentence of Article 2.4.2 allows an investigating authority to establish margins of dumping by comparing 'pattern transactions' with Normal Value, while excluding from its consideration 'non-pattern transactions.' Comparing Normal Value with 'pattern transactions' only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the W-W comparison methodology to *all* export transactions." *Id*. (emphasis on "all" original, other emphasis added).

[188] *See id.* ¶ 5.166 n.366.

(4) Negotiating Group on MTN Agreements and Arrangements, Meeting of 16-18 October 1989, MTN.GNG/NG8/13.

These documents, the United States contended, showed that GATT contracting parties contemplated the use of zeroing when making asymmetrical comparisons; that is, in the context of W-T comparisons, negative dumping margins would be treated as zero, not added to other transactions to offset positive dumping margins. The inference the United States drew from the documents was that "those GATT contracting parties viewed asymmetry and zeroing as *one and the same problem*."[189] In other words, the Americans claimed the contracting parties associated asymmetrical comparisons with zeroing.

The Appellate Body rejected this legislative history argument on two grounds. First, while some GATT contracting parties saw zeroing as a way to unmask and rectify targeted dumping, generally they opposed both zeroing and asymmetrical comparisons. That is, in Tokyo Round negotiations, they did not want to include W-T comparisons or zeroing in the AD Code from that Round. Arguably, by the time of the Uruguay Round, the contracting parties viewed the second sentence of Article 2:4:2 of the *AD Agreement* as a compromise provision: it allowed W-T comparisons, but not zeroing. By not mentioning zeroing, maybe they meant to prohibit it, or maybe they meant to allow it. With no reference to zeroing, either implication is permissible.

In this first reason, the Appellate Body revealed its vulnerability to the criticism of judicial activism. The Appellate Body said:

> We, thus, consider that these documents do not support a reading of the second sentence of Article 2:4:2 as permitting zeroing. On the one hand, *they could be read, as the United States suggests, as supporting the view that the asymmetrical comparison methodology was associated with zeroing*. On the other hand, they also could be read as explaining why the final version of the *Anti-Dumping Agreement* included the second sentence of Article 2:4:2 as a compromise provision addressing "targeted dumping" by means of an asymmetrical comparison methodology, but without zeroing.[190]

This statement is (to use the Evidence Law term) an admission against interest. The Appellate Body concedes the American reading of the legislative history and second sentence of Article 2:4:2 is reasonable. The Appellate Body picks the other reasonable interpretation. In so doing, it foists its judgment of the better policy against targeted zeroing on that of the United States. Its preference, however defensible, should not infringe on the acceptable interpretation of a

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[189] *Id.* ¶ 5.166 (emphasis added).

[190] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.169 (emphasis added).

sovereign WTO Member. If both readings are correct—permitting or prohibiting zeroing—then deference is owed to the Member, and the first sentence of the above quoted passage is a *non sequitur* in relation to the remainder.

The second reason the Appellate Body offered also seems weak. It said the Tokyo Round proposals to which the United States pointed did not reflect the positions of all the GATT contracting parties. They provide historical background, but they are inconclusive as to what other delegations sought. Indeed, the Appellate Body cited its *Softwood Lumber V* and *Softwood Lumber V Compliance* precedents on the same point, as the Americans had made the legislative history argument before (albeit in the T-T context).[191] No inference could be drawn from the documents as to whether the contracting parties sought to allow or prohibit zeroing in targeted dumping cases under the Tokyo Round, much less the Uruguay Round, AD texts. Again, if no inference can be drawn in one direction, then why bar a sovereign Member from its reasonable inference in the other direction?

There was a third reason to reject the American argument, which the Appellate Body did not offer but ought to have, as it might have been the strongest. The text at issue was from the Uruguay Round, not the Tokyo Round, and whether they were verbatim equivalents was unclear. Using W-T comparisons under Article 2:4:2, second sentence, allows an investigating authority to identify and address targeted dumping. There is no need for the authority to engage in zeroing to deal with targeted dumping. In other words, both the text and context of the second sentence authorize an authority like the DOC to use W-T comparisons in instances of alleged targeted dumping. They do not authorize the DOC to zero, but there is no need for the DOC to zero, because W-T comparisons fulfill the object and purpose of the second sentence—spotting and rectifying targeted dumping. Simply put, the legislative history was inapposite, as it did not deal specifically with the Article 2:4:2, second sentence, of the Uruguay Round *AD Agreement*.

Overall, what the Appellate Body meant to say—why it reached the result it did—is that every targeted dumping case involves a logical, two-step inquiry:

(1) is there targeted dumping, and if so,
(2) what is that dumping margin?

Export Prices, but not Normal Values, matter in Step 1, whereas in Step 2, Export Prices are matched against Normal Value. There is a difference between 1 establishing whether a "pattern" of Export Prices, and thus targeted dumping, exists, and 2 computing the magnitude of the targeted dumping margin. In the first inquiry, disregarding "non-pattern transaction" Export Prices makes sense. Doing so helps unmask targeted dumping, and this inquiry still involves looking at

[191] *Id.* ¶ 5.168 nn.367–68 (citing Appellate Body Report, *US—Softwood Lumber IV*, *supra* note 121, ¶¶ 107–08; Appellate Body Report, *Softwood Lumber V Compliance*, *supra* note 123, ¶ 121).

all Export Prices. But in the second inquiry, with the universe of "pattern transactions" identified from the first inquiry, disregarding non-dumped "pattern transactions" is an unfair reading of the text, with no legislative history to justify that reading. If allowed to stand, then that reading would lead to unfairness, namely, artificial inflation of the targeted dumping margin, because of the disallowance of non-dumped transactions (ones with "pattern" Export Prices above Normal Value) to offset dumped ones (those with "pattern" Export Prices below Normal Value).

These reasons explain why the Appellate Body held zeroing in targeted dumping cases to be illegal under Article 2:4:2, second sentence, of the *AD Agreement*. Why did it also find zeroing in such original investigations in targeted dumping cases to be illegal, both "as such" and "as applied," under the Article 2:4 *chapeau*,[192] and likewise in Administrative Review of those cases under Article VI:2 of GATT and Article 9:3 of the *Antidumping Agreement*?[193] For readers of Appellate Body zeroing precedents, the answer under the Article 2:4 *chapeau* was a forgone conclusion:

> 5.179. In *EC—Bed Linen*, the Appellate Body explained that "a comparison . . . that does *not* take fully into account the prices of *all* comparable export transactions—such as the practice of 'zeroing' . . . —is *not* a 'fair comparison' between export price and normal value, as required by Article 2.4 and by Article 2:4:2." Additionally, in *US—Softwood Lumber V (Article 21:5 – Canada)*, the Appellate Body considered that, since "the use of zeroing under the transaction-to-transaction comparison methodology artificially inflates the magnitude of dumping," it "cannot be described as impartial, even-handed, or unbiased" and, accordingly, it does not "satisf[y] the 'fair comparison' requirement within the meaning of Article 2:4."
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> 5.180. Setting to zero the intermediate negative comparison results has the effect of not only inflating the magnitude of dumping, thus resulting in higher margins of dumping, but it also makes a positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value. Moreover, by setting to zero "individual export transactions" that yield a negative comparison result, an investigating authority fails to compare *all* comparable export transactions that form the applicable "universe of

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192 *See id.* ¶¶ 5.172-5.182.

193 *See id.* ¶¶ 5.183-5.190.

> export transactions" as required under the second sentence of Article 2:4:2, thus failing to make a "fair comparison" within the meaning of Article 2:4.[194]

In other words, ever since the 2001 *Bed Linen* case, reinforced in 2006 in *Softwood Lumber V Compliance*, the Appellate Body had made clear that for a fair comparison of Normal Value against Export Price, all comparable export transactions must be evaluated. Zeroing effectively excludes those transactions (where Export Price exceeds Normal Value, i.e., the dumping margin is positive), and thus prejudices the dumping margin calculation by artificially inflating the margin. The American argument went too far: yes, using W-T comparisons to unmask targeted dumping was necessary, but once the relevant "pattern transactions" (i.e., the targeted dumped transactions) had been revealed thanks to W-T comparisons, there was no further need to engage in zeroing. The special function of Article 2:4:2, second sentence, was fulfilled in these exceptional cases by W-T comparisons, and there was no further need to zero pattern transactions to give effect to that sentence.

As for the context of Administrative Reviews, the reasoning was the same— precedent under Article VI:2 of GATT and Article 9:3 of the *Antidumping Agreement*.[195] Zeroing in targeted dumping cases with W-T comparisons artificially inflates the dumping margin based on unfair comparisons in violation of Article 2:4 and 2:4:2 of the *Agreement*. Therefore, any AD duty collected would be excessive, in violation of Article VI:2 and Article 9:3. In 2006, the Appellate Body ruled in *Calculated Dumping Margins* that zeroing in Administrative Reviews using W-T resulted in assessed AD duties that "exceeded the foreign exporters' or producers' margins of dumping."[196] In 2008, the Appellate Body held in *Stainless Steel Zeroing* that "under Article VI:2 and Article 9:3, the margin of dumping established for an exporter in accordance with Article 2 operates as a *ceiling* for the total amount of anti-dumping duties that can be levied on the entries of subject merchandise from that exporter."[197] In the case at bar, the Appellate Body concluded:

> 5.188. . . . [I]f margins of dumping are established inconsistently with Article 2:4:2 by using zeroing under the W-T comparison methodology, the corresponding anti-dumping duties that are levied will also be inconsistent with Article 9:3 of the *Anti-Dumping Agreement* and Article VI:2 of the GATT 1994, as they will exceed the margin of dumping that

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[194] *Id.* ¶¶ 5.179–.180.

[195] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.183–.190.

[196] *Id.* ¶ 5.185.

[197] *Id.* ¶ 5.185 (quoting Appellate Body Report, *Stainless Steel Zeroing*, *supra* note 82,¶ 133).

> should have been established under Article 2. We, therefore, agree with the Panel that, since the use of zeroing in the context of the W-T comparison methodology would artificially inflate the margin of dumping, any duties collected would necessarily be excessive.
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> 5.189. . . . [I]f zeroing is not permitted under the W-T comparison methodology applied pursuant to the second sentence of Article 2:4:2 in original anti-dumping investigations, it also cannot be permitted in respect of administrative reviews. . . . [I]n *US—Stainless Steel (Mexico)*, the Appellate Body stated that it did not consider that there was "a textual or contextual basis in the GATT 1994 or the *Anti-Dumping Agreement* for treating transactions that occur above normal value as 'dumped' for purposes of determining the existence and magnitude of dumping in the original investigation and as 'non-dumped' for purposes of assessing the final liability for payment of anti-dumping duties in a periodic review."[198]

The United States repeated its familiar argument that Article 2:4:2, second sentence, allows the DOC not only to exclude non-pattern transactions and compare weighted average Normal Value with individual Export Prices from pattern transactions, but also to use zeroing when making W-T comparisons among pattern transactions to compute the final dumping margin.[199] The Appellate Body, of course, agreed earlier with the first point, but given its zeroing precedents, its disagreement with the second one was all but a foregone conclusion.

F. Holdings and Rationales under *SCM Agreement* Article 2:2

In ruling on Article 2:2 of the *SCM Agreement*, the Appellate Body was presented with novel issues that had not been raised in previous WTO litigation. Korea's *RSTA* Article 26 Tax Credit Program was available to all Korean enterprises, so the United States could not argue they were specific based on Article 2:1 of the *SCM Agreement*—that provision defines specificity in terms of limitations on recipients. The United States had to mount the case that the Program was regionally specific under Article 2:2, i.e., the tax credits were available to all Korean firms within a designated geographic region. Korea tried unsuccessfully to rebut the American argument by saying the Tax Credit was not regionally specific for three reasons: first, the legal personality of the recipients;

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[198] *Id.* ¶ 5.189 (quoting Appellate Body Report, *Stainless Steel Zeroing*, *supra* note 82, ¶ 107).

[199] *See id.* ¶¶ 5.186-5.187.

second, the implicit designation of a territory; and third, the small size of the excluded territory (2% of all of South Korea). Korea lost all three arguments.

1. Definition of "Certain Enterprises"[200]

On the first losing argument Korea tried, the Appellate Body explained the phrase "certain enterprises" in Article 2:2 need not be distinct legal personalities, because regional specificity is not about the nature of the recipient but rather the venue of the activities of the recipient. Korea contended that "certain enterprises" as used in this Article is restricted to a legal person, and thus excludes the facilities (i.e., any productive operations) of a company that do not have legal status. Korea had a self-interested reason to attempt this narrow interpretation: the *RSTA* Article 26 Tax Credit Program would not be regionally specific, because it is available to all companies incorporated anywhere in Korea, and imposed no geographical limitations on the location of the recipient of a subsidy; rather, the only restriction was on the location of the subsidized activities, but those activities do not qualify as "certain enterprises" because they are not independent legal entities. In other words, Korea wanted the Appellate Body to declare that regional specificity must be defined by the geographical location of the recipient of a subsidy, and that the recipient itself must be a natural or legal person. An entity without a legal personality, like a factory, could not be an enterprise, and thus regional specificity could not be established based on a recipient like a factory.

Like the Panel, the Appellate Body rebuffed the Korean argument:

> the term "certain enterprises" in Article 2:2 of the *SCM Agreement* is not limited to entities with legal personality. Rather, an "enterprise" may be located in a certain region for purposes of Article 2:2 if it effectively establishes its commercial presence in that region, including by setting up a sub-unit, such as a branch office or manufacturing facility, which may or may not have distinct legal personality.[201]

To support this holding, the Appellate Body offered two rationales.

The first was textual. Nothing in Article 2:2 suggests "enterprise" is circumscribed to a legal person. To the contrary, the concept of commercial activities should be construed broadly. So an "enterprise," such as a manufacturing facility or branch office, qualifies as an "enterprise" that is located inside a designated region, even if this facility or office is a sub-unit or constituent part of an "enterprise," such as a corporation that has invested in that facility, and

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[200] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.212–.225, 6.12.

[201] *Id.* ¶ 5.225. *See also id.* ¶ 5.240 (repeating the same conclusion in point (i)).

the corporation is headquartered far outside that region. The Article does not differentiate between (1) a manufacturing operation that lacks a distinct legal personality, and (2) an entity that has independent legal personality and owns or operates that operation. Put simply (which the Appellate Body did not do), the constituent parts of an organization, and the headquarters of that organization, qualify as a unified "entity."

The Appellate Body, of course, accepted the textually well-founded American argument—namely, that "certain enterprises" envelopes a wide variety of economic structures and activities. The term "enterprise" (based on the *Shorter OED*) is associated with the concept of "business," which in turn refers to all sorts of commercial endeavors, made "certain" in the sense of a known, particularized, but not necessarily explicitly identified area of activity.

The second rationale was not textual. Legal personality is a fiction created under the domestic laws on business organizations of the various WTO Members. If Korea's contention were accepted, then a Member easily could escape "regional specificity" under Article 2:2 and liability for illegal subsidization. Many businesses have commercial establishments in multiple locations. Requiring any one of them to be a separate legal entity before liability under the *SCM Agreement* could attach would be to condone manipulation. The Member could provide subsidies to non-legal person factories only in a designated geographic location, thereby bolstering the international competitive prospects of the factory owners—the actual legal persons, or "enterprises." The subsidies would not be deemed regionally specific, because their recipients, though huddled in a defined region, are not legal persons. That result—that a subsidy program is not countervailable if it limits access to factories in a designated region, because the factory owners that get the subsidies and funnel them to their factories are headquartered outside the region—would be "absurd."[202]

> [I]f accepted, Korea's interpretation of the term "certain enterprises" would entail that a regional specificity analysis should focus solely on the place(s) where the recipient companies are incorporated, without regard to the place(s) where those companies effectively establish their commercial presence by, for instance, setting up sub-units such as branch offices or manufacturing facilities. We agree with the United States that this interpretation could open the door to circumvention of the disciplines of Article 2:2. For example, the recipient companies may be incorporated or headquartered outside the relevant geographical region designated by a subsidy program, but manufacture their *entire* production within that region at facilities that do not enjoy distinct legal personality. Under Korea's interpretation, the subsidy program in question would not be considered regionally specific, thereby escaping

[202] *Id.* ¶ 5.219 (discussing the American argument).

> scrutiny under the *SCM Agreement* and frustrating the function of Article 2:2.[203]

While the Appellate Body undoubtedly is correct on this point, the underlying logic is not textual, but pragmatic. The interpretative methodology it uses here is a consequentialism.

2. "Designation" of a Region[204]

Korea argued the *RSTA* Article 26 Tax Program was not specific under Article 2:2 of the *SCM Agreement*, because that Program failed to make an affirmative, explicit designation of a geographical region for subsidization. Instead, the Program covered the entire territory of South Korea, save for the overcrowded Seoul area, thus embracing 98% of the country, and defining (if it be called that) the subsidization zone of just 2% by negative inference. Succinctly put, Korea argued the Program was broadly available; hence it did not distort trade. Of course, Korea had to make this argument: only if the subsidy was generally available was it non-specific, and thus countervailable; that is, it was a "subsidy" under Article 1 of the *Agreement* but flunked the Specificity Test under Article 2.

The Panel rejected the Korean argument. Merely disqualifying certain investments from the Seoul area from eligibility for subsidies indeed is sufficient to designate a specific region. In other words, it is permissible to identify a region for subsidization by saying that region is (put colloquially) "everywhere other than X." In this case, X = Seoul; therefore, the Article 26 Program applies everywhere outside of Seoul.

The Appellate Body agreed with the Panel and with the American argument, and its principal basis was, again, textual. Article 2:2 does not rule out the possibility of a designation by exclusion or other indirect means short of an express statement. The verb "designate," lexicographic sources such as the *OED* and *ODO* teach, means "indicate," and indications need not be made in an affirmative, explicit manner.[205] Its rationale also drew on its precedent. In its 2011 *United States AD-CVD* Report, the Appellate Body said limits on access to a subsidy may be expressed in "many different ways."[206]

The textual argument, as any first year Contracts Law student knows, is of course correct. Offers and acceptances can be made by non-express means,

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[203] *Id.* ¶ 5.224 (emphasis original, footnote omitted).

[204] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.212–.216, 5.226–.241, 6.12.

[205] *See id.* ¶ 5.229.

[206] *Id.* ¶ 5.231 (quoting Appellate Body Report, *United States—Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, ¶ 413, WTO Doc. WT/DS379/AB/R (Mar. 11, 2011) (*adopted* Mar. 25, 2011) (referred to commonly as *United States AD-CVD*), analyzed by the *WTO Case Review 2011*, *supra* note 1.

with the legal effect of validity the same as a performative statement like "I hereby offer" or "I hereby accept" So it is with subsidy programs: their regional specificity may be defined in terms of inclusion (affirmatively limiting eligibility within an area) or exclusion (negatively limiting eligibility to an area other than a certain location), and the operational effect is the same. Either way a subsidy program is expressed, it will discourage investments in one portion of territory and encourage investments in another portion of territory. That is what happened with respect to the Article 26 Program. What matters, said the Appellate Body, is that the relevant region is sufficiently demarcated, and its border and territorial coverage are clear:

> [T]he "designation" of a region for purposes of Article 2:2 need not be affirmative or explicit, but may also be carried out by exclusion or implication, provided that the region in question is clearly discernible from the text, design, structure, and operation of the subsidy at issue; and . . . [moreover] the concept of "geographical region" in Article 2:2 does not depend on the territorial size of the area covered by a subsidy.[207]

Article 2:2 simply asks that there be no uncertainty as to the boundaries of the region, and there were none with the Article 26 Program. If that certainty exists, as in this case, then the Article 2:2 language—"limited to certain enterprises located within a designated geographical region"—is satisfied.

To be sure, on this topic, too, the Appellate Body offered a pragmatic rationale:

> To draw the formalistic distinction proposed by Korea could enable Members to circumvent the disciplines of Article 2:2 by framing their regionally focused subsidy schemes in negative or exclusionary terms.[208]

So, to make an effective "designation" of a region under Article 2:2, it is both necessary and sufficient to do so "by exclusion or implication," as the Article 26 scheme did. Did the fact that the excluded area, Seoul, account for just 2% of the landmass of Korea matter (meaning that the subsidy was available to almost all of South Korea)?

"Yes," thought Korea. The territory in which the Article 26 Program operates—98% of the country—is so large, so unbounded, and so insufficiently demarcated as cohesive that it cannot be considered a "designated geographical region." If a subsidy is offered across 98% of the territory of the WTO Member, then it is effectively available in 100% of that territory. But the Appellate Body disagreed.

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[207] *Id.* ¶ 5.240.
[208] *Id.* ¶ 5.231.

Returning to the text of Article 2:2, the Appellate Body explained that the term "geographical region" is not qualified in any way. Agreeing with the Panel, it said that any geographical region, no matter how small or large, triggers Article 2:2: "given the absence of any textual qualification to the term 'geographical region,' the territorial size of a region does not constitute a criterion relevant to the applicability of Article 2:2."[209] There is no *de minimis* exception, to the effect that a subsidy excluding (for example) 5% or less of a Member's territory, or conversely put a subsidy including 95% or more of a Member's territory, is too diffuse to be considered "regional." Rather, Article 2:2 simply demands identification by a Member granting a subsidy of a tract of land, a well-defined area, within that Member's jurisdiction, to qualify as a "region." That identification is enough to limit access to the scheme. Further, even though Seoul is 2% by area, it is home to a huge proportion of the South Korean population and the country's economic output.

In this respect, another consequentialist matter was raised. Korea said the Panel holding infringed on its policy space to curb urban sprawl. Article 26 is designed to boost investment outside of one of the most densely populated areas in the world, the Seoul region. The Appellate Body agreed with the United States that there was no such infringement. Korea remained free to adopt real estate zoning laws, for example, that limit or bar new manufacturing investments, in and around Seoul. In contrast to subsidies, these measures were far less trade restrictive, and not subject to disciplines under GATT-WTO rules. The Appellate Body wrote:

> Members are, in principle, free to preserve portions of their territories from industrial exploitation through measures other than subsidy programmes, such as zoning regulations or prohibitions to build in certain areas. However, when Members choose to do so through the bestowal of subsidies, the disciplines of the *SCM Agreement* apply. Pursuant to such disciplines, Members have the discretion to grant subsidies—other than those prohibited under Article 3 of the *SCM Agreement* [i.e., Red Light subsidies]—that pursue legitimate policy goals, provided that, by doing so, they do not cause injury to other Members' domestic industries. If the bestowal of subsidies [in particular, Yellow Light subsidies] does, indeed, cause injury to the domestic industries of other Members, those subsidies may be subject to remedial action [if they are specific], such as the imposition of countervailing duties.[210]

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[209] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.236.

[210] *Id.* ¶ 5.238. Had the Article 26 Tax Program been a Red Light subsidy under Article 3, then specificity and adverse effects would be deemed irrebuttably to occur, but the Program fell into the Yellow Light category, instead.

The Appellate Body stressed the function of Article 2:2, namely, "to address subsidy schemes by which Members direct resources to certain geographical regions within their jurisdictions, *thereby interfering with the market's allocation of resources*."[211] It is this interference that matters, regardless of whether the territory in which it occurs is small. A big disruption can occur in a small area.

3. Tying Subsidies to Particular Products[212]

The United States argued the DOC acted properly in concluding the Article 10(1)(3) and Article 26 Tax Credit Programs were not linked to specific products (i.e., subject merchandise only), but rather attributable to expenditures associated with all goods Samsung made in Korea (i.e., both subject and non-subject merchandise). The United States said the determination of whether any subsidy is tied to a specific product depends on two factors.

The first factor is the purpose of the subsidy, based on information available at the time the subsidy is bestowed. The subsequent use of that subsidy, or the effects of the subsidy, on the recipient companies, are irrelevant to the determination of tying the subsidy to subject merchandise. That means a subsidy can be tied to a product only when its intended use is known, and acknowledged, by the granting government before or contemporaneous with the bestowal of that subsidy on the recipient. A subsidy is tied to a product, said the DOC, only when its intended use is known to the subsidy giver, and that giver says so either before, or concurrently with, its bestowal of the subsidy.

The DOC said the Korean government had no *a priori* knowledge of the intended use of the tax benefits by Samsung at the time the government authorized Samsung to lodge a claim for those tax credits. Even Samsung itself could not acknowledge receipt of the tax credit before it claimed the credit for expenses associated with goods it made in Korea. So there is no way, the DOC said, the Korean government knew or could have known the intended use of the subsidy when it authorized Samsung to file a claim for the tax credits. The subsidy is provided only at the time that the tax credit is provided—the subsidy is, after all, the provision of the actual tax credit. The tax credit does not retroactively stimulate or encourage product-specific investment that results in the earning of the tax credit. To the contrary, that investment is made first, and thereafter a tax credit is obtained.

The second factor is the claim for the benefit of a subsidy made by the recipient of the subsidy. To tie a subsidy to particular goods, said the United States, there must be evidence the recipient connected the subsidy to those goods. In the case at bar, the DOC found no evidence on the tax return Samsung filed with the Korean National Tax Service that Samsung claimed tax credits in connection with any particular product. Moreover, once Samsung obtained a tax

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211 *Id.* ¶ 5.236 (emphasis added).

212 *See id.* ¶¶ 5.212–.216, 5.247–.286, 6.14–.15.

credit, it had full discretion to spend the proceeds of the credit on products other than the ones for which it had obtained a credit—or, indeed, on no products at all. So it made sense for the DOC to treat the tax credits as un-tied, and allocate them across the sales value of all Samsung products made in Korea.

Both factors reflected an interpretation by the DOC and Panel of Article VI:3 of GATT and Article 19:4 of the *SCM Agreement* that to tie the benefit of a subsidy to subject merchandise, such as the proceeds of a tax credit to washing machines, it is essential to trace back that benefit to the merchandise. Korea said that interpretation was erroneous. Korea said it created an irrebuttable presumption that a tax credit bestowed after an activity that gave rise to eligibility of the credit has occurred never could be traced back, and thus never tied, to subject merchandise. Moreover, because money is fungible, how, asked Korea, is it possible to link particular cash proceeds from a tax credit to washing machines?

Unlike the Panel, the Appellate Body rejected the American defenses and ruled in favor of Korea. Thus, although Korea lost on the issues of "certain enterprises" and "designated geographic region," it prevailed on the tying and factional computation matters. Korea convinced the Appellate Body that the DOC was wrong to focus on the intended use by a recipient, such as Samsung, of a subsidy benefit, such as tax credits. The gist of the Appellate Body's rationale was the *OED* and *ODO* definitions of "tie." The Appellate Body declared "a subsidy is 'tied' to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the product concerned." It called for a case-by-case inquiry of the specific circumstances of each case, namely, the design, structure, and operation of the subsidy, all relevant facts concerning the granting of the subsidy, and the actual and expected results of the subsidy. The Appellate Body then rather summarily dismissed the Panel's finding in favor of the United States, saying:

> The Panel observed . . . that tax credits under the *RSTA* Article 10(1)(3) Tax Credit Program "are provided after the underlying R&D activities have been undertaken, in an amount determined by reference to total R&D activities." It also noted that Samsung's tax return "did not specify the merchandise for which [the tax credits were] to be provided." However, despite those references, the Panel ultimately grounded its affirmation of the USDOC's test on the fact that, under Article 10(1)(3) of the *RSTA*, Samsung: (i) was able to claim the tax credits only after it had undertaken the eligible activities; and (ii) was not required to spend the proceeds of those tax credits on the same type of activities as those that had given rise to eligibility for the subsidy. Based on this understanding, the Panel did not find it necessary to engage in *any* analysis of the RSTA Article 26 Tax Credit Program, for it considered that the same understanding applied "*mutatis mutandis*" to that program as well. In light of the above, we consider that the Panel's analysis falls short of a

> proper examination of the design, structure, and operation of the *RSTA* Article 10(1)(3) and Article 26 Tax Credit Program, as well as all other relevant facts surrounding the bestowal of tax credits under those Program[s]. Instead of conducting such an examination, the Panel relied on a proposition that a subsidy cannot be tied to a product if: (i) the financial contribution is conferred on the recipient after the eligible activities have occurred; and (ii) the recipient is not required to spend the proceeds of the subsidy on the same type of activities that gave rise to eligibility. This closely mirrors the USDOC's finding that the Government of Korea "had no way to know the intended use at the time [Samsung] was authorized to claim the tax credits."[213]

4. Denominator of Subsidization Rate Fraction[214]

The Appellate Body did not like the work of the Panel or DOC in respect of attributing *RSTA* Article 10(1)(3) Tax Program benefits to washing machines made only in Korea. The Panel and DOC said that even if some of Samsung's R&D activities in Korea, for which it obtained a tax credit, had positive effects on digital appliances production overseas by Samsung subsidiaries, those effects did not mean the tax credits had to be allocated across revenue to that overseas production. Any positive effects did not rise to the level of a "benefit" under Article 1:1(b) of the *SCM Agreement*. It was the parent company—Samsung in Korea—that received the tax credit and that made washing machines only in Korea, and neither it nor the Korean government adduced evidence that the overseas facilities of Samsung benefited from the credits. So they failed to rebut the presumption in favor of allocating the tax credits to domestic (Korean) output only.

Samsung replied that the denominator of the per unit subsidization rate faction should encompass the sales value of all its worldwide products, including output from its overseas subsidiaries, not just digital appliances—the washing machines—made in Korea. The Appellate Body agreed: an indirect effect overseas on R&D activities of subsidies bestowed in Korea was enough to justify inclusion of global output in the fraction. The Appellate Body said the DOC failed to evaluate all relevant evidence in an "objective and unbiased manner," and to give a "reasoned and adequate" explanation of its decision to exclude those activities, and the Panel should have called out the DOC for these failures.[215] Here, then, was the same outcome as with respect to tying.

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[213] *Id.* ¶ 5.271.

[214] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶¶ 5.212–.216, 5.287–.306, 6.16.

[215] *Id.* ¶¶ 5.299, 5.303–305.

G. Commentary

1. Correct Dissent in the Last of the Zeroing Cases

The zeroing ruling provoked what still is a relatively rare occurrence in the annals of Appellate Body, namely, a dissenting opinion from one member.[216] The dissent argued that zeroing is permitted for pattern transactions. Re-examining the text of Article 2:4:2, second sentence, the Dissent said there is no qualifying language as to how an investigating authority makes a comparison between weighted average Normal Value and Export Prices of individual transactions. The text places no limits on what an investigating authority may do to unmask and combat targeted dumping. The Majority allows an investigating authority to base W-T comparisons solely on pattern transactions, confining the targeted dumping examination to these transactions, but forbids the authority from zeroing within these transactions. The majority mandates the combination of the results of the comparisons of all sales prices within the pattern: (1) W-T comparisons of pattern-fitting individual Export Prices that are above Normal Value (where the dumping margin is negative) must be combined with (2) W-T comparisons of pattern-fitting individual Export Prices that are below Normal Value (where the dumping margin is positive). Hence, non-targeted dumped sales (category (1)) must be allowed to offset, or cancel out, targeted dumped sales (category (2)). The Dissent argued that the Majority view allows an investigating authority "to deal with 'targeted dumping' only partially, and possibly ineffectively." That is because "within the 'pattern,'" Export Prices above Normal Value will "cancel out—or 're-mask'—partly or completely, the 'targeted dumping' that results from prices below Normal Value."[217]

Tracking the interpretative methodology of Articles 31–32 of the Vienna Convention, the dissent argued this "incomplete approach is not required by the text of the second sentence, read in the context of the entire Article 2:4:2, and in light of the object and purpose of the *Antidumping Agreement*."[218] The dissent pointed out that the second sentence, unlike the first sentence, of this Article employs the phrase "prices of *individual* export transactions."[219] The dissent inferred from the word "individual" that "not all the transaction-specific comparisons arising from the Export Prices that form part of the 'pattern' need to be aggregated in order to calculate [the] dumping [margin]."[220] In other words, the dissent gave the benefit of the doubt from an arguably ambiguous text to the investigating authority. So,

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[216] *See id.* ¶¶ 5.191–.203.
[217] *Id.* ¶ 5.195.
[218] *Id.* ¶ 5.196.
[219] Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.199.
[220] *Id.*

> Accepting that, when applying the second sentence of Article 2:4:2, investigating authorities are to focus only on "pattern transactions," I would permit investigating authorities also to zero those "pattern transactions" that are priced above normal value, and to calculate dumping only on the basis of "pattern transactions" priced below normal value. Doing so would deal fully with "targeted dumping" by dividing the full amount of such dumping—instead of an amount diminished by non-dumped prices—by the full value of an exporter's sales.[221]

Moreover, the dissent argued on policy grounds—respect for sovereignty of Members—that the Majority interpretation "unduly restricts the regulatory leeway that should be accorded to investigating authorities to deal with 'targeted dumping.'" Finally, the Dissent also read Appellate Body precedents differently from the Majority. The *Softwood Lumber Compliance* and *Calculated Dumping Margins* cases did not stand for the proposition that in targeted dumping cases under Article 2:4:2, second sentence, in-pattern zeroing is forbidden. Rather, these precedents highlight the exceptional nature of asymmetric W-T comparisons, and suggested the prohibition on zeroing under W-W and T-T comparisons may be distinguished from the use of zeroing to "capture pricing patterns constituting 'targeted dumping.'"[222]

The dissent was correct. Its interpretation of Article 2:4:2, second sentence, not only is "a more permissible," but also a "more defensible" one than that of the majority. It is a pity that the dissent was not the majority opinion. Its clarity and brevity outclass that of the majority view.

This case might well be the last one in a 15-year line of WTO precedents about zeroing, dating to the 2001 *Bed Linens* decision. The Appellate Body has ruled the practice illegal in every context (original investigations, Sunset Reviews, and Administrative Reviews), and under all comparison methodologies (W-W, T-T, and W-T).[223] Yet with the dissent, there is another, even bigger point to pity. Why did the dissent stop where it did? Perhaps at least part of its reasoning, and its spirit of deference to investigating authorities, is applicable to zeroing in W-W and T-T cases, too. In other words, perhaps it is time to re-examine the precedents. *Stare decisis* never was, and never should be, viewed as a set of binding shackles.

2. Judicial Overreach on Tying and Subsidization Rate Denominator

It is difficult to escape the conclusion the Appellate Body rather grossly over-reached in its findings against the United States with respect to the tying of

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[221] *Id.* ¶ 5.196.

[222] *Id.* ¶ 5.199 (*quoting Softwood Lumber Compliance*, ¶ 100).

[223] *See* RAJ BHALA, DICTIONARY OF INTERNATIONAL TRADE LAW (3rd ed., 2015) (entry for zeroing and table discussing zeroing precedents).

subsidy benefits and the appropriate terms in the fraction to compute a net countervailable subsidization rate. The Appellate Body recounted that a Panel is forbidden from conducting a *de novo* review of the facts of a case, and from substituting its judgment for that of the relevant authority in the respondent Member.[224] Rather, a Panel is supposed to determine whether that authority attained a reasoned and adequate conclusion, with "adequacy" depending on the facts and circumstances of each case, but necessitating an evaluation of all relevant evidence in an objective, unbiased manner, and "reasoned" referring to the coherence of the logic.

Yet, in overturning the Panel, the Appellate Body did what it said was forbidden: it trampled all over the work of the DOC, and substituted its legal policy preferences for that of the expert agency. Consider these admissions by the Appellate Body:

> 5.269. . . . *the SCM Agreement does not dictate any particular methodology for calculating subsidy ratios, and does not specify explicitly which elements should be taken into account in the numerator and the denominator. Thus, an investigating authority has the discretion to choose the most appropriate methodology for carrying out its calculations, provided that such methodology allows for a sufficiently precise determination of the amount of subsidization bestowed on the investigated products*, as required under Article 19:4 and Article VI:3. In particular, *no provision in the SCM Agreement expressly sets forth a specific method for assessing whether a given subsidy is, or is not, tied to a specific product*.
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> . . . .
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> 5.295. . . . Article 19:4 of the *SCM Agreement* requires an investigating authority to calculate the amount of subsidy bestowed on the products under investigation "in terms of subsidization per unit of the subsidized and exported product." In order to calculate per unit subsidization, an investigating authority may divide the total subsidy by the total sales value of all products to which the subsidy is attributable. In so doing, the authority must properly "match[] the elements taken into account in the numerator with the elements taken into account in the denominator." *The SCM Agreement does not expressly specify whether, in order to ensure this matching, the investigating authority should limit the denominator to the sales value of the recipient's*

[224] *See* Appellate Body Report, *United States Targeted Dumping Zeroing*, *supra* note 109, ¶ 5.258.

> *production within the jurisdiction of the subsidizing Member or may also include in the denominator the sales value of the recipient's production in the jurisdictions of other Members*.
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> 5.296. . . . Article VI:3 of the GATT 1994 defines the "subsidized products" as the products for whose "manufacture, production or export" a subsidy has been "granted, directly or indirectly" in "the country of origin or exportation." By expressly referring to "manufacture, production or export," Article VI:3 contemplates that the bestowal of a subsidy may be linked to a wide array of activities, spreading across the cycle of production and sale of the relevant products. In turn, Article 1 of the *SCM Agreement* provides that a subsidy is deemed to exist if there is a financial contribution by a government or a public body within the territory of a Member that provides a "benefit" to the recipient. Finally, under Article 14 of the *SCM Agreement*, investigating authorities are required to calculate the amount of a subsidy in terms of "benefit to the recipient." Read together, *these provisions indicate that "subsidized products" for purposes of calculating per unit subsidization are limited to those manufactured, produced, or exported by the recipient*.[225]

These truthful statements would have led a deferential adjudicator to "leave well enough alone," and while perhaps expressing dislike for the work of the DOC and ruling of the Panel, "leave" their work "alone." Not the Appellate Body. This adjudicator continued by second guessing the Panel on multiple occasions.

For instance, the Appellate Body posited that even where a "subsidy operates in a manner whereby the recipient will obtain the proceeds after the eligible activity has occurred, the expectation to obtain those proceeds may induce the recipient to engage in the production or sale of the product giving rise to eligibility." One question which lawyers should know to be wary of starts with "Is it possible . . . ?" That question triggers the objection "anything is possible"; the question calls for speculation. Speculation is exactly what the Appellate Body did, and hardly provided the kind of "reasoned and adequate" explanation it demanded of the Panel and the United States. In brief, it was the Panel, not the Appellate Body, which eschewed a *de novo* review, and thus the Appellate Body, not the Panel, that disregarded the pertinent standard of deferential review, and infringed on American sovereignty.

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[225] *Id.* ¶¶ 5.269, 5.295–.296 (emphasis added).

The Appellate Body's overreach was no less defensible in respect of the issue over the denominator in the per unit net subsidization rate fraction. The obvious weakness in Korea's argument was that it presumes the outcome. Korea presumed Samsung could feel the subsidy, reflected in the numerator, in its activities worldwide, so the denominator should reflect those benefits by including Samsung's worldwide output. But that was precisely the point the DOC said Samsung failed to prove: there was no evidence to support Korea's claim that Samsung could feel the subsidy both in Korea and at its overseas facility. The Appellate Body put its view of the facts over that of the DOC. In doing so, it brushed aside two facts of high probative value the United States mentioned.[226] First, *RSTA* Article 10(1)(3) limits the eligibility of tax credits to Korean companies and their activities, such as R&D, in Korea. Second, the benefit of those credits does not automatically pass through to overseas facilities, such as Samsung's subsidiaries outside Korea, which is evident because those subsidiaries pay a royalty to their parent, Samsung.

The Appellate Body also brushed aside the plain language of the relevant legal provisions. There is no textual basis in Article VI:3 of GATT or Article 19:4 of the *SCM Agreement* for its ruling. These provisions do not suggest that a possible overseas knock-on effect of a subsidy granted within the territory of a Member must be included in the fraction. Rather, as the United States argued, they focus on domestic production, and tracing overseas effects of a domestic subsidy, which may or may not occur, and if they do, may not materialize for years, is an excessive burden on any investigating authority. So, despite the above-quoted admissions, the Appellate Body said:

> *[T]he above-mentioned provisions do not indicate that*, for purposes of calculating per unit subsidization, *the subsidized products should be limited to those produced by the recipient of a subsidy within the jurisdiction of the subsidizing Member*. *We do not see any express limitation to this effect in the SCM Agreement*. Thus, we consider that a subsidy may, indeed, be bestowed on the recipient's production outside the jurisdiction of the subsidizing Member. For instance, if the recipient is a multinational corporation with facilities located in multiple countries, the subsidized products may, depending on the circumstances of the case, include that corporation's production in those multiple countries.[227]

This "logic"—inferring from silence that the DOC could and should have included overseas production in the per unit calculation subsidization calculation—ought to have been *dicta*. The obvious rebuttal (put colloquially) is "yeah, but the above-mentioned provisions also do not forbid limiting the subsidized products to those made in the subsidizing Member." With two

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226 *See id.* ¶ 5.293.

227 *Id.* ¶ 5.297 (emphasis added).

permissible, reasonable inferences from flexible text, the supreme duty of the Appellate Body is to "back off."

To be sure, the Appellate Body could have, and should have, deferred to the DOC, and then in a non-binding discussion said that its policy preference was to include that production. What the Appellate Body did was particularly ironic in view of its holdings against the DOC on zeroing. The same "logic" could be used in interpreting Article 2:4:2 and Article 2:4 of the *AD Agreement*. In both instances, the textual difficulty is ambiguity that neither rules in nor rules out a certain methodology.

To be fair, in both the AD and CVD contexts, the Appellate Body took an anti-protectionist stance. It rendered interpretations against methodologies that inflated the dumping margin and subsidization rate. But its free-trade oriented stance compromised its integrity for impartiality, in that it crossed the line separating adjudicator from legislator. Legislators are supposed to be active to make the world safe for free trade. Adjudicators are supposed to be self-restrained as they ensure traders do not abuse those rules. There was no abuse by the United States in the case at bar.

IV. TRADE REMEDIES–DUMPING MARGIN CALCULATION AND CAUSATION

A. Citation

Appellate Body Report, *European Union—Anti-dumping Measures on Biodiesel from Argentina*, WTO Doc. WT/DS473/AB/R (Oct. 6, 2016) (*adopted* Oct. 26, 2016) (short name: *EU Biodiesel*)[228]

B. Facts: Constructed Value Computation and Non-Attribution Analysis

The antidumping investigation was initiated by the European Biodiesel Board (EBB), to counter alleged dumping of biodiesel fuel by Argentina into the EU market. The rates of the provisional anti-dumping duties applied were equal to the dumping margins ranging from 6.8% to 10.6%, based on actual data in Argentina relating to cost of production (for normal value) provided by the Argentine industry for the soybean feedstock, the principal raw material used in producing Argentine biodiesel.[229] There was no dispute between the parties that the cost of the soybeans is the main cost component in the production of biodiesel in Argentina.[230] However, the EBB had alleged that Argentina maintained a Differential Export Tax (DET) system, whereby differential taxes were imposed on soybeans, soy oil, and biodiesel. Under that system, the taxes on exports of raw materials were higher than those imposed on exports of finished products such as biodiesel,[231] which distorted the price of soybeans consumed in Argentina, including those soybeans used to produce biodiesel.

The EU authorities in the course of their preliminary investigation found that the biodiesel market was heavily regulated by the state, and on that basis concluded that domestic sales of biodiesel were not made in the ordinary course of trade.[232] Having rejected domestic biodiesel sales as the basis for normal value, the European Union instead used constructed value based on the producers' own production cost data, including the data on feedstock prices fixing a 15% profit margin.[233] According to the EBB, this system had the effect of depressing the domestic price of soybeans and soybean oil, therefore artificially reducing the

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[228] The Panel Report for this case is Panel Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, WTO Doc. WT/DS473/R (Mar. 29, 2016) (*adopted with modifications* Oct. 26, 2016) [hereinafter Panel Report, *EU—Biodiesel*].

[229] Appellate Body Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina,* ¶ 1.2, 1.4, WTO Doc. WT/DS473/AB/R (Oct. 6, 2016) (*adopted* Oct. 26, 2016) [hereinafter Appellate Body Report, *EU—Biodiesel*].

[230] *Id.* ¶ 5.3.

[231] *Id.* ¶ 5.5.

[232] Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.180.

[233] *Id.* ¶ 7.312.

costs of production of biodiesel producers in Argentina.[234] When the EU authorities re-examined this contention for the definitive regulation, they determined that the cost of soybeans purchased by the biodiesel producers were "lower than the international prices due to the distortion created by the Argentine export tax system and, consequently, the costs of the main raw material were not reasonably reflected in the records kept by the Argentinean producers."[235] Consequently, the EU replaced actual costs by "the average of the reference prices of soya beans published by the Argentine Ministry of Agriculture for export FOB Argentina" during the investigation period, with certain adjustments.[236] Other adjustments in the definitive regulation—including the acceptance by the European Union of revised EU production capacity and capacity utilization data provided by the EBB—led to a downward adjustment to the production capacity figures and an upward adjustment to the capacity utilization rates.[237] This change presumably resulted in the lower injury margin calculations.

As noted above, in the definitive regulation, the Commission rejected the actual data on the ground that they reflected prices that were "artificially low" for the soybeans, and substituted a benchmark that was unrelated to costs of production in the country of origin.[238] This change in methodology resulted in dumping margins ranging from 41.9% to 49.2%, approximately a five-fold increase, although because these dumping margins exceeded the injury margins calculated by the EU authorities—which ranged from 22% to 25.7%—the EU authorities applied the lesser duties corresponding to the injury margins.[239] While the Panel and the Appellate Body refused to accept the European Union's methodology, they gave the EU (and other Members' investigating authorities) little guidance as to what they may do when the cost of production data in the home country is distorted by export tax or other policies that artificially depress the foreign producer's manufacturing costs.

With regard to the Argentine challenge of the EU Basic Regulation "as such," the offending paragraph gives the European Union wide latitude in situations where COP is not based on the data supplied by the respondents:

> If costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be

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234 *Id.* ¶ 7.180.

235 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 5.7.

236 Council Regulation 1194/2013 of Nov. 19, 2013, Imposing a Definitive Anti-Dumping Duty Collecting Definitively the Provisional Duty Imposed on Imports of Biodiesel Originating in Argentina and Indonesia, 2013 O.J. (L 315) 5 [hereinafter Council Regulation 1194/2013]; Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.182

237 Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.401.

238 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.23.

239 *Id.* ¶ 1.2.

> used, on any other reasonable basis, including information from other representative markets.[240]

Since the Basic Regulation does not preclude the investigating authority from adapting the information in a manner consistent with ADA Article 2.2, the Panel and the Appellate Body both concluded that the Regulation was not inconsistent "as such."[241]

C. Key Issues before the Appellate Body

The European Union and Argentina each appealed certain of the Panel's findings as follows:

a. As to the determination of dumping margins by the European Union:

   1. Was the Panel correct in finding that the European Union acted inconsistently with *Antidumping Agreement* (ADA) Article 2.2.1.1 when the European Union constructed the normal value by failing to calculate cost of production (COP) of the product on the basis of the actual records kept by the investigated Argentine producers? (Raised by the EU)
   2. Did the Panel err by finding that the European Union acted inconsistently with ADA Article 2.2 and Article VI:1(b)(ii) of GATT 1994 by not using the cost of production of biodiesel in Argentina? (Raised by the EU)
   3. Did the Panel err in interpreting and applying ADA Article 2.4 in finding that Argentina had failed to demonstrate that the European Union had failed to make a "fair comparison" between normal value and export price? (Raised by Argentina)

b. Did the Panel err in finding that the European Union acted inconsistently with ADA Article 9.3 and Article VI:2 of GATT 1994 by imposing antidumping duties in excess of the dumping margins established under ADA Article 2? (Raised by the European Union)
c. Did the Panel err in its interpretation and application of ADA Articles 3.1 and 3.5 when it determined that Argentina had not established that the European Union's non-attribution of overcapacity in the injury analysis was inconsistent with the ADA? (Raised by Argentina)
d. As to Argentina's challenge to Article 2(5) of the EU Basic Regulation:

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[240] Council Regulation 1225/2009 of Nov. 30, 2009, Protection Against Dumped Imports from Countries Not Members of the European Commuity, art. 2, 2009 O.J. (L 343) 54; *see* also Panel Report, *EU—Biodiesel*, *supra* note 228, ¶7.72.

[241] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.212.

1. Did the Panel err by finding that Argentina had not established that Article 2(5) was not "inconsistent as such" with ADA Article 2.2.1.1 and also with DSU Article 11? (Raised by Argentina)

2. Also regarding the Basic Regulation, Argentina challenged the Panel's conclusions that the European Union was not prohibited for using sources of information [for COP calculations] other than producers' costs in the exporting country, and the Panel's application of an erroneous legal standard in the process. (Raised by Argentina)

3. Whether the Panel erred in finding that Argentina had failed to establish that the Basic Regulation was inconsistent as such with WTO Agreement Article XVI:4 and ADA Article 18.4? (Raised by Argentina)

D. Appellate Body Determinations

1. Challenges Related to the EU Antidumping Measure, Article 2.1 of the ADA

As noted above, the essence of the case is the fact that the Parties "disagree on whether Article 2.2.1.1 allows an investigating authority to disregard the records of a producer under investigation if the authority determines that the costs in such records are not 'reasonable;'" whether the ADA and GATT 1994 allow an investigating authority to use certain evidence other than the records kept by the investigated producer, in particular information from outside the country of origin, when determining the cost of production;" and over "the circumstances in which Article 2.4 requires due allowance to be made where the investigating authority has constructed the normal value on the basis of costs that are not those in the records kept by the investigated producer."[242]

The Panel had noted the decision of the European Union authorities not to use the documented cost of soybeans in the production of biodiesel in Argentina because "the domestic prices of the main raw material used by biodiesel producers in Argentina were found to be artificially lower than the international prices due to the distortion created by the Argentine export tax system."[243] However, the Panel found that this was an insufficient basis for "concluding that the producers' records do not reasonably reflect the costs associated with the production and sale of biodiesel," and was thus not consistent with ADA Article 2.2.1.1 since the calculations were not on the basis of the records kept by the producers.[244] The European Union countered with the argument that ADA Article 2 permits an examination of the "reasonableness" of the actual costs, giving the investigating authority discretion to disregard records that are not reasonable.[245]

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[242] *Id.* ¶ 6.1.1.

[243] Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.248 (quoting Council Regulation 1194/2013, *supra* note 240, Recital 38).

[244] *See* Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.10.

[245] *Id.* ¶ 6.11.

In its analysis, the Appellate Body noted that under ADA Article 2.2.1.1 the records of the specific investigated exporter or producer are the preferred source for COP data.[246] Moreover,

> the phrase "costs associated with the production and sale of the product under consideration" refers to the costs that have a relationship with the production and sale of the specific product from the exporting Member with respect to which dumping is being assessed . . . [Thus], it is clear that this condition refers to those costs incurred by the investigated exporter or producer that have a relationship with the production and sale of the product under consideration.[247]

Further, it is clear to the Appellate Body that it is "the 'records' of the individual exporters or producers under investigation that are subject to the condition to 'reasonably reflect' the 'costs.''[248] The Appellate Body further observed that "insofar as the cost of production is concerned, the costs 'calculated on the basis of records kept by the exporter or producer' under Article 2.2.1.1 must lead to a cost 'in the country of origin,'" meaning that the investigating authority may not evaluate the costs reported in the records "pursuant to a benchmark unrelated to the cost of production in the country of origin."[249] In addition, since COP is a proxy for use when normal value cannot be calculated using domestic sales, the associated costs must "have a genuine relationship with the production and sale of the product under consideration."[250]

In a related holding, the Appellate Body agreed with the Panel (and disagreed with the European Union) that records that are GAPP-consistent nevertheless may not reasonably reflect the costs associated with production and sale of the product, as when certain costs are spread over the records of several companies or relate to several distinct products.[251] It also confirmed that the preference for actual data is to be used not only when normal value is based on sales in the ordinary course of trade in the domestic market, but in other situations as well.[252] Finally, the Appellate Body rejected the concept, advocated by the European Union, that the term "costs" in ADA Article 2.2.1.1, incorporates an implicit standard of reasonableness. Rather, the Appellate Body concluded that there is no "additional or abstract standard of "reasonableness" that governs the meaning of "costs" in the second condition in the first sentence of Article 2.2.1.1."[253]

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246 *Id.* ¶¶ 6.17–.18.
247 *Id.* ¶ 6.19.
248 *Id.* ¶ 6.20.
249 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.23.
250 *Id.* ¶ 6.24.
251 *Id.* ¶ 6.33.
252 *Id.* ¶ 6.34.
253 *Id.* ¶ 6.37.

With regard again to the cost analysis, the Appellate Body supported the Panel's determination (challenged by the European Union) that the object of the comparison is "to establish whether the records reasonably reflect the costs actually incurred, and not whether they reasonably reflect some hypothetical costs that might have been incurred under a different set of conditions or circumstances and which the investigating authority considers more 'reasonable' than the costs actually incurred."[254]

Other technical challenges by the EU to the Panel's interpretation of ADA Article 2.2 were rejected by the Appellate Body. Thus, the Appellate Body observed that "the Panel's statement comports with our understanding, explained above, that the calculation of "cost of production," for purposes of determining the normal value under Article 2.2, is subject to Article 2.2.1.1 of the *Anti-Dumping Agreement*."[255] The Appellate Body also affirmed the Panel's endorsement of "the records of the investigated producer as the preferred source of information for the establishment of the costs of production."[256] The Appellate Body further explained that:

> The manner in which the normal value is calculated pursuant to Article 2.2 of the *Anti-Dumping Agreement* may inform the types of adjustments required under Article 2.4. This, however, does not mean that any adjustment envisaged under Article 2.4—in particular adjustments for taxation—may instead be taken into account in determining the normal value pursuant to Article 2.2. Rather, Article 2.2.1.1 and Article 2.4 serve different functions in the context of determinations of dumping: the former assists an investigating authority in the calculation of costs for purposes of constructing the normal value; whereas the latter concerns the fair comparison between the normal value and the export price.[257]

Similarly, and after rejecting the EU challenge to the Panel's interpretation of ADA Article 2.2.1.1 as discussed above, the Appellate Body rejected the EU's challenge to the manner in which the Panel *applied* ADA Article 2.2.1.1. It supported the Panel's statement that the EU determination that domestic soybean prices in Argentina were lower than international market prices because of the export tax system "was not, in itself, a sufficient basis under Article 2.2.1.1 for concluding that the producers' records do not reasonably reflect the costs of soybeans associated with the production and sale of biodiesel, or for disregarding those costs when constructing the normal value of biodiesel."[258] Thus, the European Union acted inconsistently with ADA Article 2.2.1.1 "by

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254 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.41.
255 *Id.* ¶ 6.44.
256 *Id.* ¶¶ 645–46 (quoting Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.227).
257 *Id.* ¶ 6.48.
258 *Id.* ¶ 6.55.

failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers."[259]

With regard to the relationship between ADA Article 2.2 and GATT Article VI:1(b)(ii), the Panel had concluded that while the provisions do not limit the sources of information used to established cost of production, they do require the authority to construct value of the basis of "cost of production" in the "country of origin." However, according to the Panel the authority is not prohibited from "resorting to sources of information other than producers' costs in the country of origin."[260] Here, the European Union had rejected the "artificially lower" actual domestic soybean prices in Argentina for soybeans and instead used the average reference price of soybeans for export published by the Argentine Ministry of Agriculture. These surrogate prices were rejected by the Panel as inconsistent with the ADA and GATT provisions because the prices "did not represent the cost of soybeans in Argentina for domestic purchasers of soybeans, including the Argentine producers/exporters of biodiesel."[261]

The Appellate Body began its analysis by quoting ADA Article 2.2[262] and GATT Article VI:1.[263] This language, as the Appellate Body notes, "does not contain additional words or qualifying language specifying the type of evidence that may be used." Thus, they

> do not preclude the possibility that the authority may also need to look for such information from sources outside the country. The reference to "in the country of origin," however, indicates that, whatever information or evidence is used to determine the "cost of production," it must be apt to or capable of yielding a

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[259] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 655 (citing Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.248–.249.

[260] Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.171.

[261] *Id.* ¶ 7.258–.259.

[262] "When there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country or when, because of the particular market situation or the low volume of the sales in the domestic market of the exporting country, such sales do not permit a proper comparison, the margin of dumping shall be determined by comparison with a comparable price of the like product when exported to an appropriate third country, provided that this price is representative, or with the cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits." Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 7.47.

[263] "The contracting parties recognize that dumping, by which products of one country are introduced into the commerce of another country at less than the normal value of the products, is to be condemned if it causes or threatens material injury to an established industry in the territory of a contracting party or materially retards the establishment of a domestic industry. For the purposes of this Article, a product is to be considered as being introduced into the commerce of an importing country at less than its normal value, if the price of the product exported from one country to another . . . (b) is less than . . . (ii) the cost of production of the product in the country of origin plus a reasonable addition for selling cost and profit." *Id.* ¶ 7.71.

> cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a "cost of production" "in the country of origin."[264]

In context, the first sentence of ADA Article 2.2.1.1 does not preclude "information or evidence from other sources from being used in similar circumstances," including "documents, information, or evidence from other sources, including from sources outside the 'country of origin.'" That information would be relevant "to the calculation of the cost of production *in the country of origin*."[265] Further, based on the second sentence of ADA Article 2.2.1.1, the "evidence" used to establish a "cost" can be different from that cost itself because "this sentence refers separately to 'evidence' and to 'cost.'"[266]

This being said, according to the Appellate Body, "the scope of the obligation to calculate the costs on the basis of the records in the first sentence in Article 2.2.1.1 is narrower than the scope of the obligation to determine the cost of production in the country of origin in Article 2.2." Consequently, and because Article 2.2 does not specify what evidence the authority may use,

> the authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the "cost of production in the country of origin."[267]

Thus, the Panel did not err in reaching this conclusion.

Does ADA Article 2.2 require the investigating authority to use the cost of production in the exporting country when constructing the normal value of the product, in this case soybeans and biodiesel, respectively? The Panel effectively said "yes." It rejected the European Union's use of a surrogate price for soybeans because that price was not the price for soybeans in Argentina; the "cost" of the soybeans was not the "cost prevailing in Argentina when constructing the normal value of biodiesel."[268] Given that the Appellate Body, as noted earlier, rejected the European Union's parallel argument based on ADA Article 2.2.1.1, second paragraph, the Appellate Body rejected this argument against the Panel's findings as well.[269]

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264 *Id.* ¶ 6.70.
265 *Id.* ¶ 6.71 (italics in Appellate Body Report).
266 *Id.* ¶ 6.72.
267 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.73.
268 Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.260.
269 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.78.

Other arguments relating to ADA Article 2.2 had also been rejected by the Appellate Body earlier. The Appellate Body thus confirmed again that

> when relying on any out-of-country information to determine the "cost of production in the country of origin" under Article 2.2 of the *Anti-Dumping Agreement*, an investigating authority has to ensure that such information is used to arrive at the "cost of production in the country of origin," and this may require the investigating authority to adapt that information.[270]

The "mere fact that a reference price is published by the Argentine Ministry of Agriculture does not necessarily make this price a domestic price in Argentina."[271] It was selected by the European Union precisely because it did not represent the price of soybeans in Argentina. Thus, the Panel was correct in concluding "that the European Union acted inconsistently with Article 2.2 of the *Anti-Dumping Agreement* and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina [i.e., using this surrogate price] when constructing the normal value of biodiesel."[272]

2. A "Fair Comparison" under ADA Article 2.4

Argentina faults the Panel for its finding that Argentina failed to establish that the European Union did not make a "fair comparison" under ADA Article 2.4 because it did not make "due allowance" for "differences which affect price comparability."[273] According to the Panel the difference resulting from the use by the EU of surrogate prices for soybeans in place of the actual costs as noted above is not a "difference affecting price comparability" under ADA Article 2.4.[274] While the Appellate Body took issue with the Panel's citation of a "general proposition that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as 'differences affecting price comparability'" based on the Panel's reading of *EC—Fasteners (China) (Article 21.5),*[275] it found it unnecessary to rule on Argentina's complaint because it had earlier upheld the Panel's findings that the European Union had *acted inconsistently with ADA Articles 2.2.1.1 and 2.2.*[276]

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270 *Id.* ¶ 6.81.
271 *Id.*
272 *Id.*
273 *Id.* ¶ 6.84.
274 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.84.
275 *Id.*
276 *Id.* ¶ 6.89.

3. Imposition of Antidumping Duties under ADA Article 9.3 and GATT Article VI:2

Separately, the Panel had found that the EU had acted inconsistently with Article 9.3[277] and GATT Article VI:2[278] by imposing dumping duties in excess of the margins that should have been established under the ADA and GATT Article VI. This assertion by Argentina was based on the same factual situation discussed earlier, that is, the use by the EU of an erroneous normal value based on an improper surrogate value for the soybeans used in the manufacture of Argentina biodiesel.[279] The Panel had considered "that the term 'margin of dumping' in Article 9.3 'relates to a margin that is established in a manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines.'"[280] At the same time, because of the lesser duty rule, the Panel noted that an erroneous calculation under ADA Article 2.2 would not automatically result in the collection of excess antidumping duties.[281] In the instant case, the Panel had noted that duties imposed in the EU's Definitive Regulation were substantially higher than in the Provisional Regulation "suggested that the definitive anti-dumping duties "exceeded what the dumping margins could have been had they been established in accordance with Article 2."[282] Since the same reasoning applied *mutatis mutandis* to the alleged violation of GATT Article VI:2, the Panel had found a violation of GATT as well.[283]

The Appellate Body began its analysis by noting that where ADA Article 9.3 provides that "[t]he amount of the anti-dumping duty shall not exceed the margin of dumping as established under Article 2 . . . [t]he words 'shall not exceed' indicate that Article 9.3 sets a ceiling for the maximum amount of the anti-dumping duty that may be imposed and collected."[284] Consequently, the Appellate Body approved the Panel's view that the term "margin of dumping" in Article 9.3 is established in a "manner subject to the disciplines of Article 2 and which is therefore consistent with those disciplines."[285] After further analysis of both articles the Appellate Body concluded that the Panel's conclusions were correct in their interpretation of ADA Article 9.3 and GATT Article VI:2; "the Panel properly considered that the Appellate Body's findings in US—Zeroing (EC) and US—Zeroing (Japan) confirm that Article 9.3 prohibits the amount of

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277 "The amount of the antidumping duty shall not exceed the margin of dumping as established under Article 2." *Id.* ¶ 6.92

278 "In order to offset or prevent dumping, a contracting party may levy on any dumped product an anti-dumping duty not greater in amount than the margin of dumping in respect of such product." *Id.*

279 *See* Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.92.

280 Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.359.

281 *Id.* ¶ 7.363.

282 *Id.* ¶ 7.365.

283 *Id.* ¶ 7.365–.367.

284 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.96.

285 *Id.* ¶ 6.96 (citing Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.359).

the anti-dumping duties from exceeding a dumping margin that is determined consistently with Article 2 of the *Anti-Dumping Agreement*."[286]

As to the application of ADA 9.3 by the Panel, the European Union's challenge was also rejected by the Appellate Body. The Panel did not, as the European Union alleged, imply that the dumping margins determined in the Provisional Regulation were "what the determination should have been."[287] "Rather, the Panel considered that the dumping margins in the Provisional Regulation served as a 'reasonable approximation' for what the margins 'might have been.'"[288] According to the Appellate Body, the reliance by the Panel on the margins calculated in the Provisional Regulation "was appropriate in light of the specific circumstances of this case."[289] It was, after all, the change to a surrogate value from the actual purchase price for soybeans in Argentina as reflected in the producers' records that were earlier found to be inconsistent with ADA Articles 2.2.1.1 and 2.2. Even though the lesser duty rate was ultimately applied by the European Union the actual duty rates applied were "two to three times higher" than the margin of dumping calculated in the Provisional Regulation, the consistency of which with the ADA has not been questioned.[290] Consequently, the Panel's finding that the European Union acted inconsistently with ADA Article 9.3 and GATT Article VI:2 is upheld.[291]

4. Challenges Related to the Injury Determination under ADA Articles 3.1 and 3.5

As all are aware, before antidumping duties can be imposed the authorities must not only find a margin of dumping but also that the domestic industry producing the like product (ethanol here) is being injured by the dumped imports. This determination, made under ADA Article 3, occasionally focuses on a finding by the authority that the domestic producers have been forced by decreasing demand to reduce their production overcapacity in order to assure a higher capacity utilization rate, suggesting to some administering authorities that the reduction in production capacity is a factor in demonstrating injury to domestic producers. The issue here was whether the European Union's consideration of "overcapacity" as an "other factor" to be considered as causing injury is consistent with the requirements of ADA Articles 3.1[292] and 3.5.[293] In

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[286] *Id.* ¶ 6.101 (citing Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.361).

[287] European Union's appellant's submission, para. 260.

[288] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.109 (citing Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.365).

[289] *Id.* ¶ 6.110.

[290] *Id.* ¶ 6.110 (citing Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.365).

[291] *Id.* ¶ 6.113.

[292] Article 3.1 provides that "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

the instant case, the domestic production capacity and capacity utilization data during the three years (20092011) prior to the time of the Provisional Regulation had according to the EBB data submitted increased by about 9.1%, perhaps suggesting an absence of injury. However, according to the EBB this data was inaccurate. In the Definitive Regulation, the authority used new data that had also been submitted by the EBB, indicating that production capacity had decreased by 13.4% rather than increased during the period of review, with a corresponding increase capacity utilization given that actual production data remained the same.[294]

The change in production capacity data undercut one of the principal arguments by the Association of Argentine Biodiesel Producers (CARBIO), namely that injury to the European Union producers was caused not by dumped imports but by the injurious effects of overcapacity. CARBIO argued that the European Union had violated Article 3.1 and 3.5 by relying in the Definitive Resolution on the revised figures on production capacity and capacity utilization. CARBIO also contended that the EU authority had "confused overcapacity as an 'other factor' causing injury with capacity utilization as an injury indicator, and erred in focusing on the capacity utilization rates other than overcapacity in absolute terms." [295]

The Panel rejected Argentina's assertions, considering that the revised data "did not taint the EU authorit[ies'] determination on overcapacity as an 'other factor' causing injury to the domestic Industry, as this determination was not based on or affected by the revised data."[296] On this basis the Panel further determined that the EU's use of revised production capacity data and non-attribution of overcapacity as a cause of injury did not violate ADA Articles 3.1 and 3.5.[297] The Panel also rejected Argentina's argument that the EU authorities

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in the domestic market for like products, and (b) the consequent impact of these imports on domestic producers of such products." Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade art. 3.1, June 30, 1967, 19 U.S.T. 4348, 651 U.N.T.S. 320 [hereinafter Anti-Dumping Agreement].

[293] Article 3.5 provides that "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, inter alia, the volume and prices of imports not sold at dumping prices, contraction in demand or changes in the patterns of consumption, trade restrictive practices of and competition between the foreign and domestic producers, developments in technology and the export performance and productivity of the domestic industry." *Id.* art. 3.5.

[294] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.117.

[295] *See id.* ¶ 6.119.

[296] Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.463.

[297] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.120.

improperly focused on capacity utilization [which had changed] rather than on the increase of capacity in absolute terms, on the grounds that the two are logically related, "in the sense that the rate of capacity utilization reflects the amount of excess capacity of the domestic industry in relative terms."[298] In doing so the Panel rejected the contention that under Article 3.1 "an investigating authority must give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms."[299]

The Appellate Body began its review by analyzing ADA Article 3.1, noting its status as "an overarching provision that sets forth a Member's fundamental, substantive obligation" regarding the injury determination, and observed that the term "positive evidence" focuses on "the facts underpinning and justifying the injury determination" and the quality of the evidence on which the investigating authority may rely.[300] Further, the Appellate Body has previously found that an "objective examination" requires an authority to conduct an investigation "in an unbiased manner, without favouring the interests of any interested party, or group of interested parties, in the investigation."[301] The Appellate Body also observed the need for a determination of a causal relationship between the dumped imports and injury, and the requirement that the authority "examine any known factors other than the dumped imports which at the same time are injuring the domestic industry" and to ensure that "the injuries caused by these other factors [are not] attributed to the dumped imports."[302] That analysis, the Appellate Body reminded the Parties, involves "separating and distinguishing the injurious effects of the other factors from the injurious effects of the dumped imports" and requires "a satisfactory explanation of the nature and extent of the injurious effects of the other factors, as distinguished from the injurious effects of the dumped imports."[303]

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[298] *Id.* 6.121.

[299] Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.468.

[300] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.124.

[301] Appellate Body Reports, *China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / China—("HP-SSST") from the European Union*,¶ 5.138, WTO Doc. WT/DS454/AB/R, WT/DS460/AB/R (Oct. 14, 2015) (*adopted* Oct. 28, 2015) [hereinafter Appellate Body Reports, *China—HP-SSST / China – HP-SSST (EU)*] (quoting Appellate Body Report, *China—Countervailing and Anti-Dumping Duties on Grain Oriented Flat-Rolled Electrical Steel ("GOES") from the United States*, ¶ 126, WTO Doc. WT/DS414/AB/R (Oct. 18, 2012) (*adopted* Nov. 16, 2012) [hereinafter Appellate Body Report, *China—GOES*]). *See also* Appellate Body Report, *United States—Anti-Dumping Measures on Certain Hot-Rolled Steel Products From Japan*, ¶ 193, WTO Doc. WT/DS184/AB/R (July 24, 2001) (*adopted* Aug. 23, 2001) [hereinafter Appellate Body Report, *US—Hot-Rolled Steel*].

[302] Appellate Body Reports, *China—HP-SSST / China – HP-SSST (EU)*, *supra* note 301, ¶ 5.283 (quoting Appellate Body Report, *China—GOES*, *supra* note 301, ¶ 151).

[303] *Id.* ¶ 5.283 (quoting Appellate Body Report, *China—GOES*, *supra* note 301, ¶ 151). *See also* Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 301, ¶ 223; Panel Report, *European Communities—Anti-Dumping Duties on Malleable Cast Iron Tube or*

The Appellate Body rejected Argentina's challenge. It accepted the Panel's conclusion that the European Union authorities did not depend on the revised data or the trends associated with it in their finding of injury. It also accepted the Panel's further finding that the revised data did not "taint" that injury finding, and thereby did not "*have a significant role*" in the EU authorities' conclusion in the Definitive Resolution "on overcapacity as an 'other factor' causing injury."[304] It concluded that the Panel had not erred with regard to its review of the European Union's non-attribution analysis, and then turned to Argentina's contention that the Panel erred by accepting that the EU authorities did not rely on the revised data, and in so doing acted inconsistently with ADA Articles 3.1 and 3.5.[305]

The Definitive Regulation indicates clearly why the revised data was so important:

> In addition, following the inclusion of the revised data on capacity and utilisation, the Union industry decreased capacity during the period considered, and increased capacity utilisation, from 46% to 55%. This shows that the capacity utilisation of the Union industry would be significantly higher in the absence of dumped imports than the 53% mentioned above.[306]

Given the low capacity utilization of the European biodiesel industry, even with a reduction of available capacity, the "but for" analysis apparently was a key factor in the authority's injury determination. It was also evident from the Definitive Regulation that the authority had concluded that the low capacity utilization rate was not considered sufficiently important to beak the causal chain between dumped imports and injury; low capacity utilization was only one factor causing injury. Also, low capacity utilization existed at the times of both the provisional and definitive stages of the investigation.[307]

Ultimately, the Appellate Body agreed with the Panel that Recital 165 as quoted above, particularly the first sentence, was only a "subsidiary point" in the analysis, demonstrating that the reference to "revised data" failed to show that the EU authorities had based their conclusions on overcapacity on the revised data.[308] Nor did the Appellate Body accept Argentina's assertion based on other portions of the Definitive Resolution that the non-attribution analysis was based on the revised data. Rather, the Appellate Body agreed with the Panel's conclusion that

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Pipe Fittings from Brazil, ¶ 188, WTO Doc. WT/DS219/R (Mar. 7, 2003) (*adopted* Aug. 18, 2003) [hereinafter Panel Report, *EC—Tube or Pipe Fittings*].

[304] Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.466 (emphasis added by Appellate Body).

[305] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶¶ 6.133–.134.

[306] *Id.* ¶ 6.135 (referring to Council Regulation 1194/2013, *supra* note 236, Recital 165).

[307] *Id.* ¶ 6.137.

[308] *Id.* ¶ 6.138.

the EU authorities did not err in the manner in which they had applied ADA Articles 3.1 and 3.5, whereby the overcapacity analysis was not "based on" or "affected by" the revised capacity data.[309]

Similarly, Argentina's claim that the Panel had failed to distinguish overcapacity from capacity utilization was rejected by the Appellate Body, which noted again that the two terms are "logically related."[310] Rather, the Appellate Body accepted the Panel's conclusion that "an objective and unbiased investigating authority may well have proceeded to examine the issue of overcapacity on the basis of capacity utilization rather than in terms of the evolution of the domestic industry's overcapacity."[311] Further, the Appellate Body, in light of the relationship between overcapacity and capacity utilization, concluded that the EU authorities—in their obligation to conduct an "objective examination" based on "positive evidence"—were not necessarily required "to examine the evidence regarding these concepts in exactly the same format as it was submitted by the interested parties."[312] Nor did the Appellate Body disagree with the Panel's rejection of Argentina's argument that the results of the injury determination would have been changed if the EU authorities had focused on overcapacity rates in absolute terms rather than trends in capacity utilization rates.[313] Finally, the Appellate Body agreed with the Panel that the European Union was justified in concluding that capacity utilization by EU producers remained low throughout the period; thus, the European Union did not act inconsistently with ADA Articles 3.1 and 3.5.[314]

5. Claims Concerning the EU Basic Regulation, Article 2(5); Assessment of Municipal Law

Here, both the Panel and the Appellate Body were faced with determining the appropriate manner for review of the European Union's municipal law, the Basic Regulation covering anti-dumping actions. The analysis of whether the second paragraph of Article 2(5)[315] "as such" is a violation of the ADA probably is not as significant as whether the Appellate Body should be reviewing

309 *Id.* ¶¶ 6.129–.140.

310 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶¶ 6.143–.143.

311 *Id.* ¶ 6.143 (quoting Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.468).

312 *Id.* ¶ 6.145.

313 *Id.*

314 *Id.* ¶ 6.146.

315 It provides "[i]f costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets." Regulation 2016/1036, of the European Parliament and of the Council of 8 June 2016 on Protection Against Dumped Imports from Countries Not Members of the European Union, 2016 O.J. (176) 21.

the Panel's analysis of EU law. The Appellate Body's jurisdiction arguably does not extend to such Panel determinations: "An appeal shall be limited to issues of law covered in the panel report and legal interpretations developed by the panel."[316] The determination of municipal law by international tribunals is traditionally considered an issue of fact.

Such an argument was strongly made the United States in commenting on the instant Appellate Body decision, treating the issue as *de novo*, effectively as a review of WTO law, contending that the Appellate Body's review was thus improper.[317] However, the question of whether international courts must treat the determination of municipal law as strictly an issue of fact is less clear than USTR suggests. A leading international law treatise (the one cited by USTR) suggests, rather, that "the general proposition that international tribunals take account of municipal laws only as facts 'is, at most, a debatable proposition the validity and wisdom of which are subject to and call for, further discussion and review.'"[318] That being said, there is considerable support for USTR's position as to the jurisdiction of the WTO's Appellate Body in the authoritative *Oxford Handbook of International Trade Law*, stating:

> [T[he logic of the Appellate Body's finding [that panel findings on municipal law are issues of law under DSU Article 17.6] is difficult to understand. Just because a panel assesses whether a domestic legal act—which represents a fact from the perspective of WTO law—is consistent or inconsistent with WTO law does not suddenly turn the meaning of the domestic legal act into a question of WTO law. . . . [T]here must . . . be a discernable line between issues of fact and issues of law. After all, the Appellate Body's jurisdiction is circumscribed precisely by this distinction.[319]

The Appellate Body had strongly disagreed. It contended that

> Where a Member's municipal law is challenged "as such," a panel must ascertain the meaning of that law for the purpose of determining whether that Member has complied with its obligations under the covered agreements. Accordingly,

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[316] Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17:6, Dec. 15, 1993, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1989 U.N.T.S. 401 [hereinafter DSU].

[317] *See* Simon Lester, *Appellate Review of a Panel's Examination of a Measure,* INT'L ECON. L. & POL'Y BLOG (Nov. 4, 2016 6:42 AM), http://worldtradelaw.typepad.com/ielpblog/2016/11/the-panels-examination-of-a-measure-on-appeal.html.

[318] Ian Brownlie, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 38 (6th ed., Oxford University Press, 2003).

[319] Lester, *supra* note 317 (quoting the U.S. Statement).

> "[a]lthough it is not the role of panels or the Appellate Body to interpret a Member's domestic legislation as such, it is permissible, indeed essential, to conduct a detailed examination of that legislation in assessing its consistency with WTO law."[320]

The Panel is therefore required to conduct an independent assessment of the meaning of the municipal law and may not simply defer to the meaning attributed by a party to the dispute. The Panel's assessment is according to the Appellate Body subject to appellate review under DSU Article 17.6.[321] Where one Party challenges another Party's municipal law, it has the burden of introducing evidence to substantiate the assertion. The starting point in the panel analysis should be the text of the law itself.[322] However, the challenger may also introduce "evidence of the consistent application of such laws, the pronouncements of domestic courts on the meaning of such laws, the opinions of legal experts and the writings of recognized scholars."[323] The responding Member may submit similar evidence on rebuttal, with the Panel's "independent assessment of the meaning of the municipal law at issue" being accomplished through a "holistic assessment of the relevant elements before it."[324]

Argentina had argued that the Panel erroneously assessed the text of the measure and of its context as well as the practice of EU authorities, and in failing to make the holistic assessment acted inconsistently with its responsibilities under DSU Article 11 to make an "objective and thorough examination of all the different elements" put forward by Argentina.[325] The EU disagreed, effectively contending that the criticism of the second paragraph of Article 2(5) as not being consistent with ADA Article 2.2.1.1 was misplaced; the first paragraph replicates Article 2.2.1.1 while the second "sets out what is to be done, as a matter of EU law, when costs need not be established on the basis of the records of the exporter or producer under investigation, because one of the two conditions set out in the first sentence of Article 2.2.1.1 of the *Anti-Dumping Agreement* is not met."[326]

The Panel essentially agreed with the European Union, and so did the Appellate Body. It expressed its understanding, paralleling those of the Panel, that

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[320] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.155 (quoting Appellate Body Report, *US—Hot-Rolled Steel*, *supra* note 301, ¶ 200).

[321] *Id.* ¶ 6.155 (citing Appellate Body Report, *United States–Section 211 Omnibus Appropriations Act of 1998*, ¶ 105, WTO Doc. WT/DS176/AB/R (Jan. 2, 2002) (*adopted* Feb. 1 2002)).

[322] *Id.* ¶ 6.156.

[323] *Id.* ¶ 6.156.

[324] *Id.* ¶ 6.156 (citing Appellate Body Report, *United States—Countervailing and Anti-Dumping Measures on Certain Products from China*, ¶ 4.101, WTO Doc. WT/DS449/AB/R (July 7, 2014) (*adopted* July 22, 2014)).

[325] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.159.

[326] European Union's appellee's submission, ¶¶ 39–41.

> the options identified in the second subparagraph to be those that would apply after the EU authorities make the determination, pursuant to the first subparagraph of Article 2(5), that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration. Nor do we consider that the Panel erred in finding that the text of the first and second subparagraphs of Article 2(5) does not provide any criteria for the determination of whether the costs are reasonably reflected in a producer's records.[327]

After further analyzing other evidence offered by Argentina—including several academic articles on the legislative history of the Regulation—the Appellate Body expressed its agreement with the Panel that the articles fail to demonstrate that the second paragraph of Article 2(5) governs the critical issue (explored in Part D.1 above) of whether costs must reasonably reflected in the producer's records.[328] The Appellate Body also rejects Argentina's evidence regarding prior EU proceedings in which Article 2(5) is cited relating to "costs," since none of those relate to situations where the producers' records "reflect prices that are considered to be artificially or abnormally low as a result of a market distortion."[329] The evidence presented by Argentina relating to several decisions of the General Court of the European Union was also rejected on similar grounds.[330] In particular, the Appellate Body approves the Panel's conclusion that "nothing in the judgments cited by Argentina supports Argentina's reading of the relationship between the first two subparagraphs of Article 2(5)."[331]

Having affirmed that Argentina failed in its attempt to establish Panel error with regard to the second paragraph of Article 2(5), the Appellate Body also rejects Argentina's DSU Article 11 violation allegations. It concludes that the Panel did not fail to make the required "holistic assessment" of the EU statute, noting that "there is no single methodology that every panel must employ before it can be found to have undertaken a proper 'holistic assessment.'"[332] The Appellate Body notes that in *US—Shrimp II (Viet Nam)*, "the Appellate Body concluded that the panel properly relied on the various elements that it examined to inform its understanding of the meaning and effect of the measure at issue. Therefore, the Appellate Body found that the panel in that proceeding had complied with its duty

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[327] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.176 (citing Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.134).

[328] *Id.* ¶ 6.187 (citing Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.144).

[329] *Id.* ¶ 6.191.

[330] *Id.* ¶ 6.194.

[331] *Id.* ¶ 6.197 (quoting Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.152).

[332] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.202.

under Article 11 of the DSU."[333] In the instant case the Panel conducted a proper holistic assessment, reviewing the text, the legislative history, the practice of the EU authorities, and four decisions of the General Court; on this basis, the Appellate Body rejects Argentina's challenge.[334]

6. ADA Article 2.2 and GATT Article VI:1(b)(ii) "As Such" Challenges

The issue raised is essentially one of the extent of discretion that the EU authorities possess under Article 2(5) of the EU Basic Regulation. Argentina argued that Article 2(5)—in contrast to the Panel's findings—failed to require the authorities to establish cost of production prevailing in other countries, and thus was inconsistent with ADA Article 2.2.[335] The European Union contended that the Regulation permits the authorities "broad discretion to the EU authorities to resort to various options in constructing costs" when they have rejected the costs based on the records submitted by the party under investigation. The European Union also defended the "objective assessment" made by the Panel as consistent with the requirements of DSU Article 11.[336]

The Panel in its analysis of the Regulation and other relevant information decided that the authority has "a series of options" when it needs to establish cost of production after deciding that "the producer's records do not reasonably reflect the costs associated with the production and sale of the product being investigated." Thus, Article 2(5) is permissive and does not require that the costs reported in "the producer's records be replaced by costs in another country."[337] The Panel also decided that while Article 2(5) had been applied in a manner inconsistent with ADA Article 2.2 Argentina had not shown that Article 2(5) could not have been applied in a WTO-consistent manner.[338]

The Appellate Body proceeded to discuss the "the legal standard for establishing whether a measure is inconsistent 'as such' with WTO obligations," noting that a measure does not have to have been applied in order for a Member to bring an "as such" claim. Rather, they may be brought to "prevent Members *ex ante* from engaging in certain conduct."[339] In the past, the Appellate Body has explained that "[t]he distinction between mandatory and discretionary legislation turned on whether there was relevant discretion vested in the executive branch of

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[333] *Id.* ¶ 6.206 (citing Appellate Body Report, *United States—Anti-Dumping Measures on Certain Shrimp from Viet Nam*, ¶¶ 4.50–.51, WTO Doc. WT/DS429/AB/R (Apr. 7, 2015) (*adopted* April 22, 2015)).

[334] *Id.* ¶¶ 6.208–.210, 6.211–.212.

[335] *Id.* ¶ 6.214.

[336] *Id.* ¶ 6.216.

[337] Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.169.

[338] *Id.* ¶ 7.174 (referring to Appellate Body Report, *United States—Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India*, ¶ 4.483, WTO Doc. WT/DS436/AB/R (Dec. 8, 2014) (*adopted* Dec. 8, 2014) [hereinafter Appellate Body Report, *US—Carbon Steel (India)*]).

[339] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.226.

government"[340] and that the distinction cannot be applied "in a mechanistic fashion."[341] Accordingly, the discretionary nature of a measure "is no barrier to a challenge 'as such.'" The Appellate Body further notes that "in *US—Corrosion-Resistant Steel Sunset Review*, the Appellate Body reversed the panel's finding that the measure at issue was 'not a mandatory legal instrument obligating a certain course of conduct and thus cannot, in and of itself, give rise to a WTO violation.'"[342] Still, it is the responsibility of the Complainant to introduce "evidence as to the meaning of that municipal law to substantiate its claim of WTO-inconsistency."[343]

Article 2(5) (quoted in note 87) comes into play, according to the Panel and the Appellate Body, only where a determination has been made to reject the respondent's records for lack of reflecting the "costs associated with the production and sale of the product under consideration."[344] Once this is determined the authorities "must" make adjust costs based on alternative means, a reasonable basis including but not limited to, as Article 2(5) states, "information from other relevant markets." However, for the Appellate Body, this language does not refer only to "costs of production of the product under consideration from outside the country of origin."[345] Still, under Article 2(5) the EU authorities "may adopt information from outside the country of origin to reflect the costs of production in the country of origin."[346] But according to the Appellate Body the authorities are not required to do so.[347] The Appellate Body also rejected Argentina's allegations that the legislative history of Article 2(5) requires the authorities to use information or prices not in the country of origin.[348]

The Appellate Body reached a similar conclusion based on various EU administrative decisions presented to the Panel and the Appellate Body.[349] As to the case law of the EU's General Court, The Appellate Body concluded after review that the "these judgments are consistent with the view that the EU authorities can turn to any other reasonable basis, including information from

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[340] *Id.* ¶ 6.227 (citing Appellate Body Report, *United States—Anti-Dumping Act of 1916*, ¶ 100, WTO Doc. WT/DS136/AB/R, WT/DS162/AB/R (Aug. 28, 2000) (adopted Sept. 26, 2000)).

[341] *Id.* ¶ 6.227 (citing Appellate Body Report, *United States—Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, ¶ 93, WTO Doc. WT/DS244/AB/R (Dec. 15, 2003) (adopted Jan. 9, 2004) [hereinafter Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*]).

[342] *Id.* ¶ 6.229 (quoting Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*, *supra* note 341, ¶ 100 (footnote omitted)).

[343] *Id.* ¶ 6.230 (citing Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 338, ¶ 157).

[344] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶6.237; Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.132.

[345] Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.241.

[346] *Id.* ¶ 6.242.

[347] *Id.* ¶ 6.243.

[348] *See Id.* ¶¶ 6.248–.253.

[349] *See Id.* ¶¶ 6.2.54–.56.

other representative markets, [but] only in the event that the costs of other producers or exporters in the same country were not available or could not be used."[350] The court decisions confirmed for the Appellate Body that while the EU authorities *may* rely on information from outside the country of origin, they are not *required* to do so.[351] On the same ground the Appellate Body also rejected Argentina's contention that the Panel acted inconsistently with its duties under DSU Article 11.[352]

Argentina had yet another basis for its "as such" challenge. It attacked the legal standard applied by the Panel in rejecting the argument that Article 2(5) was inconsistent "as such" with ADA Article 2.2. Since Article 2(5) does not require the authorities to use cost of production in the country of origin the provision is inconsistent "as such" with the ADA. The Panel rejected this approach on the same grounds as earlier, determining that Argentina had failed to show that the provision could not be applied in a WTO-consistent manner.[353] However, the Appellate Body found that the Panel had misread *US—Carbon Steel (India),* on which it relied (a case relating to use of "facts available.")[354] Rather, as stated by the Appellate Body earlier,[355] the Appellate Body reiterated that for the measure to be consistent with ADA Article 2.2 and GATT Article VI:1(b)(2), it is permissible to use various types of evidence in determining cost of product in the country of origin, provided that the information used arrives at the "cost of production" determined "in the country of origin."[356] Nevertheless, the Appellate Body agrees with the Panel that Argentina again failed to establish an "as such" violation.[357]

7. Challenges under WTO Agreement Article XVI:4 and ADA Article 18.4

In these derivative claims, Argentina argued that because the European Union's Basic Regulation was a violation of the ADA and GATT, the European Union had failed to ensure the conformity of its laws, regulations and administrative procedures violated Article XVI:4 of the WTO Agreement and Article 18.4 of the ADA.[358] Because Argentina made no arguments distinct from

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350 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.260.

351 *Id.* ¶ 6.261 (italics supplied by Appellate Body).

352 *Id.* ¶¶ 6.264, .266.

353 Panel Report, *EU—Biodiesel*, *supra* note 228, ¶ 7.174 (referring to Appellate Body Report, *US—Carbon Steel (India)*, *supra* note 338, ¶ 4.483).

354 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 6.279.

355 *Id.* ¶ 6.234.

356 *Id.* ¶ 6.280.

357 *Id.* ¶ 6.282.

358 *See Id.* ¶ 6.288.

those advanced earlier to support "as such" inconsistency, the Appellate Body, like the Panel, concluded that Argentina had failed to establish its case.[359]

8. Conclusions

Contrary to earlier practice in many cases, where the "conclusions" are simply a pro forma list, the conclusions in this report are five pages in length.[360] While given the earlier discussion of the issues it is unnecessary for the authors to discuss the section, the practice of including a relatively detailed conclusions section will be helpful to those interested in the report who do not have the time or the inclination to read the entire document. We hope this will now be standard practice with Appellate Body reports.

E. Commentary

1. Further Restrictions on Antidumping Investigations

The principal significance of this case is in the Panel and Appellate Body's rejection of what seems to be a reasonable methodology used by the European Union in circumstances where the foreign producers' production costs were unreliable because the prices of the materials costs (the soybean feedstocks) were artificially depressed—well below world commodity prices for soybeans—by the government's export tax policies. Consequently, the EU authorities determined that the costs of the soybeans used in production of biodiesel "were not reasonably reflected in the records kept by the Argentinean producers." The use by the European Union as a surrogate price of "the average of the reference prices of soya beans published by the Argentine Ministry of Agriculture for export FOB Argentina"[361] seems to us to be an exercise of reasonable discretion under the circumstances. In some respects the methodology is comparable, and probably less subject to distortion, than the determination by the United States in *US—Softwood Lumber V*, where it rejected domestic British Columbia stumpage prices for benchmark purposes in a countervailing duty proceeding because only a small percentage of total stumpage was sold by private interests.[362] (Commercial stumpage prices from the states of Washington and Oregon were used instead.) If domestic prices are unreliable or distorted, the investigating authority should have the option of choosing a reasonable alternative means in order to avoid the situation where cost of production of the product, and thus normal value, are depressed, decreasing or perhaps eliminating dumping margins that would otherwise be evident. A very strict textual reading of ADA Article 2.2 may be

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359 Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶6.290.
360 *Id.* ¶¶ 7.1–.12.
361 *Id.* ¶¶ 6.86–.87.
362 Appellate Body Report, *Softwood Lumber V Compliance*, *supra* note 123, ¶ 183.

defensible, but that narrow approach is hardly persuasive, and makes little sense in the real world of anti-dumping investigations.

Nor did the Appellate Body make any effort to provide guidance to investigating authorities in future cases. They noted that "[w]hen relying on any out-of-country information to determine the 'cost of production in the country of origin' under [ADA] Article 2.2, an investigating authority has to ensure that such information [the surrogate price] is used to arrive at the 'cost of production in the country of origin, and that this may require the investigating authority to adapt that information.'"[363] This language suggests that the Appellate Body has not entirely rejected in all circumstances the use of out-of-country information in establishing cost of production, but unfortunately it did not elaborate on what it meant by "adapt that information." This result is yet further evidence of the lack of understanding among Appellate Body members and the Appellate Body secretariat of the real world challenges that are faced by investigating authorities in conducting antidumping investigations. Having long ago read safeguards measures out of the permissible trade remedies under the WTO system [364] (unnecessarily in the authors' view), the imposition of unreasonable restrictions on authorities' investigations is likely both to increase the cost of these investigations for both authorities and the parties and could ultimately lead to more widespread disregarding of the Appellate Body's increasing restrictions on the conduct of antidumping investigations.

2. ADA and China's WTO Protocol of Accession

An additional question that arises is the extent to which this report will be used as a precedent by China in challenging the decision of the United States to continue using non-market economy methodology in antidumping investigations lodged against China. The accession agreement, in paragraph 15,[365] allows use of non-market economy methodology as follows: "The importing WTO Member may use a methodology that is not based on a strict comparison with domestic prices or costs in China if the producers under investigation cannot clearly show that market economy conditions prevail in the industry producing the like product with regard to manufacture, production and sale of that product." However, paragraph 15 also provides that "In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession." That 15-year period expired December 11, 2016.

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[363] *See, e.g.,* Appellate Body Report, *EU—Biodiesel*, *supra* note 229, ¶ 7.3.

[364] *See* Appellate Body Report, *Korea—Definitive Safeguard Measures on Imports of Certain Dairy Products*, ¶ 151, WTO Doc. WT/DS98/AB/R (Dec. 14, 1999) (*adopted as modified* Jan. 12, 2000) .

[365] Ministerial Accession Decision, *Accession of the People's Republic of China*, ¶ 15, WTO Doc. WT/L/432 (Nov. 10, 2001).

Presumably because the United States had made it clear that it would not abandon NME methodology as of December 11,[366] China on December 12, 2016 requested consultations with the United States on "Measures Related to Price Comparison Methodology," effectively arguing that continued use of NME methodology was inconsistent with various provisions of the *Antidumping Agreement*, GATT 1994 and the *WTO Agreement*.[367] The European Union is subject to a similar WTO challenge.[368]

It is impossible at this very early stage of the proceedings to predict how a Panel or the Appellate Body would rule on the Chinese challenge, or even the arguments the United States and China will make (beyond the obvious). For China, Paragraph 15 means exactly what it says, with no exceptions even if China has not as it promised in 2001 and as many Members expected in relying on that promise, evolved toward a market economy in the fifteen years since WTO accession. For the United States (as well as the EU and many other WTO Members), it is obvious that China does not act as a market economy—at least in many sectors—in terms of the degree of central planning that continues to exist with many factors of production, particularly including the preferential treatment of some enterprises by the state owned and controlled banking system.

That being said, with the Appellate Body's rejection of the use of out of country data in calculation cost of production when the domestic data is unreliable, and the cryptic directive to "adapt that information," both as in *EU—Biodiesel*, sets an unfortunate precedent which could receive parallel application in *US—Price Comparison Methodologies.*

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[366] *See* Bryce Baschuk, *U.S. Rejects Chinese Call to Drop "Surrogate" Antidumping Practices*, 33 INT'L TRADE REP. (BNA) 1567 (2016) (confirming U.S. intentions to treat the Article 15 clause as not requiring immediate treatment of China as a market economy for antidumping purposes).

[367] Request for Consultations by China, *United States—Measures Related to Price Comparison Methodologies,* WTO Doc. WT/DS515/1 (Dec. 12, 2016).

[368] *See* Baschuk, *supra* note 366 (noting that the EU is considering new methodology for countries where "market distortions" exist); Request for Consultations by China, *European Union—Measures Related to Price Comparison Methodologies*, WTO Doc. WT/DS516/1 (Dec. 12, 2016).

V. GATS, LIKENESS, AND NON-DISCRIMINATORY TREATMENT

A. Citation

> Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/AB/R (Apr. 14, 2016) (*adopted* May 9, 2016) (short name: *Argentina Financial Services*)[369]

B. Facts: Argentina's Eight Controversial Measures[370]

Eight distinct rules implemented by Argentina with respect to trade in goods and services got the country into trouble (again) with another WTO Member—this time, Panama. These rules covered financial, tax, foreign exchange (FX), and registration matters. As usual, the Appellate Body failed to consolidate its discussion of the facts into Section 1, but instead scattered them across that Section, Section 5, and other parts of the Report. In a classroom setting, seasoned teachers usually can tell whether a student understands the facts of a case and has a solid "gut instinct" about what transpired "on the ground," or merely regurgitates in a stilted manner what the casebook says. Based on its exposition of the facts in Section 1, the Appellate Body resembles that student, never quite grasping what is happening "in the marketplace," and adding little value to an intuitive understanding of the case.

Each of the eight Argentine "Measures" divided countries into two categories, "Cooperative Countries," and "Non-Cooperative Countries." "Cooperative Countries" (CCs) were ones that worked collaboratively with Argentine authorities on the Measures. Specifically:

> Article 1 of the *Decree* lays down the requirements for Argentina to grant "cooperative" status to a country, dominion, jurisdiction, territory, associate State, or special tax regime. To be granted cooperative status under Article 1 of the Decree, the country, dominion, jurisdiction, territory, associate State, or special tax regime must either (i) sign with Argentina an

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[369] The Panel Report is Panel Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/R (Sept. 30, 2015) (*adopted as modified* May 9, 2016) [hereinafter Panel Report, *Argentina Financial Services*]. At the Appellate stage, there were 12 Third Party participants: Australia, Brazil, China, Ecuador, European Union, Guatemala, Honduras, India, Oman, Saudi Arabia, Singapore, and United States. The presence of Oman is noteworthy. While to date Oman has not been a complainant or respondent, the *Argentina Financial Services* case marked its tenth appearance as a Third Party.

[370] *See* Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, ¶¶ 1.1–.13, 5.1–.26, WTO Doc. WT/DS453/AB/R (Apr. 14, 2016) (*adopted* May 9, 2016) [hereinafter Appellate Body Report, *Argentina Financial Services*].

> agreement on exchange of tax information or a convention on avoidance of international double taxation with a broad information exchange clause, provided that there is an effective exchange of information, or (ii) initiate with Argentina the negotiations necessary for concluding such an agreement and/or convention.[371]

Conversely, "Non-Cooperative Countries" (NCCs) did not work with Argentine authorities to adhere to the Measures; that is, NCCs did not have in place the requisite double taxation convention or information exchange agreements with Argentina, and had made no progress toward initiating, much less finalizing, these deals. Argentina updated the CC list annually.

In May 2013, Argentina implemented the Measures through *Decree Number 589/2013* of the Argentine Federal Administration of Public Revenue (AFIP). (The specific Argentine legal provisions implicated and/or amended by this *Decree* are noted with respect to each Measure.) The AFIP also kept a list of CCs, which for many years the complainant, Panama, was not on (though it made it on, subject to further review by the AFIP, during the Panel proceedings).

(1) Measure 1: Irrebuttable Presumption on Interest and Remuneration Payments
(1973 Argentine *Gains Tax Law*, Article 93(c))

> Any payment an Argentine consumer made to a creditor in a NCC was irrebuttably presumed to represent a 100% net gain of that consumer for the purpose of determining the tax base for capital gains tax. The context in which this Measure was pertinent was where a foreign bank granted a loan or credit, or placed funds in Argentina, through cross-border supply of banking services, for an Argentine consumer. This foreign bank was a non-resident; that is, it did not reside in Argentina, financial services supplier. Argentina categorized the bank as a "beneficiary abroad," because the bank received interest and fees from its Argentine consumer-debtors. Argentina deemed that income to have been generated in Argentina and, therefore, subject to the Argentine gains tax.
>
> So, under the *Gains Tax Law*, when an Argentine consumer-debtor made an interest payment or provided other remuneration to the foreign financial services supplier, the Argentine tax authorities collected a tax of 35% via a withholding mechanism. This Measure presumed, regardless of any possible contrary evidence, that the payment was a 100% net gain for the beneficiary abroad, if that beneficiary was in a NCC. But if the beneficiary abroad resided in a CC, then Argentina presumed the net gain to be 43%.

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[371] *Id.* ¶ 5.3. *See also id.* ¶ 6.132 (explaining CC versus NCC status).

Suppose, for example, a USD 100 payment were made by an Argentine debtor to a bank in an NCC. The gains tax withheld by Argentine authorities would be $35, because the full $100 payment would be taxable. If the bank were in a CC, then the taxable gain would be 43% of $100, or $43. The tax liability would be 35% of $43, or $15.05.

The difference between NCC and CC treatment thanks to the presumption can be expressed in percentage terms.[372] Banks in NCCs faced withholding of 35% (the presumed 100% taxable net gain multiplied by the 35% gains tax rate). By contrast, banks in CCs faced withholding of 15.05%, the presumed 43% taxable net gain multiplied by the 35% rate.

(2) Measure 2: Rebuttable Presumption of an Unjustified Wealth Increase (1978 Argentine *Law on Tax Procedure*, Article 18)

Any entry of funds from an NCC to an Argentine taxpayer was rebuttably presumed to be an unjustified increase in the wealth of that taxpayer, to determine liability (i.e., taxable subject matter) for capital gains taxes. Normally under the *Law on Tax Procedure*, Argentine taxpayers compute their income that is subject to taxation, and provide a sworn declaration to the AFIP. The AFIP can make an *ex officio* determination if there is no such declaration, or it has reason to doubt a declaration (e.g., it suspects the taxpayer is not declaring taxable subject matter), and in such cases apply a presumption of an unjustified increase in wealth.

This Measure essentially inverted what normally occurred. Any entry of funds from an NCC triggered an automatic ex officio determination by the AFIP, and an application by the AFIP of an unjustified increase in wealth. The nature, purpose, or type of the transaction was irrelevant. The amount of the unjustified increase equaled the full amount of the transfer, plus an additional 10% (that the AFIP branded "income disposed of or consumed as non-deductible expenditure"). This amount was subject to the gains tax. The taxpayer could try to rebut the presumption of unjustified increase. To do so, it needed to prove conclusively that the funds originated from activities that the taxpayer or a third party conduced in an NCC.

(3) Measure 3: Transaction Value Base Rule for Transfer Pricing (1973 Argentine *Gains Tax Law*, Articles 8(5) and 15(2))

For any transaction between an Argentine taxpayer and a person from an NCC, to determine the tax base for capital gains taxes, the

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372 *See id.* ¶ 5.7 & n.74.

approach to valuing the transaction was based on transfer pricing methods. Generally, under the *Gains Tax Law* any transaction between an Argentine taxpayer and unrelated counterparty in a CC was deemed to occur according to normal, arm's length market practices, hence the value of that transaction was the value on which the two sides agreed. Only if the parties were related were special transfer pricing rules used for valuation.

But what if the transaction occurred between an Argentine taxpayer and a person or entity domiciled, located, or even simply incorporated in a NCC? Then, Measure 3 said the deal could not have been consummated at arm's length practices or prices. Hence, the transfer pricing regime had to be used to value the transaction—even if the parties were unrelated.

(4) Measure 4: Allocation of Expenditures
(1973 *Gains Tax Law*, Article 18, Last Paragraph)

To determine the basis for capital gains taxes, any expenditure in a transaction between an Argentine taxpayer and a person or entity from an NCC had to be allocated to the fiscal year (FY) in which the payment for the transaction actually occurred. The Gains Tax Law allowed the taxpayer to deduct various types of expenditures when computing net profits that were subject to taxation, and used an "Accrual Rule." That Rule meant the taxpayer must allocate expenditures and profits in the FY in which they accrue (i.e., in which the obligation arose).

The FY in which a payment obligation arises is not necessarily the same as the FY in which the payment actually is made. Measure 4 exploited this distinction. If the expenditure in question was linked to a transaction between an Argentine taxpayer and a person or entity from an NCC, then a "Payment Received Rule" had to be used. That meant the expenditure had to be allocated to the FY in which the payment was executed (i.e., made, not incurred). In turn, the taxpayer could not claim a deduction from its taxable income for an expenditure to an NCC party unless and until it actually paid that party.

So, for example, if the deductible expense was $100 and incurred in FY 1, but not paid until FY 2, then the taxpayer's taxable profits could not be reduced by $100 in FY 1 (as it could under the Accrual Rule), but had to be deferred until FY 2 (thanks to the Payment Received Rule). Obviously, then, the AFIP collected more taxes in FY 1 than it otherwise would have if the foreign party were in a CC—in essence, a higher tax bill up front for NCCs.

(5) Measure 5: Reinsurance Services Requirements
(2011 and 2014 *Resolutions of the National Insurance Supervisory Authority* (SSN))

Any service supplier from an NCC had to meet certain requirements to obtain access to the Argentine reinsurance market. Failure to satisfy these requirements meant that person was denied access to the Argentine reinsurance market. Initially under the SSN, in 2011, Argentina banned the supply of reinsurance services through cross-border trade (GATS Mode I) and commercial presence (GATS Mode III) if the service supplier (e.g., a parent entity or its branch office) was from an NCC. Argentina gave an exception for an NCC-based firm that offered reinsurance contracts that were not offered in the Argentine market because of the scale or characteristics of the risks covered—in effect, a short supply exception.

In 2014, Argentina changed the SSN restrictions to allow a foreign supplier to provide reinsurance services from its country of origin (Mode I) or through a branch in Argentina (Mode III), if it met two requirements. First, the foreign supplier had to prove it is incorporated and registered in a CC. If that supplier was a branch, then it had to show its parent was based in a CC. Suppose the supplier was not from a CC and thus could not offer this proof? Then its only option to access the Argentine market was to prove (1) it was regulated by an authority similar to that of Argentina's National Insurance Supervisory Authority (NISA, i.e., it was subject to the same kind of government regulatory regime in an NCC as NISA), and (2) its regulatory authority had signed an agreement to cooperate and exchange information with NISA.

Second, the foreign supplier had to prove to Argentina that it was incorporated and registered in a country that cooperates in the global fight against money laundering and terrorist financing through compliance with FATF criteria. Suppose the supplier could not offer this proof. Then Argentina authorities would subject its application to sell reinsurance contracts in Argentina to enhanced scrutiny.

(6) Measure 6: Argentine Capital Market Access
(2013 *Rules of the National Securities Commission*, "Prevention of Money Laundering and Financing of Terrorism," Title XI, Section III, Article 5)

Any stock market intermediary (e.g., an agent engaged in bargaining, liquidation, compensation, distribution, placement or collective investment management) in Argentina had to satisfy two requirements to engage in a transaction ordered by a party from an NCC. Failure to satisfy these requirements meant that the NCC party was denied access to the Argentine capital markets. The types of capital

market transactions at stake were initial public offerings (IPOs) of securities, and trading in forwards, futures, options, and other financial instruments. The two requirements applied whenever one of the transacting parties (e.g., buyer or seller) resided or was incorporated in a NCC. That is, an Argentine stock market intermediary was not subject to the requirements when it entered into transactions with parties from CCs.

First, a stock market intermediary in Argentina that received an order from a party in a NCC had to ensure that party was itself an intermediary registered with, and regulated by, an authority that was similar to the Argentine National Securities Commission (NSC). Second (and assuming the first criterion is met), the NCC financial regulatory authority must have signed an agreement with the NSC to cooperate and share information. These two requirements were like those in Measure 5, namely, the NCC entity had to be subject to the same kind of government regulatory regime as an Argentine intermediary, and that entity had to have an agreement with the NSC. Again, unless both requirements were met, an Argentine intermediary could not deal with it in any securities transactions, effectively denying it access to the Argentine financial markets.

(7) Measure 7: Branch Registration Requirements
(2005 *Resolution on Companies Incorporated Abroad*, Article 192)

Any company from an NCC that seeks to open a branch office in Buenos Aires had to meet certain requirements concerning registration of that branch in the "Public Trade Register of the Autonomous City of Buenos Aires." Failure to do so meant it could not open a Buenos Aires branch. The Measure did not apply to branches of a company from a CC.

The key requirement the Measure imposed on NCC companies was that they prove they are "effectively engaged in economically significant business activities" in the jurisdiction in which they are established, and/or third countries. Additionally, Argentine authorities could ask the company for records, and verification of those records, as proof. Essentially, the Measure meant NCC companies had to show they were not mere fronts, or conduits, for money laundering, terrorism, or other illicit activities.

(8) Measure 8: FX Authorization Requirement
(2009 *Central Bank of the Argentine Republic, Communication A, Number 4940*, Section I)

The Argentine Central Bank had to give prior approval for any purchase of FX (in the so-called "Single Free Foreign Exchange Market") that would be used for repatriating to a beneficiary residing or incorporated in a NCC a direct or portfolio investment made by, or owed

> to, that beneficiary in Argentina. In other words, the Central Bank would not sell FX (e.g., US dollars) for Argentine *pesos* to an NCC beneficiary, for that beneficiary to shift the FX out of Argentina, without prior authorization. No such prior authorization was needed to repatriate earnings from a direct or portfolio investment in Argentina if the funds, while denominated in foreign currency, were being transferred to a natural or legal person residing or incorporated in a CC. With a CC, the peso-denominated earnings could be converted into FX, and moved out of Argentina to the CC (as long as other applicable Argentine legal requirements were met).

Succinctly put, Measures 1–4 were tax rules, while Measures 5–8 were financial services rules.

Not surprisingly, the differentiation between NCCs and CCs gave rise to the Panamanian claims at both the Panel and Appellate Body level under the GATS non-discrimination provisions, and necessitated the Argentine defenses that allow for derogation from those provisions. In particular, Panama's contentions arose under the GATS MFN and National Treatment rules, Articles II:1 and XVII:1, respectively, as follows:

> *Part II*
> *General Obligations and Disciplines*
> . . . .
> *Article II*
> *Most-Favored Nation Treatment*
>
> 1. With respect to any measure covered by this *Agreement*, each Member *shall accord immediately and unconditionally to services and service suppliers of any other Member treatment no less favorable than that it accords to like services and service suppliers of any other country*.
> 2. A Member may maintain a measure inconsistent with paragraph 1 provided that such a measure is listed in, and meets the conditions of, the *Annex on Article II Exemptions*.
> 3. The provisions of this *Agreement* shall not be so construed as to prevent any Member from conferring or according advantages to adjacent countries in order to facilitate exchanges limited to contiguous frontier zones of services that are both locally produced and consumed.
>
> . . . .
> *Part III*
> *Specific Commitments*

. . . .
Article XVII
National Treatment

1. In the sectors inscribed in its Schedule, and subject to any conditions and qualifications set out therein, each Member *shall accord to services and service suppliers of any other Member, in respect of all measures affecting the supply of services, treatment no less favorable than that it accords to its own like services and service suppliers*.[10]
2. A Member may meet the requirement of paragraph 1 by according to services and service suppliers of any other Member, either formally identical treatment or formally different treatment to that it accords to its own like services and service suppliers.
3. Formally identical or formally different treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of the Member compared to like services or service suppliers of any other Member.

[10] Specific commitments assumed under this Article shall not be construed to require any Member to compensate for any inherent competitive disadvantages which result from the foreign character of the relevant services or service suppliers.

Argentina's defenses concerned GATS Article XIV(c), and Paragraphs 1(a) and 2(a) of the *Annex on Financial Services*:

Part II
General Obligations and Disciplines
. . . .
Article XIV
General Exceptions

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

(c) *necessary* to *secure compliance with laws or regulations* which are not inconsistent with the provisions of this *Agreement* including those relating to:

(i) the prevention of deceptive and fraudulent practices or to deal with the effects of a default on services contracts;
(ii) the protection of the privacy of individuals in relation to the processing dissemination of personal data and the protection of confidentiality of individual records and accounts;
(iii) safety;

. . . .

Annex on Financial Services

1. *Scope and Definition*

(a) This Annex applies to measures affecting the supply of financial services. Reference to the supply of a financial service in this Annex shall mean the supply of a service as defined in paragraph 2 of Article I of the *Agreement*.

. . . .

2. *Domestic Regulation*

(a) Notwithstanding any other provisions of the *Agreement*, a Member shall not be prevented from taking measures for prudential reasons, including for the protection of investors, depositors, policy holders or persons to whom a fiduciary duty is owed by a financial service supplier, or to ensure the integrity and stability of the financial system. Where such measures do not conform with the provisions of the *Agreement*, they shall not be used as a means of avoiding the Member's commitments or obligations under the *Agreement*.[373]

In respect of all Eight Measures, Argentina said they served two broad policy goals, and were in line with international guidelines concerning these goals.

[373] Emphasis added.

First, the Measures were for defensive tax purposes, and consistent with the *Global Forum on Transparency and Exchange of Information for Tax Purposes* (*Global Forum*) of the Organization for Economic Cooperation and Development (OECD). The Forum standards were designed to help an OECD country establish "a comprehensive regulatory framework [to] address[] the risks posed by harmful tax competition to the integrity and stability of its tax system."[374] So, Argentina said its Measures adhered to international standards, embodied in the OECD *Forum*, to protect the tax base of Argentina from tax avoidance, evasion, and fraud. Second, the Measures were consistent with the framework of the *Financial Action Task Force* (*FATF*), meaning that they protected investors, and the safety and soundness of the Argentine financial system, from concealment and money laundering, and terrorist financing or financial crimes.

C. Issues, and Panel and Appellate Body Holdings[375]

Panama did not fare too well at the Panel stage, and worse at the Appellate stage. The "legal bottom line," at the end of both levels of litigation, was that (1) none of the Eight Measures violated the GATS Article II:1 MFN rule, and (2) although Measures 2-4 violated the Article XVII National Treatment Rule, they were justified under Article XIV(c) as necessary to secure compliance with underlying WTO-consistent Argentine laws. In other words, the "legal bottom line" was an impressive victory for Argentina.

In reviewing and evaluating the key issues on appeal, along with a recap of the Panel and Appellate Body holdings, it is important to pay attention to the "political economy bottom line." Panama has a comparative advantage in more than shipping, associated with its newly enlarged Canal. It has long had a comparative advantage in tax planning and financial services, thanks to its renowned (that is, infamous) tax haven and bank secrecy laws. Every Argentine Measure took aim at that comparative advantage. The pure-heartedness behind the Argentine Measures up for debate, but its motives were not on trial. From perspective of central banks and financial market supervisors—whose job it is to promote virtue and deter vice in both local and global finance—a loss for Argentina in the case would have been devastating.[376]

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[374] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 5.29.

[375] *See* Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶¶ 4.1, 5.27–.29.

[376] *See generally* THE SEVEN PILLARS INST. FOR GLOBAL FIN. & ETHICS, http://sevenpillarsinstitute.org/ (promoting financial ethics).

1. Likeness of Services and Service Suppliers under GATS Articles II:1 and XVII:1?[377]

For purposes of the MFN rule in GATS, the Panel decided that services and service suppliers located in NCCs are "like" services and service suppliers in CCs. Based on this decision, the Panel said services and service suppliers in NCCs are "like" those in Argentina for purposes of the National Treatment rule. Were these decisions correct? The Appellate Body said "no." The Panel also decided that Measures 1–8 were illegal under the MFN rule. That was wrong, said the Appellate Body, because it was unclear if the services and service suppliers in NCCs and CCs were "like." In all these respects, Argentina prevailed on appeal. On one point, however, Argentina lost: the Appellate Body reversed the Panel holding that Measures 2–4 were lawful under the National Treatment rule. The Appellate Body stressed it took no view as to whether services and service suppliers of CCs and NCCs are "like" one another (for MFN purposes), or whether those from NCCs are "like" those from Argentina (for National Treatment purposes).

Argentina argued on appeal that the Panel misinterpreted GATS Article II:1 in finding that services and service suppliers are "like" when a controversial measure distinguishes among services and service suppliers exclusively based on their origin. That basis, said Argentina, is insufficient to find "likeness;" that is, the Presumption Approach (discussed below) is inapposite, and likeness cannot be presumed from a distinction drawn exclusively on origin from an NCC versus a CC. Argentina said that characteristics of a good under the GATT MFN rule are intrinsic to a good itself, but characteristics of a service often are inseparable from the characteristics of service suppliers. In turn, service suppliers are rather different from one another.

As a generic matter, the Appellate Body refused to invalidate the Presumption Approach. Employing a presumption of "likeness" across services and service providers from different countries (under GATS Article II:1, the MFN rule), or as between foreign countries and an importing country (under GATS Article XVII:1, the National Treatment rule), is permissible when the disputed measure distinguishes services and service providers on the sole criterion of where they come from. Intuitively, if their origin is all that distinguished them, then surely they are "like" in all other respects—otherwise, the importing country with the controversial measure would have added further criteria to target the services and service providers about which it cared.

The Appellate Body observed that in the case at bar, the Panel actually did not base its finding that services and service suppliers from CCs and NCCs were "like" exclusively on their origin. The differences in treatment that

[377] *See* Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶¶ 6.46–.71, 6.154 (concerning the GATS MFN rule in Article II:1). *Id.* ¶¶ 6.72–.80, 6.154 (concerning the GATS National Treatment Rule). *Id.* ¶¶ 7.1(a)(i) ("like services and service suppliers" under Article II:1). *Id.* ¶ 7.1(b)(i) ("like services and service suppliers" under Article XVII:1).

Argentina accorded under the Eight Measures to services and service suppliers from CCs versus NCCs was not based exclusively on origin, said the Panel, but on another, more fundamental, factor. The Panel appreciated that Argentina's classification of countries into CCs and NCCs was predicated on the regulatory framework in those countries. The bifurcation of countries was not based on origin *per se*, but rather on the tax and financial regulatory regimes in those countries and the access Argentine authorities had to tax information from those countries. Indeed, Argentina argued that the possibility of access to tax records was a criterion it used to establish "likeness" among services and service suppliers. The preferences of Argentine consumers would be affected by such access, which would skew the competitive relationship among services and service suppliers from CCs versus NCCs. Traditional tax havens that have information exchange agreements lose business to jurisdictions that do not have such deals—crudely put, rich people often prefer banking secrecy.

The Panel ultimately concluded that it could not undertake a full analysis of "likeness" (that is, of the competitive relationship between services and service suppliers from CCs and NCCs) because of the complexity and circumstances of the dispute. The Panel therefore concluded the differential treatment between CCs and NCCs in the Eight Measures was due to origin, and consequently services and services suppliers were "like," whether they came from a CC or NCC. The Appellate Body faulted the Panel for abandoning prematurely the "likeness" inquiry. It said the Panel should have investigated the evidence about the competitive relationship of services and services suppliers that Argentina presented.

Regrettably, the work of the Appellate Body in this portion of its opinion (Paragraphs 6:53-6:64) is hardly a model of clarity. The reasoning in this portion relies on abstruse distinctions ("due to origin" versus "due exclusively to origin") and is circular (less favorable treatment is "due to origin," so services and service suppliers of CCs and NCCs are "'like' by reason of origin.") And yet the Appellate Body decided the Panel erred in finding "likeness" by reason of origin, thus handing Argentina a critical victory.

Obviously, Argentina knew that if its arguments were successful, then the MFN rule would be inapplicable to its Eight Measures. If services and service suppliers from different countries were not "like," then Argentina was not bound to treat them immediately and unconditionally with equal favor. The Argentine attack against the Panel finding in favor of "likeness" paid off: services and services suppliers from CCs were not "like" those from NCCs. In turn, the Eight Measures were not illegal under the GATS MFN rule. Argentina was not obliged to provide "treatment no less favorable" to services and service suppliers from NCCs than it gave to ones from CCs, because the services and service suppliers from the two groups of countries were un-like.

It was a short stretch for the Appellate Body to rule in favor of Argentina with respect to its argument that the Panel erred under GATS Article XVII:1. The Panel found services and service suppliers from CCs and NCCs are "like" those in Argentina. For this finding, the Panel relied on its finding under Article II:1. This

reliance was flawed, said Argentina. Under the MFN rule, the "likeness" comparison is between services and services suppliers from CCs versus those from NCCs. Under the National Treatment rule, the comparison is between services and service suppliers from NCCs versus those from Argentina. The outcome of the first comparison has no bearing on the outcome of the second comparison.

The Appellate Body agreed with Argentina. The Panel said that its "likeness" finding under Article II:1 "can be *transposed* to the scope of Article XVII."[378] (That statement showed a shocking lack of understanding by the Panel of the difference between the MFN and National Treatment rules.) Because the Panel conclusion under the MFN rule was wrong, then so was it under the National Treatment rule: services and services suppliers from NCCs were not "like" services and services suppliers in Argentina.

But Argentina did not score a complete victory under Article XVII:1. Argentina hoped that, based on modified reasoning, the Appellate Body would agree Measures 2–4 were legal under the National Treatment rule, thereby upholding the Panel that these Measures were consistent with this rule. The Appellate Body dashed Argentina's hopes, finding that because the Panel erred with respect to "likeness," the Panel further erred in holding that Measures 2–4 were legal under Article XVII:1.

2. Standard for "Treatment no Less Favorable" under GATS Article II:1 and XVII:1?[379]

As explained above, the Panel held in favor of Panama on the MFN claim.[380] The Panel agreed all Eight Measures involve trade in services (as per GATS Article I:1), and that all of them violated the GATS Article II:1 MFN rule, because none of them accorded immediately and unconditionally, "treatment no less favorable" to services and service suppliers from NCCs as they did to services and service suppliers from CCs. The Appellate Body reversed this finding, thus siding with Argentina.

As also explained above, the Panel held Measures 2–4 were lawful under the GATS Article XVII:1 National Treatment rule. The Panel said these three

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[378] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 6.75 (quoting Panel Report, *Argentina Financial Services,* supra note 369, ¶ 7.488) (emphasis added).

[379] *See id.* ¶¶ 6.85–.153 (concerning the GATS MFN and National Treatment rules in Articles II:1 and XVII:1, respectively). *Id.* ¶¶ 7.1(a)(ii)-(iii) ("treatment no less favorable" under Article II:1). *Id.* 7.1(b)(ii)-(iii) ("treatment no less favorable" under Article XVII:1).

[380] Panama also made, and lost, claims against Measures 2 and 3 under the GATT Article I:1 MFN and III:4 National Treatment rules, and the GATT Article XI:1 rule against quantitative restrictions. Essentially, the Panel said GATT was inapposite because these Measures did not involve payments or transfers for goods, but rather were fiscal (i.e., service-oriented) in nature. Panama did not appeal these holdings. *See id.* ¶ 1.7.

Measures did not offer "treatment no less favorable" to services and service suppliers from NCCs than they offered to like Argentine services and service suppliers in respect of the relevant Modes of supply where Argentina scheduled specific commitments. The Appellate Body reversed this finding, thus siding with Panama.

The case did not end with these findings (much as a reader ploughing through redundancies and circularities might have wished). The Appellate Body entertained a lengthy—and ultimately somewhat useful—discussion of the proper way to interpret "treatment no less favorable" under both GATS Non-Discrimination rules. The key issue concerned the test for such treatment under Article II:1 and XVII:1. The Panel held that an assessment of the regulations governing services and service suppliers that might affect the conditions of competition among them is required. The regulation on which the Panel focused was whether Argentina had access to tax information on foreign suppliers. The Appellate Body said the Panel erred in demanding that regulations (such as accessibility to tax information) must be checked to determine whether "treatment no less favorable" is provided.

Regrettably, the Appellate Body failed to explain clearly the procedural posture for this issue. The relevant Paragraphs of its Report (6:85–153), which span 18 pages, need to be re-read multiple times to understand how and why this issue is in front of the Appellate Body. (Its Table at Paragraph 5:27 is far too generic to be helpful, and the right-hand most column mixes claims and defenses without explanation. Some of its transition sentences are so in-artfully drafted, as between Paragraphs 6:130 and 6:131, re-reading them and their double-negatives sows confusion, hence they are better skimmed over or skipped.) The answer is it was Panama that appealed the Panel holdings about the proper test for "treatment no less favorable" under the GATS Non-Discrimination rules.

Technically, the MFN victory Panama scored at the Panel stage; that is, as explained above, that the Eight Measures were inconsistent with GATS Article II:1, was a preliminary finding. The Panel found each of the Eight Measures imposed a heavier burden, additional requirements, or mandated stricture conditions on services and service suppliers from NCCs, in comparison to those from CCs. The Panel would have done well to stop and equate "less favorable treatment" with the modification of competitive conditions through heavier burdens, etc. Alas, the Panel said its conclusion was tentative subject to an assessment of whether the Eight Measures accorded "treatment no less favorable" to CCs versus NCCs. That is where the Panel got itself in trouble.

Panama did not like the test for such treatment the Panel proposed and used—in effect, it thought the test was too high. So Panama asked the Appellate Body to sustain the Panel's holding that the Measures were illegal under the MFN rule, but overturn the Panel's test for "treatment no less favorable." The Appellate Body agreed the Panel got the test wrong, but refused to sustain the preliminary finding of an MFN violation. The Appellate Body said that the Panel's final conclusion that the Eight Measures were inconsistent with the MFN rule was based on the Panel's erroneous test; hence that conclusion could not stand. The

"bottom line," then, was that Argentina won the MFN challenge—none of its Eight Measures was found to treat services and services suppliers from NCCs less favorably than those from CCs.

Panama made the same argument with respect to Article XVII:1, except that it asked the Appellate Body to reverse the Panel holding that Measures 2–4 were consistent with this Article. The Panel said these Measures did not impose an additional burden on Argentine taxpayers when they contract for services offered by service suppliers from NCCs in comparison with Argentine services and services suppliers. In other words, under the National Treatment rule, the Panel holding that these Measures were lawful under the rule was preliminary, subject to an assessment of whether they accorded "treatment no less favorable" to NCCs vis-à-vis Argentine services and service suppliers. Panama argued the Panel got the test wrong, just as it argued with respect to the MFN rule. But, instead of wanting the Appellate Body to sustain the Panel's preliminary outcome under National Treatment, Panama wanted it to reverse that outcome—because that outcome was unfavorable to Panama. Note the consistency under both rules of the Appellate Body reasoning: because the Panel got the "treatment no less favorable" test wrong, neither of the preliminary conclusions was viable. The Panel's preliminary finding against Argentina that the Eight Measures were inconsistent with the MFN rule fell, meaning Argentina won this MFN issue on appeal. The Panel's preliminary finding for Argentina that Measures 2-4 were not inconsistent with the National Treatment rule also fell, meaning Argentina lost this National Treatment issue on appeal.

3. Defense under GATS Article XIV(c)?[381]

The Panel ruled Measures 1–4 and 7–8 were not defensible under GATS Article XIV(c), satisfying the first but not the second of the Steps in the familiar Two-Step Test (namely, provisional justification under an itemized exception, in this case, Article XIV(c), followed by completion of the *chapeau* requirements with which Article XIV leads off). On Step One, the Panel agreed with Argentina that Argentina designed these six Measures to secure compliance with its laws, and these Measures were "necessary" to do so. That is, tracking the language of Article XIV(c), the Measures were "necessary" for Argentina "to secure compliance" with Argentine tax and financial laws or regulations, such as those aimed at preventing fraudulent and deceptive practices associated with transactions involving NCCs. The Measures were needed specifically "to counter harmful tax practices, such as tax evasion, tax avoidance, fraud, concealment and laundering of money of criminal origin, and terrorist financing."[382] On Step Two,

[381] *See id.* ¶¶ 6.155–.241.

[382] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 5.28. The Panel found, and the Appellate Body agreed, that Argentina designed: (1) Measures 1-4, to secure compliance with the *Gains Tax Law*, *Law on Tax Procedure*, *Criminal Tax Law*, and *Constitution of the Republic of Argentina*; (2) Measure 7, to secure compliance

the Panel disagreed with Argentina that these Measures satisfied the *chapeau* to the Article. That is, the Panel held that Argentina failed to prove it did not apply the Measures in a manner that constituted "arbitrary or unjustifiable discrimination" among countries where "like conditions prevail" (i.e., between NCCs, like Panama, and CCs), nor were the Measures a "disguised restriction on trade in services."

Neither side appealed the Panel decision against Argentina on Step Two. So, as a practical matter, Argentina was not successful in invoking the GATS Article XIV(c) defense on appeal. Of course, that did not matter on the MFN claim, because Argentina did not need that defense on appeal to save Measures 1–4 and 7–8. The Appellate Body found (reversing the Panel) that Measures 1–4 and 7–8 did not violate GATS Article II:1. Only if the Appellate Body had not reversed the Panel, and thereby agreed Argentina violated the MFN rule, would the Article XIV(c) defense have mattered to Argentina.

Panama, however, appealed the Panel decision on Step One. Panama argued Argentina did not design the Measures to secure compliance with Argentine laws or regulations, nor were the Measures necessary to do so. Essentially, Panama sought a complete victory under both Steps of the Two Step Test. The Appellate Body denied it that victory, rejecting Panama's arguments against the Panel's conclusion on Step One.

Like the Panel, the Appellate Body agreed Measures 1–4 and 7–8 were designed to secure compliance with relevant Argentine laws or regulations, concerning, for example, preventing tax evasion and fraudulent transactions. Also like the Panel, the Appellate Body agreed those Measures were "necessary" to secure that compliance and specifically rejected Panama's contention that the Panel erred in (1) assessing the contribution of the Measures to their objectives (recall that the greater the contribution, the more likely a Measure is "necessary"); (2) evaluating the trade-restrictiveness of the Measures (recall that the less trade-restrictive a Measure is, the more likely it will pass muster, and that an import ban is the most trade restrictive of all possibilities); and (3) weighing and balancing relevant factors concerning "necessity" (recall that the stronger the weight of factors in favor of "necessity," the better to preserve the Measure). The matter of Argentina satisfying the *chapeau* requirements was not appealed; hence, the Appellate Body left untouched the Panel conclusion about it.[383]

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with the *Commercial Companies Law* and *Resolution on Companies Incorporated Abroad*; and (3) Measure 8, to secure compliance with the *Law Against Money Laundering*. Likewise, both the Panel and Appellate Body agreed that the Measures were "necessary" to do so in respect of each of these specific laws or regulations. *Id.*

[383] Additionally, the Appellate Body said Panama did not prove that the Panel failed to focus on the relevant aspects of the Measures that gave rise to the findings of inconsistency under the GATS Article II:1 MFN rule. That is, the Appellate Body affirmed that the Panel analyzed the same features of Measures 1-4 and 7-8 under its GATS Article II:1 analysis (the features gave rise to the inconsistency under the MFN rule) as it did under its Article XIV(c) analysis (the features that allow, or not, for a defense under this exception). *See id.* ¶¶ 6.156, 6.164–.179, 6.241.

The extended discussion of Step One is unenlightening, in that it raises no issues of interpretation.[384] Panama did not allege the Panel goofed in its interpretation of GATS Article XIV(c). Rather, Panama simply argued—unsuccessfully—that the Panel misapplied that general exception to horizontal GATS obligations like the MFN rule to the facts of the case. The Panel got both Steps right, as the Appellate Body approvingly noted by way of useful summary:

> 6.161. The Panel began its analysis under Article XIV(c) of the GATS by recalling the Appellate Body's [2005] finding in *US—Gambling* [cited earlier] that previous decisions under Article XX of the GATT 1994 are relevant to the analysis under Article XIV of the GATS. The Panel considered that, similarly to Article XX of the GATT 1994, Article XIV of the GATS provides for an analysis in *two stages: (i) whether the measure at issue is provisionally justified under one of the paragraphs of Article XIV; and (ii) in the event that the measure is provisionally justified under one of these paragraphs, whether the measure satisfies the requirements in the chapeau of Article XIV*.
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> 6.162. The Panel considered the legal standard set forth by the Appellate Body in [its 2001] *Korea—Various Measures on Beef* [Report] in respect of Article XX(d) of the GATT 1994 to be relevant for its analysis of Argentina's defense under Article XIV(c) of the GATS. Accordingly, the Panel explained that, in order *to justify its measures under Article XIV(c), "Argentina should first demonstrate that Measures 1, 2, 3, 4, 7 and 8 are designed to secure compliance with the relevant Argentine laws and regulations that are not in themselves inconsistent with the GATS; and secondly, that these measures are 'necessary' to secure such compliance."*[385]

Likewise, the Appellate Body approved of the Panel's citations to Appellate Body precedents in the *Antigua Gambling* and 2014 *Fur Seal* cases,[386] namely, once a respondent shows that its disputed services measure is designed to secure compliance with a law or regulation that itself is consistent with GATS, then the respondent must prove that measure is "necessary" to secure such compliance, and the "necessity" test involves weighing and balancing a multiplicity of factors:

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[384] *See id.* ¶ 6.157.

[385] *Id.* ¶¶ 6.161–.162 (emphasis added).

[386] Appellate Body Report, *Antigua Gambling*, *supra* note 44. Appellate Body Report, *Fur Seals*, *supra* note 46.

> As the Appellate Body has explained, *a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure*. The Appellate Body has further explained that, in most cases, *a comparison between the challenged measure and possible alternatives should then be undertaken*.
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> As the Appellate Body has stated, "[i]t is on the basis of this 'weighing and balancing' and comparison of measures, taking into account the *interests or values at stake*, that a panel determines whether a measure is 'necessary' or, alternatively, whether another, WTO-consistent measure is '*reasonably available*.'" Such an analysis, the Appellate Body has observed, involves a "*holistic*" weighing and balancing exercise "that involves putting all the variables of the equation together and evaluating them in relation to each other after having examined them individually, in order to reach an overall judgement."[387]

The Appellate Body added a word of caution about how to conduct a "necessity" analysis, namely:

> [A] Panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution. This is because [as per the 2001 *Korea Beef* Appellate Body Report (cited above), at Paragraph 163] "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary.'" The same is true with respect to a measure's trade-restrictiveness—a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade. Without having undertaken such analyses, a Panel would be unable to undertake a proper weighing and balancing of all of the relevant factors.[388]

Finally, note that when invoking the "Administrative Necessity" requirement under GATT Article XX(d) or GATS Article XIV(c), the general Two Step Test for Article XX cases effectively entails Four Steps, as per Table II above. The first Step is a demonstration that the underlying law is GATS-consistent, followed

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[387] *See* Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 6.182 (quoting Appellate Body Report, *Fur Seals*, *supra* note 46, ¶¶ 5.169, 5.214) (emphasis added).

[388] *Id.* ¶ 6.234.

by the remaining three Steps (importance of interest or value, design and contribution, and trade-restrictiveness).

D. Commentary

1. "Likeness" Test in GATT versus GATS

Is the test for "likeness" of goods under GATT the same as that for "services and services suppliers" under GATS? No, not exactly. The Appellate Body provided a tutorial (albeit a disjointed one, as evidenced by the rearrangement of its paragraphs below) of the similarities and (more importantly) differences between "likeness" in the MFN and national treatment rules for goods under GATT Articles I and III versus those rules for GATS under Articles II and XVII of GATS. In the annals of GATT-WTO jurisprudence, few concepts have been discussed more than "likeness." However, given the relative novelty of GATS (effective January 1, 1995) compared with GATT (effective January 1, 1948), most of that discussion has been in the context of trade in goods.

For goods, the Appellate Body explained in its famous 1995 *Japan Alcoholic Beverages* Report that, in accordance with the *Vienna Convention*, the term "likeness" must be interpreted in the context of its use in a trade agreement, and the object and purpose of that agreement. Moreover, for both goods and services, as per the 2001 *Asbestos* precedent, the Appellate Body said:[389]

> [T]he word "like" refers to something sharing a number of identical or similar characteristics or qualities. Furthermore, the Appellate Body has held that the term *"similar" as a synonym of "like"* echoes the language of the French version of these provisions, "*produits similaires*," and the Spanish version, "*productos similares*." These terms imply *some kind of comparison*. While *what is being compared is different in the context of trade in goods and trade in services*, we consider that, *in the context of both trade in goods and trade in services, "likeness" refers to something that is similar*.[390]

So "like" and "similar" are synonymous, whether in respect of goods and GATT or services and GATS. But, the test for "likeness" or "similarity" for goods versus services is different. What, then, are the two tests?

For goods, the test is well known. Thanks to the *Japan Alcoholic Beverages* case, it is well understood that the test is essentially three-pronged. Goods from different WTO Members are compared for MFN purposes, or from one Member vis-à-vis an importing Member for National Treatment purposes,

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[389] *See* Appellate Body Report, *EC—Asbestos*, *supra* note 157.

[390] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 6.21 (emphasis added).

according to their physical characteristics, consumer tastes and preferences, and end uses. Tariff classification in the Harmonized System (HS) may also be a metric of "likeness." The Appellate Body summarized the pertinent GATT "likeness" jurisprudence as follows:

> [H]ow [should] a Panel proceed in determining "likeness" [?] . . . [W]ith regard to Article III:4 of the GATT 1994, the Appellate Body in [the 2001] *EC—Asbestos* [case, at Paragraph 101] referred to the [1970] GATT Working Party Report on *Border Tax Adjustments*, which employed *four general criteria for analyzing "likeness" in the context of trade in goods: (i) the properties, nature, and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits or consumers' perceptions and behavior in respect of the products; and (iv) the tariff classification of the products*. In addition, the Appellate Body noted [at Paragraph 102] that, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. Furthermore, the Appellate Body held that the criteria for analyzing "likeness" are analytical tools to assist in the task of examining the relevant evidence, and that they are "neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of products." The Appellate Body also clarified [at Paragraph 113] that no evidence should be a priori excluded from a Panel's analysis of likeness.[391]

The GATT criteria, taken together, amount to an inquiry into the extent to which goods are in a competitive relationship with one another.

Conditions of competition matter, too, in the GATS MFN and national treatment contexts:

> 6.21. . . . [B]oth Article II:1 and Article XVII:1 [the MFN and National Treatment rules, which] further refer to "treatment no less favorable" of like services and service suppliers, and that Article XVII:3 provides that "treatment shall be considered to be less favorable if it modifies the conditions of competition in favor of services or service suppliers of [one] Member compared to like services or service suppliers of any other Member." This demonstrates that *Article XVII is concerned with competitive opportunities for like services and service suppliers of another Member*.

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[391] *Id.* ¶ 6.30 (emphasis added). Report, *Border Tax Adjustments* (Dec. 2, 1970), GATT BISD (18th Supp.), at 97 (1972), discussed in BHALA, *supra* note 40, Vol. 1, Ch. 17.

> . . . .
>
> 6.24. While Article II:1 [of GATS] refers to "treatment no less favorable," . . . Article II:3 refers to "advantages." An "advantage" is "[t]he fact or state of being in a better position with respect to another" [as per the *OED*]. Being in a better position as compared to another is closely related to the concept of competition. This suggests that, also in the context of Article II of the GATS, the determination of "likeness" of services and service suppliers must focus on the *competitive relationship of the services and service suppliers* at issue. We note that, similarly, with regard to Articles I:1 and III:4 of the GATT 1994, the Appellate Body has held [in the 2014 *Fur Seals* case, at Paragraph 5:82] that, notwithstanding their textual differences, both of these provisions are concerned with "prohibiting discriminatory measures" and ensuring "equality of competitive opportunities" between products that are in a *competitive relationship*.
>
> . . . .
>
> 6.25. . . . [T]he *concept of "likeness" of services and service suppliers under Articles II:1 and XVII:1 of the GATS is concerned with the competitive relationship of services and service suppliers*. This is *consonant with the Appellate Body's understanding of "likeness" in the ambit of trade in goods*. In *EC—Asbestos* [at Paragraph 99] the Appellate Body held that the word "like" in Article III:4 of the GATT 1994 is to be interpreted as applying to products that are in a *competitive relationship*, and that therefore a *determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products*. As the Appellate Body noted [at Paragraph 117], "[i]f there is—or could be—*no* competitive relationship between products, a Member cannot intervene, through internal taxation or regulation, to protect domestic production."[392]

However, in neither the GATT nor GATS environments is the outcome of a competitive relationship necessarily binary: yes/no. Some goods may compete to some degree with others:

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[392] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶¶ 6.25 (emphasis added).

> 6.26. . . . *[I]n the context of trade in goods*, the Appellate Body noted [at Paragraph 99 of the *Asbestos* case] that there is a *spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace*. The assessment of such a competitive relationship requires a *market-based analysis*. The Appellate Body also stated that not all products that are in some competitive relationship are "like products," and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" falls. . . . *[T]he same is true with respect to "like services and service suppliers,"* and, thus, the *likeness of services and service suppliers can only be determined on a case-by-case basis*, taking into account the specific circumstances of the particular case.[393]

In essence, the metric for "likeness" for both goods and services is about the competitive relationship of services and service suppliers, and the analysis necessarily is case-by-case.

In the case by case analysis, there is a key technical difference as to what is being compared. For goods, it is simply one good against another. Nothing in GATT refers to "goods and goods suppliers." In contrast, GATS refers to "services and services suppliers:"

> *[W]hat is being compared for "likeness" is different in the context of trade in goods and trade in services*. Articles II:1 and XVII:1 of the GATS refer to "like services and service suppliers." In contrast, Articles I:1, III:2, and III:4 of the GATT 1994, for instance, refer to "like products," *but they do not include a reference to "like producers."* The term "service supplier" is defined in Article XXVIII(g) of the GATS as "any person that supplies a service." With respect to the "supply of a service," Article XXVIII(b) stipulates that it "includes the production, distribution, marketing, sale and delivery of a service." Accordingly, this term covers a broad array of service-related activities. The word "service" is not defined in the GATS itself.[394]

Do the references in the GATS MFN and National Treatment rule to "services and service suppliers" mean the analysis involves a comparison of services against one another, plus a comparison of services suppliers against one another?

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393 *Id.* ¶¶ 6.25–.26 (emphasis on "no" original, other emphasis added).

394 *Id.* ¶ 6.27 (emphasis added).

> [T]he reference to "services and service suppliers" indicates that considerations relating to both the service and the service supplier are relevant for determining "likeness" under Articles II:1 and XVII:1 of the GATS. The assessment of likeness of services should not be undertaken in isolation from considerations relating to the service suppliers, and, conversely, the assessment of likeness of service suppliers should not be undertaken in isolation from considerations relating to the likeness of the services they provide. . . . [t]he phrase "like services *and* service suppliers" as an *integrated element* for the likeness analysis under Articles II:1 and XVII:1, respectively. Accordingly, separate findings with respect to the "likeness" of services, on the one hand, and the "likeness" of service suppliers, on the other hand, are *not required*. Because the "likeness" analysis serves to assess the competitive relationship of the "services *and* service suppliers" at issue, the particular features of that competitive relationship, in the circumstances of any specific case, will determine the relative weight to be accorded in the analysis of "likeness" to considerations relating to the service and the service supplier, respectively. In any event, in a *holistic analysis of "likeness,"* considerations relating to both the service and the service supplier will be relevant, albeit to varying degrees, depending on the circumstances of each case.[395]

In short, the answer is "no," separate examinations of "services" and "services suppliers" are not required. The GATS likeness determination is an integrated one in which the competitive relationship between one service and its supplier is compared to another service and its supplier. The service and the supplier form a package that could be taken apart if need be but, thanks to the use in GATS of the conjunctive "and," presumptively should be considered as a whole.

The second-to-last part of the Appellate Body tutorial addressed the question that was central to resolving the *Argentina Financial Services* case, namely, what is the test for "likeness" of "services and service suppliers" under the GATS Article II:1 MFN and Article XVII:1 National Treatment rules?

> 6.31. . . . [H]ow [should] a Panel . . . proceed in assessing the "likeness" of services and service suppliers in the particular context of Article II:1 and Article XVII:1 of GATS [?] . . . [T]he Appellate Body [in *Japan Alcoholic Beverages*, at pages 18-19, and 21] has clarified that the term "like" must be interpreted in the light of its context and the object and purpose of the

[395] *Id.* ¶ 6.29 (emphasis on "and" original (on both occasions), other emphasis added).

agreement in which the relevant provision appears . . . . *[T]he analysis of "likeness" serves the same purpose in the context of both trade in goods and trade in services, namely, to determine whether the products or services and service suppliers, respectively, are in a competitive relationship with each other. Thus, to the extent that the criteria for assessing "likeness" traditionally employed as analytical tools in the context of trade in goods are relevant for assessing the competitive relationship of services and service suppliers, these criteria may be employed also in assessing "likeness" in the context of trade in services, provided that they are adapted as appropriate to account for the specific characteristics of trade in services.* In particular, . . . Articles II:1 and XVII:1 of the GATS refer to likeness of "services *and* service suppliers," and, accordingly, *these criteria may be applied both in regard to the service and in regard to the service supplier in a holistic analysis*. . . .

6.32. For example, the *characteristics of services and service suppliers or consumers' preferences in respect of services and service suppliers may be relevant for determining "likeness" under the GATS*. . . . [I]n this vein, the Panel in [the 1997] *EC—Bananas III* [case, at Paragraph 7:322] considered the "nature and the characteristics" of the service transactions at issue, which may be seen as an *adaptation of the original criterion in* [the 1970 GATT Panel Report in] *Border Tax Adjustments* [cited earlier]*—namely, properties, nature and quality*. Furthermore, with respect to the *criterion of tariff classification, the classification and description of services under, for instance, the U[nited] N[ations] Central Product Classification (CPC) could be relevant*. The Panel in [the 2012] *China—Electronic Payment Services* [case at Paragraph 7:706] undertook another such adaptation in considering evidence that the service suppliers at issue "describe[d] their business scope in very similar terms," and that this suggested that "these suppliers compete[d] with each other in the same business sector." This may be seen as adaptations of the criteria of "properties, nature and quality," "end-use," and/or "consumer preferences." As in the context of trade in goods, however, . . . the criteria for analyzing "likeness" of services and service suppliers are simply

> analytical tools to assist in the task of examining the relevant evidence, and that they are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of services and service suppliers as "like."
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> 6.33. . . . *[D]ifferent modes of supply* as defined in Article I:2 exist only in trade in services under the GATS, and not in trade in goods under the GATT 1994, and, accordingly, the analysis of "likeness" of services and service suppliers may require additional considerations of whether or how this analysis is affected by the mode(s) of service supply. . . .
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> 6.34. While the criteria for analyzing "likeness" must be adapted to the particular context of Articles II:1 and XVII:1 of the GATS . . . this does not change *the fundamental purpose of the comparison to be undertaken in order to determine "likeness" in the context of trade in services, namely, to assess whether and to what extent the services and service suppliers at issue are in a competitive relationship*. The existence of a competitive relationship is a precondition for the subsequent analysis under the requirement of "treatment no less favorable" of whether the conditions of competition have been modified.[396]

To be sure, the Appellate Body did not address the matter of what kind of criteria may be relevant, and when, nor the weight one criterion should be given versus another. The *Argentine Financial Services* case did not raise those matters, so the Appellate Body wisely eschewed discussing them.

This penultimate part of the tutorial sums to a simple point: the test for "likeness" under GATT is similar to the test for "likeness" under GATS, but as with goods and services and service suppliers, "likeness" does not necessarily mean identicalness. The GATS "likeness" test allows for any pertinent characteristics of services and their suppliers that are pertinent to showing whether those services and their suppliers are or are not in a competitive relationship, as well as the extent of that relationship. As with goods and GATT, there is no *a priori* bright line criterion to use. Rather a case-by-case analysis is needed, but in that analysis the *Border Tax Adjustments* case criteria from nearly 50 years ago may be a useful basis for analogical reasoning.

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[396] *Id.* ¶¶ 6.31–.34 (emphasis added). *The EC—Bananas III* case is Appellate Body Report, *European Communities—Regime for the Importation, Sale, and Distribution of Bananas*, WTO Doc. WT/DS27/AB/R (Dept. 9, 1997) (*adopted* Sept. 25, 1997), discussed in BHALA, *supra* note 39, Vol. 1, Ch. 25. The Panel Report in *China—Electronic Payments Services* is Panel Report, *China—Certain Measures Affecting Electronic Payments Services*, WTO Doc. WT/DS413/R (July 15, 2012) (*adopted* Aug. 31, 2012) (not appealed).

2. Presumption of "Likeness" from Distinction based Exclusively on Origin in GATT versus GATS

The final step in the tutorial concerned presumptions. Can likeness be presumed if the controversial measure at issue is based on origin? As the Appellate Body put it:

> [W]ith respect to the interpretation of "likeness" in Articles II:1 and XVII:1 of the GATS, namely, whether, in order to establish "likeness," a complainant must always have recourse to the relevant criteria for establishing "likeness" . . . or whether a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin (. . . the "[P]resumption [A]pproach").[397]

That is, suppose a measure separates goods, or services and service suppliers, exclusively based on the origin of those goods or services and services suppliers. The measure applies this country-of-origin division, and nothing else, to treat goods, or services and services suppliers, differently. (Typically, such measures are *de jure* in nature.) It is alleged the measure violates the MFN or National Treatment Rule, or both, in GATT or GATS, or both. Does the legal fact that the sole basis of segregation is origin support the inference that all affected goods are the same except for origin, and thus "like"? Does that fact support the inference that all affected services and service suppliers are the same, and thus "like"?

The Appellate Body said various Panels had allowed the Presumption Approach under GATT, and cited to them approvingly:

(1) Two Panels under Article I:1 (MFN)—the 2009 *Colombia—Ports of Entry*, and 2010 *United—States Poultry (China)*,[398]
(2) Two Panels under Article III:2 (National Treatment for fiscal measures)—2001 *Argentina—Hides and Leather*, and 2010 *China—Audiovisual Products*,[399]

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[397] Appellate Body Report, *Argentina Financial Services*, *supra* note 369, ¶ 6.35.

[398] *See* Panel Report, *Colombia—Indicative Prices and Restrictions on Ports of Entry*, WTO Doc. WT/DS366/R (Apr. 27, 2009) (*adopted* May 20, 2009) (not appealed); Panel Report, *United States—Certain Measures Affecting Imports of Poultry form China*, WTO Doc. WT/DS392/R (Sept. 29, 2010) (*adopted* Oct. 25, 2010) (not appealed).

[399] *See* Panel Report, *Argentina—Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WTO Doc. WT/DS155/R (Dec. 19, 2000) (*adopted* Feb. 16, 2001) (not appealed);Appellate Body Report, *China Audiovisual Products*, *supra* note 156.

(3) Seven Panels under Article III:4 (National Treatment for non-fiscal measures)—2015 *Argentina—Import Measures*, 2000 *Canada—Auto Pact*, 2004 *Canada—Wheat Board*, 2010 *China—Audiovisual Products*, 2002 *India—Autos*, 2011 *Thailand—Cigarettes*, and 2007 *Turkey—Rice*.[400]

If the Appellate Body did not like the Presumption Approach, it had 11 prior opportunities (or 10, if the *China Audiovisual Products* case is not double-counted) to overturn the use of this Approach by the Panels. Manifestly, it did not, nor did it look askance at this Approach in the *Argentine Financial Services* case. Rather, the Appellate Body agreed that "when a measure makes a distinction between products based *exclusively on the origin of the product*, the likeness of such products can be presumed."[401]

So "rather than invariably establishing 'likeness' on the basis of the relevant criteria, a complainant may establish 'likeness' by demonstrating that the measure at issue makes a distinction based exclusively on the origin of the product." This affirmative acceptance of the Presumption Approach for goods under GATT means there is no need to perform a "likeness" analysis. The goods are presumed to be "like," because the only difference the controversial measure makes among them is where they come from. If that is the only difference, then why bother applying *Border Tax Adjustment* type criteria? To borrow from American Constitutional Law, and specifically jurisprudence under the 14th Amendment Equal Protection clause, a government-created categorization that separates persons based on race or national origin is presumptively unconstitutional. So it should be. Why bother with lengthy litigation, and who

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[400] *See* the following with respect to the above-mentioned cases: (1) 2015 *Argentina Import Measures* (Appellate Body Reports, *Argentina—Measures Affecting the Importation of Goods*, WTO Doc. WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R (Jan. 15, 2015) (*adopted* Jan. 26, 2015), analyzed in the *WTO Case Review 2015*, *supra* note 1); (2) 2000 *Canada Auto Pact* (Appellate Body Reports, *Canada—Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/AB/R, WT/DS142/AB/R (May 31, 2000) (*adopted* June 19, 2000), analyzed in the *WTO Case Review 2000*, *supra* note 1); (3) 2004 *Canada Wheat Board* (Appellate Body Report, *Canada—Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WTO Doc. WT/DS276/AB/R (Aug. 30, 2004) (*adopted* Sept. 27, 2004), analyzed in the *WTO Case Review 2004*, *supra* note 1); (4) 2010 *China Audiovisual Products* (Appellate Body Report, *China Audiovisual Products*, *supra* note 157); (5) 2002 *India Autos* (Panel Report, *India—Measures Affecting the Automotive Sector*, WTO Doc. WT/DS146/R, WT/DS175/R (Dec. 21, 2001) (*adopted* Apr. 5 2002) (not appealed)); (6) 2011 *Thailand Cigarettes* (Appellate Body Report, *Thailand—Customs and Fiscal Measures on Cigarettes from the Philippines*, WTO Doc. WT/DS371/AB/R (June 17, 2011) (*adopted* July 15, 2011), analyzed in the *WTO Case Review 2011*, *supra* note 1); and (7) 2007 *Turkey Rice* (Panel Report, *Turkey—Measures Affecting the Importation of Rice*, WTO Doc. WT/DS334/R (Sept. 21, 2007) (*adopted* Oct. 22 2007) (not appealed)).

[401] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 6.36 (emphasis added).

cares about whatever rational basis the government might claim it has for the categorization?

Does the Presumption Approach also apply for services and service suppliers under GATS? This question was unprecedented, yet an affirmative answer was a short extension of the GATT-based precedents:

> [W]here a measure provides for a distinction based exclusively on origin, there will or can be services and service suppliers that are the same in all respects except for origin and, accordingly, "likeness" can be presumed and the complainant is not required to establish "likeness" on the basis of the relevant criteria…. Accordingly, . . . under Articles II:1 and XVII:1 of the GATS, a complainant is not required in all cases to establish "likeness" of services and service suppliers on the basis of the relevant criteria for establishing "likeness." Rather, in principle, a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin.[402]

The Appellate Body did tack on a caveat, namely, that the scope of the Presumption Approach is more limited under GATS than GATT. Depending on the facts of a case, an origin-based distinction in a controversial measure might have to be examined with respect to both "services" and "service suppliers." That additional layer of complexity beyond a case involving goods arises because of the four Modes of service supply. The way in which suppliers provide a service may affect the reasonableness of the Presumption Approach. Still, overall, services and service suppliers may be presumed to be "like" if the only difference a controversial measure makes among them is where they come from. Here again, services and service suppliers are like, but not identical to, goods.

3. No Second Step in GATS "Treatment No Less Favorable" Test

Along with the "likeness" test, the Appellate Body's examination of the test for "less favorable" treatment under the GATT Non-Discrimination rules is of potentially enduring interest. Why did the Appellate Body strike down the Panel's idea that whether regulatory aspects, such as accessibility to tax information, affecting services and services providers modify the conditions of competition must be considered?

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[402] *Id.* ¶ 6.36 (emphasis added).

> Under Article II:1 and Article XVII of the GATS, a measure fails to confer "treatment no less favorable" if it *modifies the conditions of competition to the detriment of* services or service suppliers of any other Member in comparison to like services or service suppliers of, respectively, any other country or the Member imposing the contested measure. However, the Panel employed an erroneous legal standard of "treatment no less favorable" whereby, depending on the analysis of the "regulatory aspects," a measure that modifies the conditions of competition to the detriment of services or service suppliers of any other Member could nonetheless be found to confer "treatment no less favorable." In other words, *under the Panel's standard, the "regulatory aspects" identified by the importing Member could convert "less favorable treatment" into "treatment no less favorable."* The Panel's interpretive errors are manifested in both its articulation of the legal standard and its application of Articles II:1 and XVII to the facts of the case.[403]

Note, then, the core of the Appellate Body's rationale was conversion. But to see that core, it is necessary to unpack the turgid prose, and re-sequence the disjointed presentation, of the Appellate Body. The rationale was entirely correct in substance, but so poorly written in style that the significance of that substance is easily lost.

The Appellate Body reaffirmed the test for whether a measure accords "less favorable" treatment to some versus other services and service suppliers is whether that measures modifies the conditions of competition among the services and services suppliers. There is a logical symmetry between this test and the definition of "likeness," which focuses on competitive relationships. If services and service suppliers are "like" because they are in a competitive relationship, then the next question must be whether a disputed measure tilts the competitive playing field in favor of some foreign services and services suppliers over others (for MFN purposes) or of domestic over foreign services and service suppliers (for National Treatment purposes).

What the Panel did was inject an additional mandate into the "treatment no less favorable" language, namely, that the regulatory regime governing the services and services suppliers must be studied:

> In the light of the Panel's analysis of the "regulatory aspects" under Article II:1, . . . we find that the Panel erred in finding . . . that an assessment of "treatment no less favorable" under Article II:1 of the GATS in this dispute "has to take into account regulatory aspects relating to services and service suppliers that

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[403] *Id.* ¶ 6.151 (emphasis added).

> may affect the conditions of competition; in particular, whether Argentina is able to have access to tax information on foreign suppliers." Similarly, in the light of the Panel's analysis of the "regulatory aspects" under Article XVII, . . . we find that the Panel erred in finding . . . that an assessment of "treatment no less favorable" under Article XVII of the GATS in this dispute "has to take into account regulatory aspects concerning the services and service suppliers that might affect the conditions of competition . . . in particular . . . the possibility for Argentina to access tax information on the relevant service suppliers."[404]

The Appellate Body feared this injection could cause a measure that modifies competitive conditions, and thus should be judged to provide less favorable treatment, to confer "no less favorable" treatment:

> 6.131. . . . [U]nder both Article II:1 and Article XVII, the Panel went on to conduct an additional step of analysis regarding the "regulatory aspects" in this dispute, that is, "the possibility for Argentina to have access to tax information on foreign suppliers providing services in Argentina." . . . [I]n this *additional step of analysis*, the Panel did not actually examine the regulatory aspects for purposes of assessing how the measures modify the conditions of competition, but effectively employed an *erroneous legal standard under which the regulatory aspects could justify the detrimental impact* that it had already found in its preliminary conclusions described above.[405]

The Panel fixated on what it called a "lack of consistency" in the way Argentina treated countries that did, versus did not, provide access to tax information. Argentina gave CC status to countries that had initiated, but not yet finalized, a tax information exchange agreement—even though Argentina had not yet obtained information from that country. In that sense, this CC was no different from an NCC—neither was giving Argentina tax information. The Panel said this inconsistency, which led to different treatment of CCs versus NCCs under the disputed Measures, was a "distortion" in the "design and operation" of the Measures.

To be sure, the Appellate Body recognized that the Panel employed the language of modification of conditions of competition, saying this distortion modified those conditions. But the Appellate Body intimated that it did not trust what the Panel said; rather, it saw the Panel as trying to introduce a second step in

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404 *Id.* ¶ 6.152 (emphasis original).

405 *Id.* ¶ 6.131 (emphasis added).

the "treatment no less favorable" language, akin to the second step associated with that same language in Article 2:1 of the *WTO Agreement on Technical Barriers to Trade*. In the *TBT Agreement*, a technical regulation that modifies the conditions of competition (and thereby accords less favorable treatment) must be checked to see if any detrimental impact stems exclusively from a legitimate regulatory distinction. That second step is allowable under the *TBT Agreement* MFN rule, but not under the GATS MFN rule:

> 6.136. . . . [A]lthough the Panel used the words "modify the conditions of competition" in . . . [its] conclusion . . . the Panel's consideration of the relevant regulatory aspects does not actually speak to the question of whether the measures at issue modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries. Indeed, . . . the Panel had already concluded that the measures at issue modify the conditions of competition in such a manner. In the Panel's analysis of the "regulatory aspects," we do not find any assessment of the implications of these measures for the competitive opportunities of the services and service suppliers of non-cooperative countries vis-à-vis those of cooperative countries. Rather, in analyzing the relevant "regulatory aspects," the Panel appears to have been looking at something akin to the second step of the analysis regarding "treatment no less favorable" under Article 2:1 of the *TBT Agreement*, as developed in the relevant jurisprudence. Although the Panel did not use such words to describe its analysis, statements made by the Panel indicate that the Panel was effectively looking at whether the detrimental impact on like services and service suppliers, which it had already established, "stems exclusively from a legitimate regulatory distinction" [citing the 2012 *Clove Cigarettes* Appellate Body Report at Paragraph 182], even though such an analytical step is not foreseen under the GATS non-discrimination clauses.
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> 6.137. Specifically, the Panel stated that, pursuant to Decree No. 589/2013, "the way in which Argentina classifies countries as cooperative or non-cooperative is not consistent with the possibility for Argentina to have access to tax information, even though the possibility to have access to tax information is the "*raison d'être*" of all of the measures at issue. Similarly, the Panel found that the "difference in treatment" under the

> measures at issue is not, as Argentina argued, based on whether Argentina has access to tax information. Thus, the Panel was effectively reviewing whether the regulatory aspects in this dispute could somehow justify the detrimental impact that the Panel had already found, and could render the measure not inconsistent with Article II:1 of the GATS. Although the Panel ultimately concluded that the regulatory aspects in this dispute do not render the measures at issue consistent with Article II:1, this conclusion does not change the fact that the Panel erroneously conducted an additional step of inquiry not envisaged under the correct legal standard of "treatment no less favorable" under the GATS.[406]

The Appellate Body applied the same reasoning to the Panel's use of a "regulatory aspect"—namely, the exchange of tax information between Argentina and NCCs as a regulation that modifies the conditions of competition in the Argentine market—as an evaluative criterion under the GATS National Treatment rule.

The Appellate Body applied the Article 31-32 *Vienna Convention* methodology in concluding that this additional criterion has no textual, contextual, or object-purpose basis in GATS:

> 6.138. In examining the "regulatory aspects" under Article XVII of the GATS, the Panel noted Argentina's statement that Measures 2, 3, and 4 are essential tools for equalizing the conditions of competition on the international market for financial and other services. In several documents of the G-20, the Global Forum, and the OECD, the Panel found support for Argentina's statement concerning the importance of access to tax information for equalizing the conditions of competition. According to the Panel, the reference in these documents to "harmful tax competition" highlights the "obvious link" between access to tax information (tax transparency) and the conditions of competition. On this basis, the Panel considered:
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> > [A] central issue in this dispute is whether the exchange of tax information between Argentina and non-cooperative jurisdictions

[406] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶¶ 6.136–.37. The *Clove Cigarettes* case is Appellate Body Report, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WTO Doc. WT/DS406/AB/R (Apr. 4, 2012) (*adopted* Apr. 24, 2012), analyzed in the *WTO Case Review 2012*, *supra* note 1.

> constitutes a regulatory aspect that modifies the conditions of competition on the Argentine market in such a way that it converts different and, in principle, less favorable treatment into "treatment no less favorable."
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> 6.139. In our view, *under Article XVII of the GATS, a measure either modifies the conditions of competition in the marketplace, thus according less favorable treatment, or it does not*. However, with this statement, *the Panel effectively employed a standard whereby certain regulatory aspects, as alleged by a Member in a particular dispute, could "convert" a measure that accords less favorable treatment, and is therefore inconsistent with Article XVII of the GATS, into a measure that is GATS-consistent*. . . .
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> . . . .
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> 6.147. In sum, our review of the Panel's application of Article XVII of the GATS to the measures at issue confirms that the Panel employed an erroneous legal standard with regard to "treatment no less favorable." In its analysis regarding the "regulatory aspects," the Panel essentially relied on what it perceived to be the regulatory objective of Measures 2, 3, and 4 to convert "less favorable treatment" under these measures into "treatment no less favorable." The Panel's approach finds *no basis in the text or Article XVII, its context, or the object and purpose of the GATS*.[407]

Note that in reaching this conclusion, the Appellate Body took pains to stress that ensuring equal competitive conditions is not the same as guaranteeing one group of services and service suppliers is equally competitive with another.

4. No Conversion from Unfavorable to Favorable Treatment Allowed

The difference between the two kinds of equality is what leads to the "bottom line" rationale against conversion. National treatment demands equality of competitive opportunities, but not equality of competitive results. The Appellate Body thought the Panel's references to a level competitive playing field confused the two concepts:

[407] Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 6.147 (emphasis added).

> 6.143. In its findings under Article XVII of the GATS, the Panel thus referred to the concepts of "a level playing field," "unintended competitive advantages," and competitive relationship "on an equal footing" in describing what it considered to be the objective of the measures at issue. . . . [T]he Panel considered that a measure that "neutralizes" an "unintended competitive advantage" is not inconsistent with Article XVII, because it ensures equality of competitive conditions.
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> 6.144. However, ensuring equal competitive conditions, which is required by the legal standard of "treatment no less favorable," is not the same as guaranteeing that one group of services or products does not have any competitive advantage over another group. As Panama rightly points out, ensuring equal conditions of competition under the national treatment obligation means "to guarantee equality of opportunities to compete in the marketplace," rather than to guarantee that all like services and service suppliers are "equally competitive."
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> 6.145. Moreover, by specifying that a measure accords less favorable treatment when it "modifies the conditions of competition," Article XVII . . . indicates that the national treatment obligation requires a Member to refrain from upsetting or distorting the existing market conditions and opportunities in favor of domestic services and service suppliers. Read in this light, the Panel's references to the notion of "a level playing field" seem misguided, as this would suggest that Article XVII allows a Member to pursue actively measures that redress certain perceived "unfair" competition in the market. Indeed, the legal standard developed by the Panel would seem to allow a discriminatory measure to "neutralize" a "regulatory" competitive advantage, namely, one that results from the regulatory framework in the country of origin of certain foreign service suppliers. Yet, we do not see Article XVII as providing the basis for permitting such discriminatory measures.[408]

The confusion between equality of competitive opportunities (which national treatment demands) and equality of competitive positions and possibly results (which national treatment does not demand) is the difference between Capitalism

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[408] *Id.* ¶¶ 6.143–.145 (emphasis added).

and Socialism—and the WTO is all about the former, not the latter. Put differently, it is the difference between giving every runner (from all foreign countries and the home country) the chance to begin a race at the front, right on the start line, and placing every runner on an equal footing, at the start line. The Panel caused the confusion by injecting an additional criterion for evaluating "treatment no less favorable" that would allow a discriminatory measure to pass muster under the national treatment rule of GATS Article XVII, if the objective of that Measure was to neutralize competitive advantages.

As the Appellate Body further pointed out, the confusion between a guarantee of equality of competitive opportunities and a guarantee of being equally competitive could lead, as it did in this case, to an inconsistent result, which in turn could lead to the risk of conversion of an unlawful to a lawful measure:

> [T]the Panel identified the objective of Measures 2, 3, and 4 while introducing certain concepts that are not defined in the WTO-context, including "a level playing field," and "unintended competitive advantages." The Panel did not develop definitions of these concepts. The Panel went on to examine each of the three Measures in turn, and found that none of these measures modifies the conditions of competition "in favor of" Argentine service suppliers, because the measures are designed to respond to risks perceived by Argentina to its tax collection system resulting from the lack of tax transparency in other countries. . . . [T]he less favorable treatment accorded to foreign services and service suppliers, on the one hand, and the more favorable treatment to domestic services and service suppliers, on the other hand, are flip-sides of the same coin under the legal standard of Article XVII. *As a result of its erroneous legal standard, however, the Panel reached findings that are irreconcilable. Specifically, the Panel found that the measures accord "less favorable treatment" to services and service suppliers of non-cooperative countries. At the same time, the Panel found that such measures do not accord "less favorable treatment" because they do not modify the conditions of competition "in favor of" domestic like services and service suppliers.*[409]

This inconsistency allowed the Panel to convert treatment into non-discriminatory treatment: the discrimination of Measures 2–4 was permissible, because it modified the conditions of competition in a way to level the competitive playing field between services and services suppliers from NCCs vis-à-vis those from Argentina. The lack of access to tax information from NCCs gave those services

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[409] *Id.* ¶ 6.141 (emphasis added).

and their service suppliers an advantage among Argentine consumers, who wanted tax secrecy (i.e., who wanted to hide their financial transactions from Argentine authorities). This consumer preference, to use the language of the *Border Tax Adjustments* case, put Argentine services and services suppliers at an unfair disadvantage. Measures 2-4 corrected the unfairness, ensuring they were equally competitive with their counterparts from NCCs. However, again, National Treatment does not demand equally competitive positions, but rather equally competitive opportunities. After all, the idea is Capitalist, not Socialist.

To sum up, the Appellate Body had no choice but to overturn the Panel's test for MFN and national treatment under GATS Article II:1 and XVII:1, respectively. The Panel's test allowed one particular regulation (e.g., accessibility to tax information) to offset otherwise unfavorable treatment. If the Panel test became law, then Panels would be in the business of weighing and balancing the competitive effects of one regulation against another. This business would undermine the power of the non-discrimination rules. That power lies in the black letter rule that any less favorable treatment is illegal, and no amount of favorable treatment can offset unfavorable treatment. Violating the MFN or national treatment rule is a strict liability offense (to analogize to Torts), a grave sin (to analogize to Theology). The violation is not mitigated by good behavior or virtuous acts. The violation needs to be identified objectively, and penance must be done.

5. Novel Question under GATS Annex on Financial Services[410]

The Panel held Measures 5–6 violate the GATS Article II:1 MFN rule and rejected Argentina's defense of them under Paragraph 2(a) of the *GATS Annex on Financial Services*. The Panel said that for a measure to fall within the Paragraph 2(a) justification, it must "affect[] the supply of financial services" under Paragraph 1(a) of the same *Annex*. The Panel held Paragraph 2(a) covers any type of measure that affects the supply of financial services, as defined by Paragraph 1(a), and Measures 5–6 fit within this coverage. That is, the Panel agreed with Argentina that Measures 5–6 were within the scope of Paragraph 2(a).

However, the Panel said Argentina did not undertake Measures 5–6 "for prudential reasons" within the meaning of that Paragraph. That was because of a lack of "rational relationship" between the Measures and "prudential reasons:"

> the Panel focused on the word "for" and found that a Member invoking Paragraph 2(a) must demonstrate that there is "a rational relationship of cause and effect" between the measure that the Member seeks to justify under Paragraph 2(a) and the prudential reason provided for taking it. The Panel found that Measures 5 and *6 do not have such a rational relationship with*

410 *See id.* ¶¶ 6.242–.272.

> *the prudential reasons* identified by Argentina and, accordingly, that *these measures were not taken "for" prudential reasons within the meaning of Paragraph 2(a)*.[411]

The Panel appears to have invented this "rational relationship" test out of whole cloth—or from a hyper-technical emphasis on the word "for."

The Panel's opinion here was heresy to central bankers and financial market supervisors; put less delicately, it was ridiculous. Argentina certainly undertook all Eight Measures for "prudential reasons." These reasons were "the protection of financial consumers and investors from the distortions, manipulations, and abusive situations arising out of a lack of an effective exchange of information, as well as the preservation of the integrity and smooth functioning of the Argentine financial system and capital market."[412] Panama did not like those Measures—they cut into Panama's comparative advantage in services. But that comparative advantage was built on Panama's status as a tax haven and banking secrecy jurisdiction, and if the Panel's opinion had prevailed, then the blow to champions of global financial ethics would have been severe.

In one sense, the *Annex* Paragraph 2(a) discussion was irrelevant, because the Appellate Body over-turned the Panel's holding that Measures 5–6 breached GATS Article II:1. Once the Appellate Body did so (i.e., once it found these Measures did not violate the MFN rule) then Argentina did not need recourse to Paragraph 2(a)—no violation, so no defense needed. Consequently, the Appellate Body discussion of the Paragraph did not focus on whether Argentina undertook Measures 5–6 "for" prudential reasons, and issued no ruling on the Panel's proposed rational relationship test. But the Appellate Body could not leave untouched the Panamanian contention about the scope of the Paragraph. Panama stressed that the title of Paragraph 2(a), namely, "Domestic Regulation," strictly circumscribed the scope of this Paragraph. Panama urged that other services measures, such as those relating to market access would not be within its purview. The Panel disagreed with Panama, and so did the Appellate Body.

The question of the scope of the defense this provision affords was a new one. This issue was one of first impression; indeed the case was the first one in which a WTO Member invoked Paragraph 2(a)—the so-called "Prudential Exception" or "Prudential Carve Out." Was Panama right in thinking the Exception applies only to domestic regulations under GATS Article VI, on the ground the title of the Paragraph delimits its scope, not measures of general application affecting services trade? Or was the Panel correct that Paragraph 2(a) is an across-the-board defense for any measure a Member might take for prudential reasons, such as protecting investors, depositors, and policy holders, or promoting the integrity and stability of that Member's financial system?

The Appellate Body sided with the Panel. Panama's argument, if accepted, would scupper the Prudential Carve Out by circumscribing its scope so narrowly that WTO Members would have little room to maneuver to take measures to protect their financial system. Plenty of measures, other than those

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411 *Id.* ¶ 6.245.

412 Appellate Body Report, *Argentina Financial Services*, *supra* note 370, ¶ 5.28.

strictly concerning domestic regulations, may serve a prudential purpose, such as measures under Article XVI:2(e), which concern requirements about the type of legal entity or joint venture through which a supplier may supply services, such as agency, branch, or subsidiary requirements for banks. Further, applying *Vienna Convention* principles, the Panamanian argument was flawed. The title of a provision is not dispositive as to the scope of that provision.

Instead, the text, context, and object and purpose of the provision matter. So, upholding the Panel, the Appellate Body concluded:

> 6.268. The Panel considered that, if it were to interpret Paragraph 2(a) as referring solely to measures that constitute a domestic regulation under Article VI of the GATS, as Panama had argued, it could render certain parts of Paragraph 2(a) inutile. Specifically, the explicit reference to "[n]otwithstanding any other provisions of the Agreement" in the introductory clause of Paragraph 2(a) would be reduced merely to "[n]otwithstanding Article VI of the Agreement." In the same vein, the Panel expressed the concern that Panama's interpretation "would drastically reduce the scope of the prudential exception, since it would provide an escape valve only for those 'domestic regulations' which do not conform with Article VI of the GATS and not for those measures which may be covered by other provisions of the GATS (such as those relating to market access, national treatment or MFN treatment)."
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> . . . .
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> 6.272. [A]n interpretation of Paragraph 2(a) of the *Annex on Financial Services* on the basis of its text, read in the light of its context and the object and purpose of the GATS, supports the view that Paragraph 2(a) does *not* impose specific restrictions on the types of "measures affecting the supply of financial services" that fall within its scope, *provided that* such measures fulfil all of the requirements of Paragraph 2(a). . . . [W]e find that the Panel did not err in finding . . . that "Paragraph 2(a) of the *Annex on Financial Services* covers all types of measures affecting the supply of financial services within the meaning of Paragraph 1(a)" of the *Annex*.[413]

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[413] *Id.* ¶ 6.272.

First, it is important—and indeed consistent with precedent, such as the 2002 *Carbon Steel* Appellate Body Report—to look at the text of the provision.[414] Here, Paragraph 2(a) refers to other provisions of GATS (in part thanks to the introductory clause of the Paragraph, "[n]otwithstanding any other provisions" of GATS, and the reference in the second sentence of the Paragraph to "the provisions of the Agreement)." Second, the context matters. Here, the Paragraph 2(a) title "Domestic Regulation" should be examined in light of Article VI, which bears the same title, "Domestic Regulations." That Article plainly covers measures of general application concerning trade in services, such as administrative, licensing, qualification requirements, and technical competency standards. Third, the *Preamble* of GATS bespeaks its object and purpose, namely, to progressively liberalize trade in services while preserving the right of each Member to regulate services to meet national policy objectives.

6. Read it Backwards

The *Argentina Financial Services* case is best read backwards. That is because the Appellate Body's writing, in addition to the usual curse of redundancy, is circular. Starting at the end helps (but does not eliminate) the confusion the Appellate Body sows with its non-linear flow.

The most obvious way for the Appellate Body to correct these flaws itself is to discipline itself in the manner that first-year law students are disciplined through basic courses in the common law system: brief a case in logical order. That order is as follows:

(1) Facts
(2) Procedural Posture
(3) Issues
(4) Judgment
(5) Losing Argument
(6) Winning Argument
(7) Holding
(8) Rationale
(9) Observations

Minor variations, of course, are permissible as warranted by peculiarities in a case and the preferences of civil law jurists. International arbitration panels have used a similar approach consistently for decades, in the majority of cases producing a more readable product. Regardless of the precise sequencing, the Appellate Body could benefit from an approach that would make it easier for readers, whether the officials of the WTO Parties or other stakeholders and observers who seek a further understanding of AB jurisprudence.

[414] *See* Appellate Body Report, *US—Corrosion-Resistant Steel Sunset Review*, *supra* note 341.