WTO CASE REVIEW 2017[1]

[1] This *WTO Case Review* is the 18th 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 2016*, 34 ARIZ. J. INT'L & COMP. L. 281–460 (2017).
- *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).

We are grateful to the Editors and Staff of the *Arizona Journal of International and Comparative Law* for their excellent editorial assistance and continuing support of our work (even when there have been unconscionable delays by the authors in submitting the manuscript as with the current case review).

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

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I. INTRODUCTION: AN EXISTENTIAL THREAT TO WTO DISPUTE SETTLEMENT: BLOCKING APPOINTMENT OF APPELLATE BODY MEMBERS

> On the one hand, the dispute settlement system, which has for over two decades established its credentials as an efficient and impartial mechanism, faces the burgeoning pressure of increasingly complex disputes at various stages. On the other, some recent critiques have raised fundamental questions about the way the [Dispute Settlement Understanding] should be used to resolve disputes. These two challenges are clearly beyond the capacity of the dispute settlement system itself to resolve, and they call for determined political dialogue among WTO Members. Left unaddressed, these challenges can cripple, paralyse, or even extinguish the system. If they are properly addressed, the system can continue to discharge its mandate in the coming years with renewed vigour.[6]

A. Introduction

The WTO's Dispute Settlement Mechanism (DSM)[7] is being threatened with destruction by the United States. For almost a year, the United States blocked appointment or reappointment of Appellate Body (AB) Members, reducing the number of sitting AB Members to four,[8] based on various procedural and substantive objections to AB Body practices, some dating from 2002. Should the United States continue to refuse to join a consensus to appoint AB Members through September 2018, the number of sitting Members will be reduced to three.[9] While most cases could still be heard with three judges, the large backlog of complex cases could mean that AB reports—required under the Dispute Settlement Understanding

[6] Statement of Appellate Body Chairman Ujal Singh Bhatia on the release of the Appellate Body's 2017 Annual Report, quoted in *Appellate Body Chair Puts Onus on Members to Resolve Delays*, WORLD TRADE ONLINE (June 22, 2018), https://insidetrade.com/trade/appellate-body-chair-puts-onus-members-resolve-delays (last visited Jun. 25, 2017).

[7] Understanding on Rules and Procedures Governing the Settlement of Disputes: Annex 2 of the WTO Agreement, Apr. 15, 1994 [hereinafter DSU]; the Dispute Settlement Body, a committee of the entire WTO Membership created under art. 2.1 of the DSU to administer the rules and procedures; the panels, Appellate Body and their secretariats.

[8] *See Appellate Body Members*, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm (last visited Jan. 25, 2018) [hereinafter *Appellate Body Members*] showing that after the expiration of the terms of Ricardo Ramirez Hernandez and Peter Van den Bossche in 2017 only four active Members remain.

[9] The term of Shree Baboo Chekitan Servansing expires September 30, 2018. *Id*.

(DSU) to be issued in no more than ninety days after appeal,[10] will take far longer to complete. Moreover, some cases in which an AB Member worked on a case in the earlier stages could not be decided at all because of conflict of interest issues.[11]

The US actions are perplexing both to other WTO Members and to outside observers, even to those who sympathize with many of the United States' substantive concerns with AB decision-making. The surprise results both from the intransigence of the United States' delegation and the adamant refusal to date of US Trade Representative Robert Lighthizer to propose any specific solutions to the perceived problems.[12] One trade official in Geneva has suggested bluntly that the US obstructionism is "Buyers' Remorse—We [the United States] made the rules, we know what they mean and they should not apply to us."[13] Even if this is an overstatement, it illustrates the level of frustration among WTO bureaucrats and other Member governments, and the view that the United States is a trade bully.[14]

Also, it has seemed strange to many that the United States has not considered one major result of holding the process hostage through September 2018, a situation in which only three AB Members remain; one from the United States, one from China, and one from India.[15] Given that the United States is the most frequent user of the DSM, both as Claimant and Respondent,[16] one wonders whether future appeals in which the United States is respondent, likely including a refusal of the United States to afford Market Economy Status to China despite arguably being required to do so under the China's Accession Agreement with the WTO,[17] would benefit by referring the decision to this particular group of three AB

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[10] DSU, *supra* note 7, art. 17.5.

[11] *Id*. art. 17.3 (specifying that Members "shall not participate in the consideration of any disputes that would create a direct or indirect conflict of interest," as for example if a Member had worked on a matter during the initial panel stages of the proceeding).

[12] *See* Bryce Baschuk, *WTO Dispute System Working Despite US Action, Official Says*, INT'L TRADE DAILY (BBNA) (Jan. 25, 2018), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=127359018&vname=itdbulallissues&wsn=499717000&searchid=31826886&doctypeid=1&type=date&mode=doc&split=0&scm=TDLNWB&pg=0.

[13] *See* Priti Patnaik, THE WIRE (Oct. 10, 2017), https://thewire.in/191205/us-launched-offensive-wtos-dispute-settlement-system/ (quoting an unidentified official).

[14] *Id*.

[15] *Appellate Body Members*, *supra* note 8.

[16] 115 as Claimant, 134 as Respondent; the European Union is second, with 91 and 84 cases, respectively. *See Disputes by Member*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dispu_by_country_e.htm (last visited Jan. 25, 2018).

[17] Article 15.2(a)(ii) of China's Protocol of Access to the WTO provides in pertinent part that "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." It also provides in sub-paragraph 2(d) that "In any event, the provisions of subparagraph (a)(ii) shall expire 15 years after the date of accession [November 2016]." Accession of the People's Republic of

Members. While under the Dispute Settlement Understanding AB Members serve independently of their governments, in the real world such independence can probably never be complete.[18]

At this writing in March 2018, it is unclear whether the United States seeks to destroy the DSM (which many believe is the heart of the WTO) and perhaps the entire WTO system of rules, or hopes that by holding AB Members hostage the remaining 163 WTO Members will offer acceptable (as yet unspecified) solutions. The Trump Administration, despite its heavy-handed approach, has articulated many of the same concerns that the Obama and earlier administrations have raised beginning in 2002, and that from time to time have been shared by a number of other Member states.

Part II of this section discusses the objections, both substantive and procedural, raised by the United States to the manner in which the AB operates and in which it analyzes issues and renders decisions. Part III further addresses the crisis created by US intransigence. Part IV discusses several work-arounds being proposed by various other WTO members, none of which are particularly desirable or even legally feasible. Part V is a short summary and discussion of the way forward.

B. United States' Dissatisfaction with the Appellate Body

1. Overview of US Objections

Probably more than any other GATT Contracting Party, the United States was responsible for creating the DSM as a legalistic, quasi-judicial mechanism to replace the less legal, more diplomatic approach that evolved between 1947 and the early 1990s under GATT Articles XXII and XXIII.[19] Still, US dissatisfaction with the current process was evident as early as 2002, as discussed below. It was also reflected in a US proposal during the early stages of the Doha Round negotiations (joined by Chile), advocating a more flexible approach, where the AB would be

China, art. 15.2(a)(ii), WTO Doc. WT/L/432 (2001), https://www.wto.org/english/thewto_e/acc_e/completeacc_e.htm.

[18] DSU, *supra* note 7, art. 17.3 (providing that Members "shall be unaffiliated with any government." For example, the United States refused to reappoint two consecutive AB judges appointed earlier by the United States, Merit Janow and Jennifer Hillman, apparently because the US Trade Representative was unsatisfied with their willingness to defend US interests).

[19] During the Uruguay Round negotiations, the GATT Contracting Parties were divided between a so-called "legalistic" approach to dispute settlement and one based on diplomacy, "with some Contracting Parties, particularly the USA, arguing for greater legalism, and some other countries, as well as important voices in the global trade policy elite, arguing the advantages of diplomatic flexibility." The legalists stressed time limits for panel decisions, adequate reasons being offered for rulings and an end to the consensus requirement of adoption of reports. *See* MICHAEL TREBILCOCK ET AL., THE REGULATION OF INTERNATIONAL TRADE 174–75 (4th ed. 2013).

required to circulate its reports on an interim basis to the Claimant and Respondent for comment:

> The proposal is particularly aimed at giving parties to a dispute more control over the process and greater flexibility to settle disputes . . . [It] will improve the dispute settlement system by providing greater flexibility, and by giving countries more control over the process in order to facilitate the settling of disputes. The purpose of the system is to settle disputes, and these proposals will help do that . . . . Under the proposal, parties to a dispute would for the first time have the right to see and comment on an Appellate Body report before it is made final. This would help ensure the best possible final report since parties would have the chance to provide useful clarifications on the facts and the law prior to the issuance of the final report.[20]

Currently, the bulk of the US complaints fall within three areas: a) alleged overreaching by the AB in a manner that conflicts with the DSU requirement that the Panel and AB not "add to or diminish the rights and obligations provided in the covered agreements"; [21] b) the practice of the AB of discussing issues which are not before it, creating *obiter dicta* that is in the US view unwarranted; c) other Members' use of the AB to obtain through litigation benefits that they could not have achieved through negotiations; d) AB review of facts and of a Member's domestic law de novo; and e) the AB's alleged insistence that its reports be treated as precedent. It is worth noting as well that the United States sees the covered agreements as contractual, while other members and some observers see them more as akin to a constitution, despite the fact that neither approach is fully satisfactory.[22] The United States has also objected to the recent practice of the AB and its secretariat permitting AB Members whose terms have expired to continue sitting on cases for which they were originally empaneled.

The core US complaints about the AB were set out in the United States Trade Representative's comments at a meeting of the DSB in May 2016 (under the Obama Administration):

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[20] *United States Proposes Flexibility Reforms in WTO Dispute Settlement*, THE OFF. OF THE US TRADE REPRESENTATIVE (Dec. 12, 2002), https://ustr.gov/archive/Document_Library/Press_Releases/2002/December/United_States_Proposes_Flexibility_Reforms_in_WTO_Dispute_Settlement_printer.html.

[21] DSU, *supra* note 7, arts. 3.2, 19.2.

[22] *See* Joanna Langille, *Neither Constitution nor Contract: Understanding the WTO by Examining the Legal Limits on Contracting Out Through Regional Trade Agreements*, 86 N.Y. UNIV. L. REV. 1482, 1484 (2011) (explaining the two conceptual regime, constitutional and contractual).

> The role of the Appellate Body as part of the WTO's dispute settlement system is to decide appeals of panel reports to help achieve "[t]he aim of the dispute settlement mechanism . . . to secure a positive solution to a dispute," as set out in DSU Article 3.7. And the DSU reminds panels and the Appellate Body not once, but twice [arts. 3.4 and 19.2], that "in their findings and recommendations, the panel and Appellate Body cannot add to or diminish the rights and obligations provided in the covered agreements."[23]

At that same May 23 meeting, the United States indicated that the above complaints were among those resulting in the refusal of the United States to support the reappointment of AB Member Seung Wha Chang.[24]

The principal US concerns were set out more recently in somewhat different form the President's 2018 Trade Policy Agenda.[25] In that report the United States also complained repeatedly about the failure of the AB to adhere to the ninety-day deadline for appeals,[26] a problem that has been articulated regularly for several years and by other Members as well as the United States. In June, the United States again criticized the AB for delaying the issuance of its reports, referring to Article 17.5 of the DSU, which states in part that "In no case shall the proceedings [of the Appellate Body] exceed ninety days."[27] The recent complaints about timing by the United States are ironic given that the failure of the United States to concur in the appointment of new AB members since mid-2016, resulting in an AB with only four members as of mid-2018, is at least in significant part responsible for the delays in the issuance of reports. The following subsections address many the key US concerns in greater detail.

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[23] Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, at 2 (May 23, 2016), https://www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf [hereinafter May 23 Statement].

[24] *Id*. at 11.

[25] OFF. OF THE US TRADE REPRESENTATIVE, 2018 TRADE POLICY AGENDA AND 2017 ANNUAL REPORT 25–28 (2018), https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF [hereinafter 2018 TRADE POLICY AGENDA].

[26] *See* DSU, *supra* note 7, art. 17.5.

[27] *Id*. art. 17.5; *US Opens New Front against Appellate Body Over Delayed Reports*, WORLD TRADE ONLINE (June 22, 2018, 1:21 PM), https://insidetrade.com/daily-news/us-opens-new-front-against-appellate-body-over-delayed-reports.

2. Appellate Body Members Serving after Expiration of Their Terms

The Working Procedures for Appellate Review, which were drafted and have been amended on various occasions by the AB, with notice to, but not approval by the Dispute Settlement Body,[28] read in pertinent part as follows:

> 15. A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB, complete the disposition of any appeal to which that person was assigned while a Member, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.

The United States has objected that one of the three AB Members, [Mr. Hyun Chong Kim], who heard the appeal in *US–Certain EC Products*,[29] had resigned more than a month before the report was circulated.[30] According to the United States, he should have been replaced by another Member after his resignation. As the United States asserted in the March 2018 Report, "the Appellate Body simply does not have the authority to deem someone is not an Appellate Body member to be a member."[31]

Similarly, Member Ricardo Ramirez had also continued to sit on the case, even though his term had also expired (although he had not resigned).[32] Under the circumstances, the Report in the view of the United States did not meet the requirements of the DSU, and could not be properly adopted under those procedures without the approval of the Dispute Settlement Body, although the United States did not object "in these particular and exceptional circumstances" to the adoption of the Report by DSB consensus.[33] (The United States later indicated that it would "welcome" Professor Ramirez continuing to participate in the appeals to which he

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[28] *Working procedures for appellate review*, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_e.htm (last visited Jan. 29, 2018) (effective Sept. 2010).

[29] Appellate Body Report, *European Union—Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, ¶ 5.200, WTO Doc. WT/DS442/AB/R (adopted Sep. 29, 2017) [hereinafter Appellate Body Report, *EU Fatty Alcohols*] (summary at page 33 of this Review).

[30] May 23 Statement, *supra* note 23, at 7–8; *see Appellate Body Members* n.10, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm#fnt-10 (last visited Mar. 25, 2019) (showing that Member Kim resigned before the date of the release of the referenced report).

[31] 2018 TRADE POLICY AGENDA, *supra* note 25, at 25.

[32] May 23 Statement *supra* note 23, at 8; *see Appellate Body Members* n.9, WTO, https://www.wto.org/english/tratop_e/dispu_e/ab_members_descrp_e.htm#fnt-10 (last visited Mar. 25, 2019) (noting that Member Ramirez had been authorized by the Appellate Body members to continue sitting on several cases despite the fact that his term had expired).

[33] May 23 Statement, *supra* note 23, at 9.

had been assigned, but argued that it was the DSB rather than Appellate Body that possessed the authority to decide that issue.)[34]

The AB has contested the US position in a restricted "Background Note" explaining their Rules of Procedure, arguing that "[m]any international adjudicative bodies follow transitional rules or practices similar to Rule 15 of permitting or requiring an outgoing adjudicator to complete the disposition of cases assigned prior to the expiry of the adjudicator's term of office."[35] However, the Background Note does not address whether such reappointment is the responsibility of the AB or the DSB (as the United States argues), although the note lists several precedents for continued sitting of AB Members in the past to complete pending cases extending beyond the Member's term (although not in situations where the Member has formally resigned).[36] This view presumably reflects in part the DSU language, stating that "The DSB shall appoint persons to serve on the AB for a four-year term, and each person may be reappointed once"[37] as a ground for concluding that the DSB rather than the AB would properly have responsibility for extending the term of Members whose terms had expired while sitting on pending cases.

3. Limiting Appellate Body Reports to Discussion of Legal Issues Necessary to Resolve the Matters Before It

In May 2016, the United States "raised systemic concerns about the disregard for the proper role of the Appellate Body and the WTO dispute settlement system in these reports."[38] It complained that in a case between Panama and Argentina, 46 pages of the report is *dicta*, setting out interpretations of the General Agreement on Trade in Services that effectively consisted of "advisory opinions on legal issues."[39] Similar criticisms were raised in a dispute concerning the Sanitary and Phytosanitary Measures Agreement, with the United States asserting the AB Report "engaged in a lengthy abstract discussion of a provision of the SPS Agreement without ever tying that discussion to an issue on appeal," and even expressed "concerns" in that discussion on findings of the Panel that were not raised

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[34] Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, at 8 (Oct. 17, 2017), https://geneva.usmission.gov/wp-content/uploads/2017/10/Oct.23.DSB_.Stmt_.as-delivered.fin2_.pdf [hereinafter Oct. 17 Statements].

[35] Appellate Body Report, *Background Note on Rule 15 of the Working Procedures for Appellate Body Review*, Annex 2 (Nov. 24, 2017).

[36] *Id*.

[37] DSU, *supra* note 7, art. 17.2.

[38] *See* May 23 Statement, *supra* note 23, at 3.

[39] *See id*. (referring to Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/AB/R (adopted May 11, 2016)).

by either party in the appeal.[40] Further, the Appellate Body was criticized by the United States for "revers[ing] the Panel report and [finding] a breach on the basis of an argument and approach entirely of the Appellate Body's creation."[41]

These arguments were also raised by the Trump Administration at a DSB meeting on September 29, 2017. There, the United States objected to a statement in the AB report, *US–Certain EC Products*, on the grounds that it "was obiter dicta as it was not made in response to any issue appealed in that dispute, and therefore was not necessary to resolve that appeal."[42] One of the concerns over such "unnecessary" discussions is that they consume AB and Secretariat time and resources, detracting from that spent on other pending cases, a particular concern when the AB has a large backlog of cases. This complaint was also emphasized in the Trade Policy Agenda, with the United States noting that the:

> [P]urpose of the dispute settlement system is not to produce reports or to "make law," but rather to help Members resolve trade disputes among them. WTO Members have not given panels or the Appellate Body the power to give "advisory opinions" as some national or international tribunals have.[43]

Also in the area of overreaching, one study indicates that a number of Members, including not only the United States, but also Mexico, India, Chile, Argentina, Pakistan, Costa Rica, Malaysia, and Turkey among others:

> [H]ave criticized panels and/or the Appellate Body for overreaching their authority by filling gaps, construing silences, selectively choosing one of many dictionary definitions available to define terms in the texts of the agreements, and creating obligations never agreed to in negotiations among Members. These members believe that, in certain cases, the Appellate Body has failed to respect the negotiated compromises reflected in the agreements and failed to exercise restraint when faced with textual gaps, ambiguity, or silence – which may have been intended by the negotiators. Rather, they believe that the meaning

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[40] *See* May 23 Statement, *supra* note 23, at 4 (referring to Appellate Body Report, *India—Measures Concerning the Importation of Certain Agricultural Products*, WTO Doc. WT/DS430/AB/R (adopted June 19, 2015)).

[41] *See id*. (referring to Appellate Body Report, *United States—Countervailing Duty Measures on Certain Products from China*, WTO Doc. WT/DS437/AB/R (adopted Jan. 16, 2015)).

[42] *See* Statements by the United States at the Meeting of the WTO Dispute Settlement Body Geneva, at 7 (Sept. 29, 2017), https://geneva.usmission.gov/wp-content/uploads/2017/09/Sept29.DSB_.Stmt_.as-delivered.fin_.public.pdf [hereinafter Sept. 29 Statements].

[43] 2018 TRADE POLICY AGENDA, *supra* note 25, at 26.

> and filling of gaps or silences should properly be left to the members themselves.[44]

4. Litigation as a Substitute for Negotiation?

Expressed concerns of the United States predate the Trump Administration by 15 years. In a Report by the Bush Administration to Congress in 2002, the Commerce Department noted that:

> [T]he United States does not agree with the approach that WTO panels and the Appellate Body have sometimes taken in disputes, and is concerned about the potential systemic implications. In particular, the executive branch views with concern the manner in which WTO panels and the Appellate Body have applied the applicable standard of review in disputes involving US trade remedy and safeguard matters, and instances in which they have found obligations and restrictions on WTO Members concerning trade remedies and safeguards that are not supported by the texts of the WTO agreements . . . .[45]

In other words, the concerns of the United States have been festering for a long time, even if the only action the United States has taken to remedy the matter after DSU reform in the Doha Round failed, was to block appointment or reappointment of AB Members beginning in May 2016.

US concerns in this regard have been succinctly summarized by US Trade Representative Lighthizer as follows: "We are concerned that the WTO is losing its essential focus and becoming a litigation-focused organization . . . Too often members seem to believe they can get concessions through lawsuits that they can never get at the negotiating table."[46] Given the large number of unfair trade (anti-dumping and countervailing duty) cases brought against the United States in the DSM, there may well be some truth to this assertion. There seems little doubt to us that over a period of years, the AB has made it more difficult for investigating authorities to complete an investigation and assess anti-dumping or countervailing duties in a manner that passes AB muster.

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[44] TERENCE P. STEWART, DISPUTED COURT: A LOOK AT THE CHALLENGES TO (AND FROM) THE WTO DISPUTE SETTLEMENT SYSTEM 5 (2017), http://www.stewartlaw.com/Content/Documents/WTO%20Dispute%20Settlement%20System%20-%20Paper%20for%2012-20-17%20GBD.pdf.

[45] US SEC'Y OF COM., EXECUTIVE BRANCH STRATEGY REGARDING WTO DISPUTE SETTLEMENT PANELS AND THE APPELLATE BODY: REPORT TO CONGRESS 7 (2002).

[46] *See* Bryce Baschuk, *WTO Faces Paralysis in Dispute Settlement Cases as US Blocks Appointments*, 34 INT'L TRADE REP. (BBNA) 1653 (2017) (quoting Ambassador Lighthizer).

Examples of this include, among many others, *US–CDOSA*,[47] about which the United States asserted that:

> The Appellate Body has created a new category of prohibited subsidies that had neither been negotiated or agreed to by WTO Members . . . . A finding that a Member had not acted in "good faith" would clearly and unambiguously exceed the mandate of dispute settlement panels and the Appellate Body.[48]

Other cases in which the United States has criticized the AB's reasoning as flawed include *United States—Countervailing and Anti-dumping Measures (China)*[49] mentioned earlier and *Argentina–Trade in Goods and Services*.[50]

From time to time, we have criticized the AB in our annual case reviews for rejecting reasonable methodologies for dealing with anti-dumping and subsidies investigations. In *EU–Biodiesel*, we noted:

> [T]he 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. . . . 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" seems to us to be an exercise of reasonable discretion under the circumstances.[51]

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[47] Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*, ¶ 2, WTO Doc. WT/DS217/234/AB/R (adopted Jan. 27, 2003) [hereinafter Appellate Body Report, *United States—Continued Dumping and Subsidy Offset Act of 2000*].

[48] *See* STEWART, *supra* note 44, at 6–7.

[49] *See generally* Appellate Body Report, *United States—Countervailing and Anti-dumping Measures on Certain Products from China*, WTO Doc. WT/DS449/AB/R (adopted Jul. 22, 2014) [hereinafter Appellate Body Report, *United States — Countervailing and Anti-dumping Measures*].

[50] *See generally* Appellate Body Report, *Argentina—Measures Relating to Trade in Goods and Services*, WTO Doc. WT/DS453/AB/R (adopted May 11, 2016) [hereinafter Appellate Body Report, *Argentina—Trade in Goods and Services*]; *see also* Patnaik, *supra* note 13, at 9–10.

[51] *See generally* Appellate Body Report, *European Union—Anti-Dumping Measures on Biodiesel from Argentina*, WTO Doc. WT/DS473/AB/R (adopted Oct. 26, 2016) [hereinafter Appellate Body Report, *EU-Biodiesel*] (discussed in Raj Bhala et al., *WTO Case Review 2016*, 34 ARIZ. J. INT'L COMP. L. 281, 417 (2017)).

Similarly, we noted in *EU—Stainless Steel Tubes*, that the AB had created a new term that appears nowhere in the Subsidies and Countervailing Measures Agreement:

> With respect to the calculation of a "benefit" Article 14(d) of the SCM Agreement, the Appellate Body, for the most part, reinforced previous jurisprudence, indicating that use of alternative benchmarks under Article 14(d) must be based on a finding that in-country prices are not market-determined. However, it also expanded the body of WTO "law" by, in a footnote, explaining the use of the term "government-related entity." It appears as though the Appellate Body . . . creates a new type of entity to use during an analysis under Article 14(d). Time will tell, but as it stands, it appears as though there are now three types of entities—"government," "public body," and "government-related"—for purposes of a market benchmark analysis.[52]

It is recognized that the system was not designed to give the last word on interpretation and application of the WTO covered agreements to the Appellate Body. Rather, that authority rests elsewhere, as the WTO Agreement specifies:

> The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements. In the case of an interpretation of a Multilateral Trade Agreement in Annex 1, they shall exercise their authority on the basis of a recommendation by the Council overseeing the functioning of that Agreement. The decision to adopt an interpretation shall be taken by a three-fourths majority of the Members.[53]

However, the membership has found it impossible to reach an agreement on most controversial issues, including the continuation of the Doha Round of negotiations,[54] so it is unsurprising that no (almost certainly fruitless) effort has

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[52] *See generally* Appellate Body Report, *China—Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes from Japan*, WTO Doc. WT/DS454/AB/R (adopted Oct. 28, 2015) [hereinafter Appellate Body Report, *Stainless Steel Tubes*] (discussed in Raj Bhala et al., *WTO Case Review 2016*, 33 ARIZ. J. INT'L COMP. L. 505, 626 (2016)).

[53] Agreement Establishing the World Trade Organization, Apr. 15, 1994, art. IX:2 [hereinafter WTO Agreement].

[54] This was again illustrated at the WTO's Eleventh Ministerial Meeting in Buenos Aires in December 2017. The Members could not even agree on a final communique, and Director-General Azevedo painted a gloomy picture of the results: "We have made important

been made by the United States or other Members to convince the Membership (or three-fourths of them) to agree on a particular interpretation of a group of covered agreements. The result is in part responsible for the situation which the WTO is now facing.

5. Review of Facts and Domestic Law; Reports as Precedent

The United States has also charged that the AB has on occasion reviewed facts, although the DSU limits and appeal to "issues of law covered in the panel report and legal interpretations developed by the panel."[55] It complains in particular that:

> [T]he Appellate Body consistently asserts that it can review the meaning of a Member's domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for Appellate Body review. Furthermore, when the Appellate Body reviews the meaning of a Member's domestic measure, it does not provide any deference to a panel's findings of fact.[56]

Under the WTO Agreement, binding interpretations of the obligations agreed to in the WTO's covered agreements, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[57] As the United States asserts, "While Appellate Body reports can provide valuable clarification of the covered agreements, Appellate Body reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed."[58] Under such circumstances, it is inappropriate for the Appellate Body to require that panels must follow its reports in the absence of "cogent reasons."[59] We note that the challenges for the AB in this dichotomy are significant. On the one hand, only the Ministerial Conference and General Council are authorized to issue interpretations, but in more than twenty years neither have been able to agree upon even one interpretation. At the same time the AB must decide cases, a process which in actual practice will likely result in more than a "clarification" if a decision is to be issued.

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progress in some areas. In most of them it did not prove possible. Members did not manage to agree final, substantive agreements this time." See Robert Azevedo, WTO Dir. Gen., Remarks MC 11 Closing Ceremony (Dec. 13, 2017), https://www.wto.org/english/news_e/spra_e/spra209_e.htm.

55 DSU, *supra* note 7, art. 17.6.

56 2018 TRADE POLICY AGENDA, *supra* note 25, at 28.

57 WTO Agreement *supra* note 53.

58 2018 TRADE POLICY AGENDA, *supra* note 25, at 28.

59 *Id*.

C. The United States' Risky Approach to Reforming the Appellate Body

As Part II indicates, we have considerable sympathy for many of the concerns that have been expressed regarding the allegations of excessive dicta in Appellate Body reports, general overreaching, and encouraging Members to use litigation to obtain modification of the covered agreements (particularly the ADA and the SCMA) in place of negotiations in Geneva. In particular, we agree with the US Trade Representative's Office under the Trump, Obama, and Bush Administrations that some AB reports are ultimately inconsistent with the DSU requirement that Panel and AB Reports "cannot add to or diminish the rights and obligations provided under the covered agreements."[60]

That being said, as we suggested in the introduction to this discussion, the approach that the United States has taken through September 2018, blocking all AB appointments or reappointments for almost a year and declining to present any proposals for reform that, if accepted, would satisfy the United States, is mystifying. It strikes us and many others not only as unproductive bullying, but as raising a threat to the continued functioning of the AB and probably to the future of the WTO itself.[61] The United States is stubbornly refusing to budge on the reappointment issue, despite increased pressures from 58 Members to immediately begin the process of filling the three outstanding AB vacancies.[62]

It also remains unclear whether the United States seeks to totally emasculate the dispute settlement system, and has fully considered the implications of an international trading regime with myriad rules but no enforcement. Or perhaps the Trump Administration wishes to be able to use the unilateral remedies provided under Section 301(b) of the Trade Act of 1974, as amended, which the Executive Branch under USTR is authorized to take action under with respect to "an act, policy, or practice of a foreign country is [that] unreasonable or discriminatory and burdens or restricts United States commerce"[63] without regard to WTO rules or to action against the use of Section 301 by the Panels, AB and, ultimately, the target Member state. Or perhaps also the US Trade Representative has concluded that if the United States imposes Section 232[64] tariffs and/or quotas on imported steel and

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60 DSU, *supra* note 7, arts. 3.2, 19.2.

61 *See Ministers show 'particular concern' for WTO Appellate Body in Davos Meeting*, WORLD TRADE ONLINE (Jan. 26, 2018, 1:17 PM) (noting that "many ministers at the meeting expressed the "need to preserve and enhance the functioning of the multilateral trading system" with an emphasis on the regular WTO bodies and the "WTO's Dispute Settlement Mechanism").

62 *US Rejects Proposal Brought by 58 Members to Fill WTO Appellate Body Slots*, WORLD TRADE ONLINE (Jan. 22, 2018, 5:46 PM), https://insidetrade.com/daily-news/us-rejects-proposal-brought-58-members-fill-wto-appellate-body-slots.

63 19 U.S.C. § 2411(b)(1) (1988).

64 19 U.S.C. § 1862 (1962).

aluminum for specious "national security" reasons, as seems likely to occur at this writing,[65] avoiding DSM review is desirable.

The US emasculation of the AB seems to us to be particularly surprising at a time when China is flexing its economic muscles through the gigantic "Belt and Road" project combining a network of seaports, railroads and roads stretching from China to Eastern Europe,[66] and the "Made in China 2025" initiatives (the latter almost certainly supported with massive government subsidies that will be illegal under WTO rules[67]) designed to guarantee Chinese dominance in such fields as energy, robotics, electric cars, and artificial intelligence by 2025.[68] Not only the United States but all other WTO Members would be effectively barred from challenging such actions to the extent they are inconsistent with the covered agreements.

The longer the list of US complaints is matched by a lack of reform proposals,[69] the more likely it is that other Members will (a) conclude that the United States is more interested in destroying the system than reforming it; and (b) seek out methods for bypassing the AB once its membership has declined to the point where it can no longer render reports (three members in cases where there is a conflict of interest). As current AB Chair Ujal Singh Bhatia has noted, "An erosion of trust in this system can lead to the re-emergence of power orientation in international trade policy . . . . Delays compel WTO Members to look for other solutions, particularly elsewhere."[70] Such "other solutions" within the WTO and DSU framework are discussed in the next section.

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[65] *See* Press Release, US Dep't of Com., Secretary Ross Releases Steel and Aluminum 232 Reports in Coordination with White House (Feb. 17, 2018), https://www.commerce.gov/news/press-releases/2018/02/secretary-ross-releases-steel-and-aluminum-232-reports-coordination (suggesting several quota and tariff remedies to restrict US imports of steel and aluminum).

[66] *See* Tian Jinchen, '*One Belt and One Road': Connecting China and the World*, MCKINSEY& COMPANY (July 2016), https://www.mckinsey.com/industries/capital-projects-and-infrastructure/our-insights/one-belt-and-one-road-connecting-china-and-the-world (discussing what China hopes will be the modern equivalent of the ancient Silk Road).

[67] *See Agreement on Subsidies and Countervailing Measures*, Annex 1A of the WTO Agreement, *supra* note 53, arts. 1–3 [hereinafter SCM Agreement] (making most subsidies provided by a government or public body that consist of a financial contribution that is specific to an industry or group of industries actionable, and export subsidies illegal).

[68] Tristan Kenderdine, *China's Industrial Policy, Strategic Emerging Industries and Space Law*, 4 ASIA & PAC. POL'Y STUD. 325, 325 (2017).

[69] *See* Bryce Baschuk, *WTO Dispute System Working despite US Action, Official Says*, WTO DAILY (BNA) (Jan. 25, 2018) (reporting on the absence of any specific US reform proposals).

[70] *See* Brian Flood, *Head of Troubled WTO Appellate Body Wins New Term*, 34 INT'L TRADE REP. (BBNA) 1681 (2017) (quoting Mr. Bhatia).

D. The Unattractive Alternatives to a Fully-Staffed Appellate Body

Not surprisingly, Members and those observing the problem from outside have floated several proposals, most of which are not likely to be fully invoked until after the end of September 2018, when, if the United States continues to block a consensus on appointments and reappointments, the number of sitting AB Members will fall to three. All of these seem designed in significant part to "find a way to exclude the US from its decision-making and its operations, even if only temporarily"[71] or to permit the WTO Membership to avoid the politically painful process of seeking to directly address US concerns.

Of the proposals, the one that is mostly likely feasible, at least to attempt, would be the reliance by willing WTO Members, on an arbitration process that is included in the DSU but to date has been largely unused. Under this mechanism,

> (1) Expeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties.
> (2) Except as otherwise provided in this Understanding, resort to arbitration shall be subject to mutual agreement of the parties which shall agree on the procedures to be followed. Agreements to resort to arbitration shall be notified to all Members sufficiently in advance of the actual commencement of the arbitration process.
> (3) Other Members may become party to an arbitration proceeding only upon the agreement of the parties which have agreed to have recourse to arbitration. The parties to the proceeding shall agree to abide by the arbitration award. Arbitration awards shall be notified to the DSB and the Council or Committee of any relevant agreement where any Member may raise any point relating thereto.
> (4) Articles 21 and 22 of this Understanding shall apply *mutatis mutandis* to arbitration awards.[72]

This mechanism stands in parallel to the Panel/AB system set out elsewhere in the DSU. It seems open to use by Members if—and only if—the disputing Members agree to resort to it for each dispute. Otherwise, once arbitration is completed the enforcement mechanisms in the DSU apply, all without resort to the AB. If the current impasse continues, it seems likely that some Members who strongly support the survival of the DSM in some form will eventually resort to arbitration.

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[71] Robert McDougall, *The Search for Solutions to Save the Appellate Body*, EUR. CTR. INT'L POL. ECON. BULL. (Dec. 2017), http://ecipe.org/publications/the-search-for-solutions-to-save-the-wto-appellate-body/.

[72] DSU, *supra* note 7, art. 25.

In terms of resolving the issues, perhaps the most sensible (although politically unlikely) approach would be for the United States and a group of Members to seek to draft a series of "interpretations" of the DSU which would "fix" the DSM, and then seek to enact them through action of the General Council (since the Ministers are not scheduled to meet again until late 2019), as provided under the WTO Agreement. There, as noted earlier, both bodies have "the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements."[73] The hurdles include a) agreement on a series of interpretations by both the United States and a significant group of Members, and b) adopting the interpretation by consensus or, failing that, by a three-fourths majority.[74]

Unfortunately, the idea of a consensus on such a tentative agreement by the Members seems far-fetched. While a vote is theoretically possible, the near-phobia many members, including the United States, exhibit toward voting would cause opposition entirely apart from the substance of any reform proposals. Many would fear setting a precedent for other votes in which the United States or other powerful Members would likely be on the losing side, and thus be unacceptable not only to the United States, but probably to Brazil, China, India, Russia, Japan, and the EU, among others, as well. Moreover, given that the United States' complaints about the AB often relate to almost universally unpopular US methodologies for application of its anti-dumping laws (e.g., zeroing and NME analysis),[75] it seems highly unlikely that any broad agreement, even well short of consensus, could be reached.

Another option, suggested at Georgetown's Institute for International Economic Law, proposes several relatively minor amendments to the DSU. Under that proposal, AB judges whose terms have expired would serve on the cases to which they had been assigned only if the oral argument had already taken place. This would mean that where AB proceedings greatly exceeded the 90-day limit in the DSU the carryover would be limited to the period between the oral argument and the issuance of the decision, typically no more than two and a half months.[76] Arguably, this could be done without modifying the AB's procedural rules, Article

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[73] WTO Agreement, *supra* note 53.

[74] *Id*.

[75] With the practice of zeroing, for example, as of 2012 the EU, Braz., China, Ecuador, Japan, S. Kor., Mex., Thai., and Viet. are among the Members who have charged that zeroing is a violation of the Antidumping Agreement. In the view of all of them, zeroing increases the dumping margins by decreasing the export price (compared to the home market price or "normal" value by setting at zero all transactions where the export price is larger than the home market price, instead of taking the algebraic sum of all transactions. *See What is Zeroing?* EU COMM'N (Feb. 6, 2012), http://trade.ec.europa.eu/doclib/docs/2012/february/tradoc_149065.pdf (listing Members that have challenged the United States' methodology and providing examples of the practice).

[76] *See Transition on the WTO Appellate Body: A Pair of Reforms?*, INST. INT'L ECON. L., Feb. 2013, at 3 (noting that in the longest running AB proceeding, *Indonesia-Licensing*, all but 72 of the 265 days required to complete the proceeding occurred before the hearing).

15, with the AB refraining from authorizing carry-over unless the hearing had occurred.

A second proposal designed to encourage Members to join in the consensus for appointing new AB Members would require a DSU modification providing an AB Member whose term had expired would continue to serve until after his/her replacement had been appointed.[77] While this would require a consensus of the Membership—a tall order under the current impasse—it is legally possible to amend the DSU simply by consensus in the DSB and then in the Ministerial Conference or General Council.[78]

Other short to mid-term options seem to us to be even less feasible. These would include action by the AB to amend its own rules to dispose automatically of appeals (making the adoption of panel reports automatic); and any type of voting in the General Council or elsewhere that represented a departure from consensus or a departure from long-followed practice.[79] The latter would seem to include any actions taken by other bodies of the WTO to usurp the functions of the Dispute Settlement Body, where all decisions are taken by consensus.[80] Nor is there likely to be much support for taking the Members' frustration with the United States to other WTO Bodies, such as the General Council, where voting is theoretically (but not practically) possible, unless of course the United States withdraws from the WTO.

In the longer term, the other Members will be forced to contemplate a WTO without US participation. Even if the US does not formally withdraw—an eventuality that is no longer in our view beyond the realm of possibility—the remaining Parties would be free to try to move forward with what former WTO Director General Pascal Lamy has termed the "lonesome cowboy" scenario, in which the US either withdraws from the WTO, or the remaining Members, in an effort to rebuild a WTO without the US, resist the American offensive. As Lamy notes, "If a major power does not want to play by the rules of international disciplined trade, the others will have to react."[81]

E. Conclusion

While the United States has a reasonable basis for considerable dissatisfaction with some of the Appellate Body's procedural and substantive practices, few observers are convinced that this unhappiness is worth emasculating the Dispute Settlement Mechanism, and with it risking the destruction of the rules-

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77 *Transition on the WTO Appellate Body: A Pair of Reforms?*, *supra* note 76, at 6–7.

78 *Id*. at 6 (citing WTO Agreement, *supra* note 53, art. X:8).

79 *See* McDougall, *supra* note 71 (listing some of the various alternative proposals).

80 DSU, *supra* note 7, art. 2:4 (providing that "Where the rules and procedures of this Understanding provide for the DSB to take a decision, it shall do so by consensus).

81 *See* Tom Miles, *WTO Should Prepare for Life Without US, Ex-Chief Lamy Says*, REUTERS (Feb. 19, 2018), https://www.reuters.com/article/us-usa-wto/wto-should-prepare-for-life-without-u-s-ex-chief-lamy-says-idUSKCN1G326S (quoting Lamy's statements).

based international trading system that the United States was instrumental in fashioning 70 years ago. A return to the law of the jungle does not seem to be in the United States' medium and longer term interests, particularly at a time when the emerging economic superpower (China) is currently far more protectionist than the United States, although the United States may catch up with its growing embrace of mercantilism and "America First" if current trade policies are pursued and expanded. Whether at this juncture, a change in tone by the United States and an expressed willingness to negotiate and compromise would be sufficient to move the WTO toward a compromise, or whether the well has been poisoned beyond the possibility of such efforts; it seems to us to be worth making the attempt. The United States will be tested again in the coming months when a decision is made whether to reappoint by September 30, 2018, Shree Baboo Chekitan Servansing of Mauritius to a second term.[82] However, a recently leaked version of a bill would effectively abandon US adherence to MFN treatment, the cornerstone of the GATT/WTO system.[83] Even if such legislation has no chance of being passed by the Congress, its existence suggests that the US government tactics relating to the Appellate Body have a broader objective, to destroy the WTO and the post-war rules-based economic system.

II. DISCUSSION OF THE 2017 CASE LAW FROM THE APPELLATE BODY

A. Gatt Obligations and Exceptions–Gatt Article Xi:2(C) and Agriculture Agreement Article 4:2

1. Citation

WTO Appellate Body Report, *Indonesia – Importation of Horticultural Products, Animals, and Animal Products*, WT/DS477/AB/R (complaint by United States), WT/DS478/AB/R (complaint by New Zealand) (adopted Nov. 22, 2017) ("*Indonesia Horticultural Products*").[84]

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[82] *See* Bryce Baschuk, *WTO Appellate Body Crisis Reaches New Phase*, INT'L TRADE DAILY (BNA) (June 18, 2018), http://news.bna.com/tdln/TDLNWB/split_display.adp?fedfid=136316601&vname=itdbulallissues&jd=00000164002ede44a7e550fec9100000&split=0.

[83] *See* Jonathan Swain, *Exclusive: A Leaked Trump Bill to Blow up the WTO*, AXIOS (July 1, 2018), https://www.axios.com/trump-trade-war-leaked-bill-world-trade-organization-united-states-d51278d2-0516-4def-a4d3-ed676f4e0f83.html.

[84] Panel Report, *Indonesia–Importation of Horticultural Products, Animals, and Animal Products*, WTO Doc. WT/DS477/R (complaint by US), WT/DS478/R (complaint by N.Z.) (adopted Nov. 7, 2017) [hereinafter Panel Report, *Indonesia Horticultural Products*]. Third parties from 14 Member states joined the co-complainants, namely, Austl., Braz., Can., China, E.U., India, Japan, Nor., Para., Sing., Chinese Taipei, Arg., Republic of Korea, and Thai.).

2. Facts

This case involves quantitative restrictions that were imposed by Indonesia on imports of certain agricultural products. Quantitative restrictions are non-tariff measures that limit the quantity or value of an imported or exported good or service. Specifically, this WTO dispute concerned nine measures related to the import licensing regime for horticultural products,[85] eight measures related to the import licensing system for animals and animal products, and one measure that established import restrictions on horticultural products, animals, and animal products when domestic supply was deemed sufficient to meet domestic demand. In total, 18 Indonesian measures were impacted by the dispute.[86]

As is common in agricultural trade, the numerous Indonesian import rules addressed in this dispute were complex. Imported agricultural goods were subject to different requirements and procedures, which were governed by several laws and regulations, administered by multiple government authorities. The measures at issue related to the Food Law,[87] Farmers Law,[88] Horticulture Law,[89] and Animal Law,[90] all of which had common stated policy objectives of "food sovereignty, sufficiency, independence, and food security."[91] The key Indonesian government authorities involved fell under the Ministry of Agriculture and Ministry of Trade.

Broadly, the Indonesian importation process for horticultural products required the importer to:

> (1) Obtain Importer Registration Number,
> (2) Obtain Horticultural Products Determination (depending upon the end-use, e.g. human consumption or further processing and manufacturing) from the Ministry of Trade,
> (3) Obtain Horticultural Products Import Recommendation (RIPH) from the Ministry of Agriculture,
> (4) Obtain Import Approval by the Ministry of Trade, and
> (5) Undergo a Technical Inquiry at the port of origin carried out by Surveyors from the Ministry of Trade.

Each of these elements above were subject to their own procedural requirements and the order of steps varied depending upon the end-use of the

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85 Panel Report, *Indonesia Horticultural Products*, *supra* note 84, ¶ 1.3

86 *Id*.

87 *See generally* Concerning Food, No. 18 (Indon. 2012).

88 *See generally* Concerning Protection and Empowerment of Farmers in Indonesia, No. 19 (2013).

89 *See generally* Concerning Horticulture, No. 13 (Indon. 2013).

90 *See generally* Animal Husbandry and Animal Health, No. 18 (Indon. 2009) (as revised by Concerning Husbandry and Animal Health, No. 41 (Indon. 2014)).

91 Panel Report, *Indonesia Horticultural Products*, *supra* note 84, ¶ 2.2.1.4.

imported product.[92] For example, Measure 1 in this dispute limited application windows and the validity period for the RIPH and Import Approval, while Measure 4 generally limited importation of horticultural products to certain time periods (as determined by the Ministry of Agriculture) before, during, and after the harvest season.[93]

Regarding animals and animal products, the Indonesian importation process differed slightly depending on the end-use and product type. To import animals and animal products, Indonesia required importers to:

(1) Obtain an Importer Registration Number,
(2) Obtain a Recommendation from the Ministry of Agriculture,
(3) Obtain Import Approval from the Ministry of Trade, and
(4) Obtain a Certificate of Health from the country of origin.

For cattle, beef meat, and offal, Indonesia also required a Product Designation from the Ministry of Agriculture for end-use human consumption. After the Panel was formed, Indonesia eliminated the product designation step. This change to the import licensing regime occurred with several other amendments to the requirements for importation of animal and animal products. As noted, eight measures related to the import licensing process for animals and animal products, broadly described above. For example, Measure 11 related to limitations on the application windows and validity periods for recommendations from the Ministry of Agriculture and Import Approvals from the Ministry of Trade, while Measure 16 established a reference price system for beef imports and "suspension of imports when the domestic market price of secondary beef cuts falls below the pre-established reference price."

Following failed consultations with Indonesia regarding its import licensing regime for horticultural products, animals, and animal products, New Zealand and the United States each requested the establishment of a Panel on March 18, 2015. Roughly two months later, on May 20, 2015, a single Panel was established.

New Zealand and the United States asserted the eighteen measures at issue violated GATT Article XI:1 and Article 4.2 of the Agreement on Agriculture. The following is a reproduction of the table of these eighteen measures as set forth by the Panel:[94]

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92 *See* Panel Report, *Indonesia Horticultural Products*, *supra* note 84, ¶¶ 2.2.2–2.2.2.1.5, 2.2.3.

93 *Id*. ¶¶ 2.3.2.1, 2.3.2.4.

94 *Id*. ¶ 2.32 (emphasis original).

Discrete Elements of the Regime:	
Measure 1	Limited application windows and validity periods
Measure 2	Periodic and fixed import terms
Measure 3	80% realization requirement
Measure 4	Harvest period requirement
Measure 5	Storage ownership and capacity requirements
Measure 6	Use, sale and distribution requirements for horticultural products
Measure 7	Reference prices for chillies and fresh shallots for consumption
Measure 8	Six-month harvest requirement
Regime as a Whole:	
Measure 9	Import licensing regime for horticultural products *as a whole*
Discrete Elements of the Regime:	
Measure 10	Prohibition of importation of certain animals and animal products, except in emergency circumstances
Measure 11	Limited application window and validity periods
Measure 12	Periodic and fixed import terms
Measure 13	80% realization requirement
Measure 14	Use, sale and distribution of imported bovine meat and offal requirements
Measure 15	Domestic purchase requirement
Measure 16	Beef reference price
Regime as a Whole:	
Measure 17	Import licensing regime for animals and animal products *as a whole*
Measure 18	Sufficiency of domestic production to fulfil domestic demand

In particular, the claims regarding Measures 1 through 8 concerned "discrete elements of Indonesia's import licensing regime for horticultural products." The complaint regarding Measure 9 implicated "Indonesia's import licensing regime for horticultural products as a whole."[95] Similarly, the claims for Measures 10 through 16 related to "discrete elements of Indonesia's import licensing regime for animals and animal products," and Measure 17 addressed "Indonesia's import licensing regime for animals and animal products as a whole."[96] The co-complainants also challenged Measure 18, "the requirement whereby importation of horticultural products, animals, and animal products depends upon Indonesia's determination of the sufficiency of domestic supply to satisfy domestic demand."[97] In addition, New Zealand and the United States asserted Measures 6, 14, and 15 violated GATT Article III: 4, while Measures 1 and 11 violate Article 3.2 (or, if not, then Article 2.2(a)) of the Import Licensing Agreement.

The Panel found all 18 Measures in violation of GATT Article XI: 1. Specifically, "by virtue of their design, architecture, and revealing structure:"

> (a) Measures 1 through 7, 9, and 11 through 17 "constitute a restriction having a limiting effect on importation"
> (b) Measures 8 and 10 "constitute a prohibition on importation"
> (c) Measure 18 "constitutes a restriction having a limiting effect on importation."

The Panel also found that Indonesia failed to mount a successful defense under GATT Article XX. In light of these findings, the Panel decided not to rule on whether the eighteen Measures also violated Article 4.2 of the Agreement on Agriculture or on the complaints related to GATT Article III:4 and Articles 3.2 or 2.2(a) of the Import Licensing Agreement.

The Panel Report was adopted on December 22, 2016, and on February 17, 2017, Indonesia appealed certain findings.[98] There were two main issues of importance on appeal.[99] Indonesia asserted:

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[95] Appellate Body Report, *Indonesia–Importation of Horticultural Products, Animals and Animal Products*, ¶ 1.3 & n. 5, WTO Doc. WT/DS477/AB/R (complaint by United States), WT/DS478/AB/R (complaint by New Zealand) (adopted Nov., 22, 2017) [hereinafter Appellate Body Report, *Indonesia Horticultural Products*].

[96] *Id*. ¶ 1.3 & n.6.

[97] *Id*. ¶ 1.3.

[98] *See generally id*.

[99] Indonesia had several other appeals that are not taken up in this article.

First, Indonesia claimed the Panel "erred in determining that Indonesia bears the burden of proof under the second part of footnote 1 to Article 4.2 of the Agreement on Agriculture." Appellate Body Report, *Indonesia Horticultural Products*, *supra* note 95, ¶ 4.1.

Second, Indonesia asserted "the Panel failed to make an objective assessment of the matter under Article 11 of the DSU." *Id.*

> [T]he Panel erred in finding that Article XI:1 of the GATT 1994 deals more specifically with quantitative restrictions on agricultural products than Article 4.2 of the Agreement on Agriculture, and accordingly, [that] the Panel erred in considering the co-complainants' claims under Article XI:1 of the GATT 1994 rather than under Article 4.2 of the Agreement on Agriculture.[100]

The AB upheld the related Panel determinations and findings.[101]

3. Issue 1: Relationship between GATT Article XI and *Agriculture Agreement* Article 4

On appeal, Indonesia claimed the Panel erred "in assessing the 18 measures at issue under Article XI:1 of the GATT 1994 rather than Article 4.2 of the Agreement on Agriculture," because Article 4.2 was the "provision [that] dealt specifically with quantitative restrictions."[102] Indonesia asserted if "the Agreement on Agriculture contains specific provisions dealing specifically with the same matter [at issue,]" then it "would apply to the exclusion of more general agreements, such as the GATT 1994."[103] Therefore, because Article 4.2 of the Agreement on Agriculture "contains more specific substantive and procedural rules" than does GATT Article XI:1, the Panel should have found that Article 4.2 of the Agreement on Agriculture applies exclusively "by virtue of Article 21.1 of the Agreement on Agriculture."[104] Specifically, Indonesia claimed the language "subject to" in Article 21.1 should have led the Panel to find that the Agreement on Agriculture "prevails over the GATT 1994, because Article XI:1 and Article 4.2 concern the same matter, and Article 4.2 contains specific provisions dealing specifically with the measures at issue from both a substantive and a procedural perspective," regardless of whether a conflict between the provisions exists.[105]

Third, Indonesia asserted that if the Panel finding under GATT Article XI:1 was upheld, that the Panel erred in finding GATT Article XI:2(c) was "rendered inoperative by Article 4.2 of the Agreement on Agriculture. *Id.*

Fourth, Indonesia challenged the Panel's findings that it failed to justify Measures 9 through 17 under GATT Article XX(a), (b), or (d). *Id.* The Appellate Body declined to rule on this claim, ruling the Panel's corresponding finding to be "moot and of no legal effect." *Id.* ¶ 6.8(a).

100 Appellate Body Report, *Indonesia Horticultural Products*, *supra* note 95, ¶ 4.1(a).

101 *Id.* ¶¶ 6.2, 6.5–6.6.

102 *Id.* ¶ 5.5.

103 *Id.* ¶ 5.1.1 n.58.

104 *Id.* (emphasis original).

105 Appellate Body Report, *Indonesia Horticultural Products*, *supra* note 95, ¶ 5.5.

To determine the relationship between GATT Article XI:1 and Article 4.2 of the Agreement on Agriculture, in the context of Article 21.1 of the Agreement of Agriculture, the AB first assessed the meaning of Article 21.1. Article 21.1 states: "The provisions of GATT 1994 and of other Multilateral Trade Agreements in Annex 1A to the WTO Agreement shall apply subject to the provisions of this Agreement."

The AB determined there is no explicit statement that the Agreement on Agriculture excludes application of GATT 1994 or other Multilateral Trade Agreements in Annex 1A. Further, pursuant to its assessments in *EC–Export Subsidies* and *EC–Bananas III*, the AB determined the Agreement on Agriculture and the GATT 1994 apply cumulatively where no inconsistency exists. In light of this determination, the AB dismissed the Indonesian assertion that the Agreement on Agriculture applied to the exclusion of the GATT 1994 on the basis that the Agreement on Agriculture contains more specific provisions dealing with the eighteen measures at issue.[106]

Second, the AB looked at whether GATT Article XI:1 and Article 4.2 of the Agreement on Agriculture can be read cumulatively, or if there is a conflict or other reason for not doing so. The AB found that both Articles "contain the same substantive obligations"[107] to avoid quantitative import restrictions on agricultural products, and therefore such measures would be prohibited under both provisions. This assessment also aligned with the AB analysis in *Chile – Price Band System*.[108] According to the AB, the Panel would have had to undertake the same analysis under each provision to determine whether the 18 measures were quantitative import restrictions. The GATT Article XX exceptions also apply to both provisions, and the AB noted that the same burden of proof would apply to each provision. In addition, the remedy for each violation is identical, namely, to "bring the measure into conformity with these provisions."[109]

4. Holding and Rationale: Issue 1

Based on a plain reading of the text and findings from relevant, past AB Reports as described above, the AB in this case determined that:

> Article 4.2 of the Agreement on Agriculture does not apply "to the exclusion of" Article XI:1 of the GATT 1994 in relation to the claims challenging the 18 measures at issue as quantitative restrictions. Both provisions contain the same substantive

[106] Appellate Body Report, *Indonesia Horticultural Products*, *supra* note 95, ¶¶ 5.7–5.12.

[107] *Id*. ¶ 5.16.

[108] *Id*. ¶ 5.15, n.85.

[109] *Id*. ¶ 5.15.

> obligations in relation to these claims and, thus, in these circumstances, they apply cumulatively.[110]

5. Issue 2: Sequencing of Analysis of GATT and Agriculture Agreement Provisions

On appeal, the AB also undertook an analysis of whether, when Article XI:1 and Article 4.2 apply cumulatively as it determined above, the Panel should have sequenced its analysis in a particular order. The Panel determined that GATT Article XI:1 more specifically addresses quantitative restrictions than Article 4.2 of the Agreement on Agriculture, which also addresses "measures other than quantitative restrictions."[111] In light of this determination, the Panel only assessed the conformity of the 18 measures under Article XI:1 and did not rule on whether they violate Article 4.2. Indonesia asserted this was an error of law and that the Panel should have found that Article 4.2 applies more specifically to the measures at issue.

The AB ultimately determined the Panel has discretion on the order of analysis between Article XI:1 and Article 4.2, as there is no mandatory sequence.[112] This determination was based primarily on considerations by the AB Reports *Canada–Wheat Exports and Grain Imports* and *Canada–Renewable Energy / Canada–Feed-in Tariff Program*. According to the AB in *Canada–Wheat Exports and Grain Imports*, "the nature of the relationship between two provisions . . . determine whether there exists a mandatory sequence of analysis." Further, in some cases, the relationship is such that following an illogical sequence of analysis would result in substantively different outcomes.[113] In addition, the AB noted in *Canada–Renewable Energy / Canada–Feed-in Tariff Program* that the agreements at issue did not indicate a mandatory sequence of analysis. In that case, the AB determined that unless a different sequence of analysis would lead to a different substantive outcome, the Panel has discretion on how to order its analysis.[114]

6. Holding and Rationale: Issue 2

Thus, the Appellate Body found that:

> [T]here is no mandatory sequence of analysis between Article 4.2 of the Agreement on Agriculture and Article XI:1 of the GATT 1994 in this dispute, and the decision as to whether to commence

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110 Appellate Body Report, *Indonesia Horticultural Products*, *supra* note 95, ¶ 6.2.
111 *Id*. ¶ 5.19.
112 *Id*. ¶ 5.25.
113 *Id*. ¶ 5.22.
114 *Id*.

> the analysis with the claims under Article XI:1 or those under Article 4.2 was within the Panel's margin of discretion.[115]

Here, the AB found that the provisions are "substantively and procedurally the same insofar as they apply to the co-complainants' claims challenging the 18 measures at issue," and Indonesia did not demonstrate why a different sequence of analysis would have impacted the substantive outcome of this dispute.[116] The AB noted the analysis by the Panel of the GATT XX exceptions asserted by Indonesia would yield the same result regardless of whether they sought to justify violations under GATT Article XI:1 or Article 4.2 of the Agreement on Agriculture. Finally, the AB stated the Panel could have switched the sequence, ruling on the Article 4.2 of the Agreement on Agriculture claims and GATT XX justifications first, and then used judicial economy to refrain from ruling on the GATT Article XI:1 claims.[117]

7. Commentary

a. Indonesia Case Illustrative of Protectionist Trade Policy Trend

The 18 Indonesian measures in this dispute are part of a national trend that, on balance, favors protectionist policies. After enacting IMF-led reforms toward trade liberalization in the late 1990s and early 2000s, Indonesia returned to tightening trade restrictions in the wake of the global financial crisis.[118] Nontariff measures on agricultural products, including the quantitative import measures at issue in this case, continued to grow after 2008, as did Indonesian trade restraints on telecommunication equipment, raw minerals, alcoholic beverages, and foreign professional services.[119] The rise of protectionist policies across sectors in Indonesia has not only led to disputes like this one at the WTO but also pauses in bilateral FTA negotiations with key Indonesian trading partners, including the European Union (EU) and Australia.[120]

Indonesia is not alone in enacting protectionist trade measures over the past decade. Indeed, its measures are part of a global trend of "creeping"

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115 Appellate Body Report, *Indonesia Horticultural Products*, *supra* note 95, ¶ 6.2.

116 *Id*. ¶ 5.23.

117 *Id*.

118 ARIANTO A. PATUNRU & SJAMSU RAHARDJA, TRADE PROTECTIONISM IN INDONESIA: BAD TIMES AND BAD POLICY 7 (2015), https://www.lowyinstitute.org/sites/default/files/patunru_and_rahardja_trade_protectionism_in_indonesia_0_0.pdf.

119 The trade controls exercised by the government may also fit into a broader set of policies designed to enhance the President's control over the country. An example of these policies is the recently enacted jail-time penalties for criticizing national politicians. *See Indonesia Makes Criticizing Politicians a Crime*, THE STAR ONLINE (Mar. 15, 2018, 6:38 PM), https://www.thestar.com.my/news/regional/2018/03/15/indonesia-makes-criticising-politicians-a-crime/.

120 PATUNRU & RAHARDJA, *supra* note 118, at 5.

protectionism.[121] In the decades prior to the crisis, a global wave of trade liberalization had taken place and a period of sharper economic growth in emerging market economies occurred.[122] As the global economy contracted, countries turned away from the liberalization policies of the past decade and slowly and steadily began making moves to protect national interests and industries through both tariff and non-tariff measures.

Indonesia's quantitative import restrictions in this case are examples of nontariff measures, which stand in contrast to tariff measures like the recent tariff rate increases on steel and aluminum announced by the Trump Administration, yet both are part of the same trend. Since the global financial crisis, 7,000 protectionist trade policies have been adopted by the top 60 economies in the world according to a 2017 report from the law firm Growling WLG.[123] Notably, some of the very WTO Members increasing their own protectionist trade policies are at the same time using the WTO dispute settlement mechanism to reduce barriers abroad. For example, although the United States was a co-complainant in this dispute, from 2009 to 2017 it had enacted 1,297 trade restrictive measures and only 206 trade liberalizing measures the most number of protectionist measures during that period.[124] In general, protectionist policies around the world have tended to focus on non-tariff measures over increases in tariffs. However, with the recent tariff increases announced by the United States, that focus could shift.

b. Unintended Consequences of Indonesian Protectionist Policies

Regardless of a measure's category, protectionist policies can often have unintended consequences. Careful consideration is needed to ensure the design and implementation of measures that impose quantitative restrictions on trade avoid some of the common pitfalls. These include increasing the price of protected goods to consumers and vulnerability of the system to corruption.

For Indonesia, these risks became a reality. There was evidence the import restrictions themselves seemed to be driving up price of beef within Indonesia,

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[121] *See* Shawn Donnan, *WTO Warns on Rise of Protectionist Measures by G20 Economies*, FIN. TIMES (June 21, 2016), https://www.ft.com/content/2dd0ecc4-3768-11e6-a780-b48ed7b6126f; Mariem Malouche & Julia Oliver, *Rise of Non-Tariff Protectionism Amid Global Uncertainty*, THE WORLD BANK (Jan. 31, 2012), https://blogs.worldbank.org/trade/rise-of-non-tariff-protectionism-amid-global-uncertainty.

[122] MATTHIEU BUSSIERE ET AL., PROTECTIONIST RESPONSES TO THE CRISIS: GLOBAL TRENDS AND IMPLICATIONS 5 (2010), https://www.ecb.europa.eu/pub/pdf/scpops/ecbocp110.pdf?a9e5d9a3d7fab9edc635261bb6dcb1de.

[123] Ashley Kirk, *Mapped: Protectionism is on the rise as US and EU implement thousands of restrictive trade measures*, THE TELEGRAPH, Nov. 28, 2017, https://www.telegraph.co.uk/business/2017/11/28/mapped-protectionism-rise-us-eu-implement-thousands-restrictive/.

[124] *Id*.

making it difficult, if not impossible, for consumers to afford.[125] In addition, the opportunity to make money though the allocation of import quotas became a major challenge for the Indonesian government. The accusations around corruption and bribery by Indonesian politicians were quite public due in part to the salaciousness of the circumstances surrounding them. In a string of scandals commonly referred to as "beef-gate," multiple members of the Prosperous Justice Party (P.K.S.), a popular political party that ran on morality and anti-corruption, were reportedly involved in bribery issues surrounding the issuance of beef import quotas. Early on in beef-gate, an aide to the chairman of the P.K.S. was found in a hotel room with a young woman and a suitcase of money, which reportedly was from a local company that wanted a larger share of a beef import quota. This revelation was one of several corrupt activities related to the beef import quotas by other party members.[126]

III. TRADE REMEDIES – DUMPING MARGIN ADJUSTMENTS AND ON-THE-SPOT INVESTIGATIONS

A. Citation

WTO Appellate Body Report, *European Union–Anti-Dumping Measures on Imports of Certain Fatty Alcohols from Indonesia*, WT/DS442/AB/R (adopted Sept. 29, 2017) ("*EU Fatty Alcohols*").[127]

B. Facts

European Union (EU) authorities began an anti-dumping investigation on August 13, 2010, of imports of certain fatty alcohols and their blends originating in India, Indonesia, and Malaysia.[128] The EU authorities attempted to calculate the normal values and export prices of the exporting producers on an ex-works (EXW)

[125] *See* P.U. HADI ET. AL., IMPROVING INDONESIA'S BEEF INDUSTRY 3 (2002), https://ageconsearch.umn.edu/bitstream/114076/2/mn95.pdf; *see also* Kiki Siregar, *Indonesia hit by soaring beef price*, BBC NEWS (Aug. 17, 2015), https://www.bbc.com/news/av/business-33955802/indonesia-hit-by-soaring-beef-price.

[126] *See* Joe Cochrane, *'Beef-gate' Transfixes Scandal-Prone Indonesia*, N.Y. TIMES, May 16, 2013, http://www.nytimes.com/2013/05/17/world/asia/beefgate-transfixes-scandal-prone-indonesia.html; AFP, *Allegations of sex, bribes and money laundering in Indonesia's 'Beefgate*,' NEWS.COM.AU (Dec. 15, 2013, 10:25 PM), http://www.news.com.au/world/allegations-of-sex-bribes-and-money-laundering-in-indonesias-beefgate/news-story/969817ba1a7d3eabebc0dfff4c2e8f71.

[127] *See generally* Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29 (noting that at the Appellate stage, there were two Third Party participants: Korea and the United States).

[128] *Id*. ¶ 5.3.

basis.[129] Adjustments were made for differences in indirect taxes, transport, insurance, handling, loading and ancillary costs, packing costs, credit costs, and commissions.[130]

One such commission was a mark-up paid by PT Musim Mas to Inter-Continental Oils & Fats Pte Ltd–Singapore (ICOF-S), which the EU deducted from export price per EU Basic Anti-Dumping Regulation Article 2(10).[131] PT Musim Mas is an Indonesian producer of those intermediary products called fatty alcohols which are mainly used as inputs to produce household, cleaning, and personal care products, and detergents.[132] ICOF-S is a trading company based in Singapore, through whom PT Musim Mas exported its products.[133] Because there was no corresponding pricing component on the domestic side, the EU characterized this mark-up as a commission and treated it as a difference affecting price comparability and made a downward adjustment to the export price.[134] Subsequently, the EU imposed a provisional anti-dumping rate of 4.3% on PT Musim Mas.[135]

Indonesia argued to the EU that this anti-dumping duty was improper because the mark-up from PT Musim Mas to ICOF-S was not a commission and should not have been deducted from the export price.[136] Rather, this difference in price was, in essence, part of the operating costs inherent in maintaining PT Musim Mas and ICOF-S together as a "single economic entity."[137] Also, Indonesia claimed that ICOF-S "carries out exactly the same functions for domestic sales as for export sales," and so any adjustment the EU made to the export price should have also been made to the domestic price.[138]

After its unsuccessful challenge at the EU's General Court, Indonesia requested a WTO Panel, which was established on June 25, 2013.[139] The Panel found the EU's anti-dumping duty was not inconsistent with Article 2.4 as applied. But the Panel did say the EU had not complied with the reporting requirements for on-the-spot investigations under Article 6.7. Both parties appealed the Panel's Report; Indonesia appealing the Article 2.4 decision and the EU appealing the Article 6.7 decision.

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129 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.4.
130 *Id*.
131 *Id*. ¶ 5.5.
132 *Id*. ¶ 5.5, n.3.
133 *Id*. ¶ 5.5.
134 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.5.
135 *Id*.
136 *Id*. ¶ 5.7.
137 *Id*.
138 *Id*.
139 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶¶ 5.10, 1.1.

C. Issue 1: *AD Agreement* Article 2:4 and Downward Adjustment to Export Price for Mark-Up Paid

> The issue Indonesia raised on appeal was whether the Panel erred in its interpretation and application of Article 2.4 of the Anti-Dumping Agreement in finding that Indonesia had not demonstrated that the EU authorities made an improper deduction for a factor that did not affect price comparability. Before the Panel, Indonesia had helpfully narrowed the issue: no evaluation needed to be made of the amount of the adjustment because the issue was *whether* any adjustment should be made.[140] Indonesia argued the EU should not have made any adjustment to the export price in relation to the mark-up because it was an internal transfer of funds within a "single economic entity."[141]

According to Indonesia, the costs of services performed by entities within a single economic entity are, for dumping purposes, indirect selling expenses that are included in the normal value and export price and may therefore not be deducted from the normal value or export price.[142] Therefore, by Indonesia's reasoning, the existence of a single economic entity was dispositive of the issue, barring the EU from making an adjustment to correct for the mark-up.[143] On appeal, third party United States supported the Panel's position that "whether an entity constitutes a single economic entity would not be dispositive of the need for adjustments under Article 2.4 of the Anti-Dumping Agreement, and that, depending on the underlying facts, transactions between affiliated entities may impact price comparability."[144]

D. Holding and Rationale

1. Interpretation of Article 2.4

Article 2.4 is broad enough to encompass a wide array of factors which can affect price, including a commission paid.

> 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 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

140 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.14.
141 *Id*. ¶¶ 5.15, 5.26.
142 *Id*. ¶ 5.48.
143 *Id*. ¶¶ 5.15, 5.26.
144 *Id*. ¶ 5.28.

> terms of sale, taxation, levels of trade, quantities, physical characteristics, and any other differences which are also demonstrated to affect price comparability. In the cases referred to in paragraph 3, 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.[145]

The AB took the sentences of Article 2.4 in turn, noting that the first sentence establishes the guiding principle of the paragraph: a fair comparison.[146] The AB takes pains to stress that Article 2.4 goes beyond allowing investigating authorities to compare normal value and export price. The plain language of Article 2.4 sets left and right limits on the methodology used to make the comparison.

For a comparison to be fair, it must be unbiased, objective, and even-handed. The second sentence of Article 2.4 identifies basic parameters that further the goal of achieving a fair comparison, requiring investigating authorities to make the comparison at the same level of trade, normally at the ex-factory level, and in respect of sales made at as nearly as possible the same time.[147] Members are clearly and plainly required to be precise in their calculations in the context of an anti-dumping investigation.

In just a paragraph or two packed with citations, the AB reminds Indonesia, the EU, third parties Korea and the United States, and all WTO Members of previously established meanings. The AB cites to *US–Softwood Lumber V*, *US–Hot Rolled Steel*, *US–Zeroing (EC)*, and *EC–Fasteners (China)* as having established the meanings of "fair," "differences," "affect[ing] price comparability," "allowances," and even "due."[148] In short, the Member seeking to impose an anti-dumping duty must be careful in adjusting for differences which affect price comparability. "If proper 'allowances' are not made, then the comparison made by the investigating authorities between the export price and the normal value will, by definition, not be 'fair.'"[149]

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[145] Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, Apr. 15, 1994, art. 2.4 [hereinafter Anti-Dumping Agreement].

[146] Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶¶ 5.20–21.

[147] *Id*. ¶ 5.21 (citing Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, ¶ 176, WT/DS184/AB/R (adopted Aug. 23, 2001)).

[148] *Id*. ¶¶ 5.20–22.

[149] *Id*. ¶ 5.22.

While the AB cites precedent, it is careful to say those prior cases can only serve to illuminate. "Findings by panels and the Appellate Body in prior disputes illustrate, to an extent, certain differences that may affect price comparability within the meaning of Article 2.4."[150] There can be no bright line rule for AD investigations for two reasons. First, the plain language of Article 2.4 states that "due allowance shall be made in each case, on its merits," making a case-by-case evaluation mandatory by the terms of the *AD Agreement*. Second, and perhaps more importantly, real-life practical matters like differences in corporate structure, shipping arrangements, tax schemes, and export controls will force case-by-case evaluation by investigation authorities anyway. Therefore, the text of Article 2.4 is precisely appropriate in that it does not exclude any "due allowances" made with respect to any type of difference, merely requiring it be a difference affecting price comparability.[151] This flexibility is what gives Article 2.4 its strength: it allows investigating authorities to account for circumstances on the ground.

Further, the flexibility inherent in the phrase "due allowances" in Article 2.4 renders the type of bright line rule sought by Indonesia nearly impossible. That is, Indonesia argued the existence of a "single economic entity" is dispositive of whether a given mark-up qualifies as a difference which affects price comparability under Article 2.4, and that the Panel erred because its decision contained no reference to a single economic entity.[152] The AB made clear the Panel was correct in assessing multiple factors affecting price comparability, not treating any one as dispositive, especially the existence of "a single economic entity."[153] "The text of Article 2.4 does not contain the words 'single economic entity', nor does it contain any explicit reference to affiliations or relationships between different entities."[154]

Rather, Article 2.4 instructs investigating authorities to account for all factors which could affect price comparability, weighing them, scrutinizing them, and then making "due allowances" to account for differences in export price and normal value. "It follows that the existence of a close relationship between transacting companies would be pertinent to the extent that the relationship affects the relevant transactions in such a way as to affect the comparability of the export price and normal value."[155] In short, the existence of a "single economic entity" is relevant to an anti-dumping investigation, just not dispositive, as Indonesia would have it. In point of fact,

> [T]he "dividing line" between (a) an internal allocation of funds within a single economic entity which is not reflected in the producer's pricing decision and (b) an expense that is linked to either the export side or the domestic side or to both sides but with different amounts such that price comparability is affected,

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150 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.24.
151 *Id*.
152 *Id*. ¶ 5.29.
153 *Id*. ¶ 5.44.
154 *Id*. ¶ 5.31.
155 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.33.

> is dependent on the particular situation and evidence before the investigating authority in a given case. . . .

The AB, in upholding the Panel on this point, makes it clear that the existence of a "single economic entity" is so relevant that perhaps future investigating authorities in future AD cases who ignore it as a difference affecting price comparability do so at their peril. The AB returns to precedent to illustrate its point, largely because Indonesia's citation to *US–Hot Rolled Steel* could not be ignored.

The AB's reasoning in *US–Hot-Rolled Steel* concerned transactions "in the ordinary course of trade" within the meaning of Article 2.1 of the Anti-Dumping Agreement, rather than "due allowances" within the meaning of Article 2.4. Nonetheless, the observations made in that dispute illustrate the diversity of possible permutations of transactions between related companies that an investigating authority may encounter in establishing the normal value, or the export price. The examples referred to by the AB in that dispute also illustrate that there are instances when the affiliation between transacting entities will have an impact on the dumping analysis, and there are other instances when such affiliation will not have an impact on the dumping analysis. The focus of the investigating authority's assessment is not on the nature of the relationship between related companies per se, but rather on whether that relationship can be demonstrated to be a factor that impacts the prices of the relevant transactions.[156]

This emphasis on case-by-case analysis is central to the reading of *EU Fatty Alcohols* in its entirety. With this focus on treating each case individually, the AB found that Indonesia had not demonstrated the Panel erred in its interpretation of Article 2.4, delineating its reasoning with precision. Having so found, we wish to be clear on what we are not saying. We are not ruling, nor do we consider that the Panel ruled, that the nature and degree of affiliation between related companies is irrelevant to the issue of whether any allowances should be made in order to ensure a fair comparison between the normal value and the export price.[157]

The interpretation of Article 2.4 dealt with, the AB moved on to the Panel's application of it in this case.

2. Application of Article 2.4

To begin with, the Panel's starting point was that Article 2.4 does not prescribe a specific methodology for ensuring a fair comparison.[158] So, the Panel examined the evidentiary basis for the EU's finding that ICOF-S had functions

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156 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶¶ 5.39, 5.40.

157 *Id*. ¶ 5.45.

158 *Id*. ¶ 5.56.

similar to those of an agent working on a commission basis.[159] The evidence presented was a) PT Musim Mas's direct sales to domestic and export customers as support to show ICOF-S was not an internal sales department of PT Musim Mas; b) records showing a substantial proportion of ICOF-S's trade was in products of unrelated entities; c) evidence suggesting ICOF-S was not dependent to any significant degree on PT Musim Mas for its revenue stream or the operation of its business; and finally, d) the Sales and Purchase Agreement between PT Musim Mas and ICOF-S.[160] The Panel concluded the EU had a sufficient evidentiary basis for establishing the mark-up was a factor which impacted prices exclusively on the export side, therefore constituting a difference which affects price comparability under Article 2.4.[161]

E. Issue 2: *AD Agreement* Article 6:7 and On-the-Spot Investigations

The issue raised by the European Union on appeal was whether the Panel erred in its interpretation and application of Article 6.7 of the Anti-Dumping Agreement in finding that the EU authorities failed to make available or disclose the results of the on-the-spot investigations to PT Musim Mas, and that the EU therefore acted inconsistently with Article 6.7.[162] The EU argued to the AB that the Panel had erred in interpreting Article 6.7 as imposing an obligation to provide a document setting out a complete description of the verification process.[163] The first document was a letter from the EU on November 5, 2010, announcing to PT Musim Mas that authorities would conduct on-the-spot investigations at PT Musim Mas in Indonesia and certain related companies, including ICOF-S in Singapore.[164] After those visits occurred in November 2010, the EU authorities informed PT Musim Mas of their provisional findings on May 11, 2011, and imposed a definitive anti-dumping duty on November 8, 2011. Article 6.7 of the Anti-Dumping Agreement provides:

> In order to verify information provided or to obtain further details, the authorities may carry out investigations in the territory of other Members as required, provided they obtain the agreement of the firms concerned and notify the representatives of the government of the Member in question, and unless that Member objects to the investigation. The procedures described in Annex I shall apply to investigations carried out in the territory of other Members. Subject to the requirement to protect

159 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.57.
160 *Id*.
161 *Id*. ¶ 5.58.
162 *Id*. ¶ 5.116.
163 *Id*.
164 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.117.

> confidential information, the authorities shall make the results of any such investigations available, or shall provide disclosure thereof pursuant to paragraph 9, to the firms to which they pertain and may make such results available to the applicants.[165]

The European Union argued the results of the investigation are the essential factual outcomes of the on-the-spot investigations, which may bear on the investigating authorities' decision whether to impose an anti-dumping measure, and the content of any such measure.[166] The EU claimed the Panel had erred in concluding the EU had not made available or disclosed the results of such investigations to PT Musim Mas.

F. Holdings and Rationales

The AB begins by observing that the word "results" is not explicitly limited or qualified by Article 6.7.[167] However, the results of on-the-spot investigations are necessarily connected to the overall process of the investigations.[168] The focus, for the AB, is on how the process begins. Paragraph 7 of Annex I of the *Anti-Dumping Agreement* starts off the process with questionnaires, noting that only after they have been received by investigating authorities should the on-the-spot investigations commence.[169] It follows logically that the questionnaires are a starting point for the on-the-spot investigation, and the obligation to disclose results also relates back to the information sought in the questionnaires. "[T]he process involves an on-site visit aimed at verifying the accuracy of such information and soliciting additional relevant information."[170]

Of course, verifying accuracy involves noting both presence and absence: "the 'results' of on-the-spot investigations encompass both the fact that certain information could be verified, as well as the fact that certain information could not."[171] The extent of information which could and could not be verified, and how much detail on each, which must be disclosed in results is limited by the overall purpose of Article 6. "Due process is promoted in various ways in the provisions of Article 6," says the Appellate Body as it places Article 6.7 in context.[172] "This context supports the view that, under Article 6.7, investigated firms must be informed of the 'results' in sufficient detail and in a timely manner so as to be placed

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165 Anti-Dumping Agreement, *supra* note 145, ¶ 6.7.
166 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.127.
167 *Id*. ¶ 5.133.
168 *Id*. ¶ 5.134.
169 *Id*.
170 *Id*.
171 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.135.
172 *Id*. ¶ 5.138.

in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation."[173]

Similar to its refrain of "case by case analysis" in its section on Article 2.4, the AB in this part of its opinion notes, "[t]he scope of the on-the-spot investigations and the ensuing results to be communicated to the investigated firms vary from case to case."[174] Despite this variance, the due process concerns remain the same.

> The disclosure of the "results" of the on-the-spot investigation must enable the firms to which they are communicated to discern the information that the authorities considered to have been successfully verified, as well as the information that could not be verified, and to be informed of the results in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation.[175]

Although each investigation may differ, every investigated firm has the same due process right and this fact allows the AB to uphold the Panel's surprisingly firm bright line rule.

The Panel had identified five elements which, in its view, were necessary for authorities to disclose "at a minimum." The five elements are:

> (1) The part of the questionnaire response or other information supplied for which supporting evidence was requested;
> (2) Whether any further information was requested;
> (3) Whether documents were collected by the investigating authorities;
> (4) Whether the producer made available the evidence and additional information requested; and
> (5) Whether the investigating authorities were or were not able to confirm the accuracy of the information supplied by the verified companies in, inter alia, their questionnaire responses.[176]

The AB upheld all five of these minimum requirements, finding the Panel's interpretation of Article 6.7 was correct before moving on to its application in this case.

With respect to the facts of *EU Fatty Alcohols*, the Panel reviewed documents the EU provided to PT Musim Mas to determine if those documents met the five minimum requirements. Taking the example of the Disclosure of definitive findings dated August 26, 2011, the Panel found that the information was largely

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173 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.138.

174 *Id*. ¶ 5.140.

175 *Id*.

176 *Id*. ¶ 5.146.

unrelated to the on-the-spot investigations at issue because it referred to fatty alcohol AD investigations in Malaysia and India, with only one passing reference to a verification visit at PT Musim Mas.[177] In total, the various documents, taken together, did not comprise the full extent of the results of the on-the-spot investigation.[178]

The AB particularized the EU's shortcomings with respect to the disclosure. "The EU authorities had not identified which elements of the information provided by the investigated firm in its questionnaire response they had sought to verify, which elements they had been able to verify successfully, and which elements they had been unable to verify."[179] The AB's decision in *EU Fatty Alcohols* provides an unusually firm rule in mandating compliance with Article 6.7. Besides the five minimum requirements outlined by the Panel, the AB focuses squarely on the spirit of due process, explaining the disclosure of the results of on-the-spot investigations "must" allow investigated firms to discern: a) the information investigators successfully verified; b) information that could not be verified; and c) in sufficient detail and in a timely manner so as to be placed in a position to defend effectively their interests in the remaining stages of the anti-dumping investigation.[180]

G. Commentary

If ever there were a case that exemplified a need for this publication, *EU Fatty Alcohols* would be it. The *WTO Case Review* is meant as a time-saver. Practitioners in international trade law do not have to read the entire 68-page AB Report to get the gist. The reviews here encapsulate the main ideas, hopefully allowing practitioners to sit and read an entire AB Report itself only if that case is particularly relevant to the practitioner's area.

With anti-dumping, certain AB Reports are indispensable for understanding the *AD Agreement* as a text, and as a set of obligations for WTO Members. *EU Fatty Alcohols* cites to several staple AD cases (e.g., *US–Hot Rolled Steel*, *EC–Fasteners (China)*), but extends understanding of AD obligations very little beyond those cases. Therefore, the review here can be brief. In fact, the case itself could almost be boiled down to a single sentence: "Rather, the Panel observed that Article 2.4 does not prescribe a specific methodology for ensuring a fair comparison."[181] Everything else the AB writes here flows from that single proposition. Without a specific methodology for fair comparison, all factors are eligible and must change from case to case. The Article 6.7 results-reporting obligation also changes concomitantly.

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177 Appellate Body Report, *EU Fatty Alcohols*, *supra* note 29, ¶ 5.157.
178 *Id*. ¶ 5.159.
179 *Id*. ¶ 5.161.
180 *Id*. ¶ 5.164.
181 *Id*. ¶ 5.56.

This simple statement allowed both the Panel and the AB to short-cut an argument here. Indonesia's argument that the companies at issue were together a single economic entity was never confronted head-on by either the Panel or the AB. Instead of reviewing the evidence to determine the precise nature of the corporate relationship between Indonesia-based PT Musim Mas and Singapore-based ICOF-S, and perhaps awkwardly and uncomfortably impeaching Indonesia on a dubious claim, the AB focused on the difference in price. Yet this focus is completely proper, and it certainly makes the case an easier precedent to follow. Future cases will not be encumbered with the need to decipher complex inner workings of corporations but will be free to focus only on the export price, normal value, and the differences affecting them.

IV. TRADE REMEDIES – TARGETED DUMPING AND ADVERSE FACTS AVAILABLE (AVA)

A. Citation

WTO Appellate Body Report, United States–Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China, WT/DS471/AB/R (adopted May 22, 2017) ("China Targeted Dumping").[182]

B. Facts: Two Step *Nails* Test to Detect Targeted Dumping[183]

In December 2013, China sued the United States about the methodology the US Department of Commerce (DOC) used in three anti-dumping (AD) investigations of Chinese subject merchandise, namely, coated paper for high-quality print graphics using sheet-fed presses (coated paper), oil country tubular goods (OCTG), and high-pressure steel cylinders (steel cylinders). These investigations were, respectively, the *Coated Paper*, *OCTG*, and *Steel Cylinder* cases.

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[182] Panel Report, *United States–Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WTO Doc. WT/DS471/R (adopted May 22, 2017) [hereinafter Panel Report, *Chinese Targeted Dumping*].

At the Appellate stage, there were 13 Third Party participants: Brazil, Canada, European Union, India, Japan, Korea, Norway, Russia, Saudi Arabia, Taiwan, Turkey, Ukraine, and Vietnam. Given its relationship to the respondent, Taiwan's presence is notable. The WTO affords one of the few (if not the only) international legal dispute settlement mechanisms in which China and Taiwan appear together, in the same case, on an equally respectable footing, to work out peaceably an important case.

[183] Appellate Body Report, *United States–Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, ¶¶ 1:1–1:2, 1:3 & n.4., WTO Doc. WT/DS471/AB/R (adopted Nov. 5, 2017) [hereinafter Appellate Body Report, *Chinese Targeted Dumping*].

At the Panel stage, China argued (*inter alia*) on an "as applied" basis, the DOC methodology violated Article VI:2 of the General Agreement on Tariffs and Trade (GATT), as well as Articles 2:4:2, 6:1, 6:8, 6:10, 9:2–4, and Annex II (Paragraph 7) of the WTO *Agreement on Antidumping* (*AD Agreement*). On appeal, China raised four arguments, all of which concerned the dumping margin determination. Three of the appellate issues were "as applied," and focused on the methodology's details based on China's allegation of two quantitative and one qualitative flaw in that methodology. The fourth appellate issue was an "as such" challenge to a data collection practice the DOC used.

On methodology, China argued, first, there were quantitative flaws in the so-called "Nails Test" the DOC used in the *OCTG*, *Coated Paper*, and *Steel Cylinder* cases.[184] Second, China said the DOC incorrectly evaluated qualitative factors when it determined whether prices differ "significantly."[185] Third, China contended the DOC was wrong in its determination of a "pattern" based on averages.[186] China alleged all three methodological defects violated Article 2:4:2 of the *AD Agreement*.[187] The Panel had ruled for the United States,[188] hence China sought a reversal.

The DOC used the *Nails* Test from 2008 to 2013 to satisfy Article 2:4:2 of the *AD Agreement*, in particular, the second sentence, also called the "Pattern Clause," to determine whether "targeted dumping" exists. The Test aims to find out whether there is a significant difference in the pattern of Export Prices to alleged "Target" purchasers compared to Export Prices of Non-Targeted Purchasers, or whether significant differences exist in the pattern of Export Prices amongst Target time periods and Non-Target time periods. (Targeted dumping also exists if the pattern differs as to geographic locations, but the Panel and Appellate Body did not describe the *Nails* Test as designed for Target versus Non-Target Places.)

The *Nails* Test entails two sequential steps: the "Standard Deviation Test," and the "Price Gap Test."[189] The Standard Deviation Test asks whether there is a "pattern" of Export Prices that differs among different buyers, times, or places. The Price Gap Test considers whether any differences found under the Standard Deviation Test are "significant." That is, the Standard Deviation Test focuses on pattern: 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 stresses significance: whether any difference matters, with a defined benchmark of average prices of regular (non-pattern) sales.

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184 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 1.3.

185 *Id*. ¶ 5.2.

186 *Id*.

187 *Id*.

188 *Id*. ¶ 5.2.

189 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.6–5.9 (in this poorly organized opinion, the Appellate Body explained the *Nails* Test, under "Background," rather than having a clear, complete statement of facts in Part I, "Introduction.").

In each step of the *Nails* Test, the DOC uses models of subject merchandise, assigning to each model a "Control Number," or "CONNUM." The DOC includes only those CONNUMS that were sold both to the target of the targeted dumping, and to non-targets.[190] And, each step of the Test itself consists of two parts—in effect, a four-phased, sequenced analysis to detect targeted dumping.

As for the Standard Deviation Test, its two parts are:

> (1) What sales are dumped, in a targeted sense?
>
> First, the DOC considers whether (1) the Weighted Average ("WA") Export Price to a target in a particular CONNUM, called the "Alleged Target Export Price," is below (2) a benchmark price. The DOC sets this benchmark price at one standard deviation below the WA Export Price in that CONNUM, and calls the benchmark the "CONNUM-Specific Weighted Average Export Price." So, with the comparison of (1) versus (2), the DOC asks whether the allegedly targeted dumped price is more than one standard deviation below a reasonable threshold. One standard deviation is the DOC's metric for non-random significance of Export Price differences.
>
> (2) How significant are targeted dumped sales?
>
> Second, in asking this question across all CONNUMs, the DOC checks the volume of sales to alleged targets. Suppose the volume of sales in a CONNUM in which the Alleged Target Export Price is below the CONNUM-Specific Weighted Average Price is more than 33% of the total volume of the respondent producer-exporters sales to the alleged target. Then, the DOC determines the Standard Deviation Test is passed for that CONNUM, and it proceeds to the Price Gap Test. (In computing these volumes, the DOC excludes sales to non-targets.) In effect, the 33% figure represents significance. The DOC rationale is that if more than one-third of allegedly dumped sales are priced below the one-

[190] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.6. Like the 2016 United States *Targeted Zeroing* case (discussed below), the Appellate Body here again fails to explain the concept of "model." From previous zeroing cases, particularly the 2001 *EC Bed Linen* dispute, it may be posited that different models are different types of subject merchandise, such as different kinds of coated paper, OCTG, or steel cylinders. The different types are all within the class or kind of merchandise being investigated, *i.e.*, they are all like products for purposes of the trade remedy case (in comparison to what is sold in China, and what is produced in the United States). But, certain features allow them to be grouped into categories with the fancy, if misleading, label "models."

> standard deviation price benchmark, then the targeted dumping matters.

In sum, the Standard Deviation Test asks whether there are Export Price differences that vary across buyers, time, or place. This Test identifies subject merchandise sold at Export Prices to buyers, at time periods, and/or in regions targeted by the respondent producer-exporter that are below a reasonable average (one standard deviation), and above a reasonable volume (33%).

The two parts of the Price Gap Test are:

(1) How big, in terms of price, is the targeted dumping?

> First, the DOC makes CONNUM-specific calculations about the difference between the (1) Alleged Target Export Price and (2) the next highest WA Non-Target Price. It also computes the Weighted Average of the gaps between individual Non-Target WA Prices. In other words, the DOC checks the gap in prices to alleged targets, and the gap in prices to non-targets. Logically, across all CONNUMS, the DOC asks whether the alleged Target Price Gap exceeds the WA Non-Target Price Gap. If the Target Price Gap is wider than the Non-Target Price Gap, then there is a wide difference in Gaps to targeted purchasers, times, or places, and non-targets.

(2) For big targeted dumped sales, how significant is the sales volume?

> Second, the DOC checks the extent of the Price Gap, using a five percent sales volume threshold. The DOC takes all CONNUMs in which the Alleged Target Price Gap is bigger than the Weighted Average Non-Target Price Gap and asks whether the sales of these CONNUMs to the alleged target exceeds five percent of the total sales to that target. (Here again, in computing these volumes, the DOC excludes sales to non-targets). If so, then the sales are not *de minimis*. That is, if more than five percent of the total sales of subject merchandise to a targeted purchaser, time, or place are at Price Gaps that are wider than the Gaps to non-targets, then the DOC considers those sales to be significant.

In sum, the Price Gap Test applies only to subject merchandise sales that pass the Standard Deviation Test, i.e., sales for which the DOC finds non-random departures in terms of sales price and quantity. But, the Standard Deviation Test does not address whether those deviant sales are big, in terms of varying from non-target sales, nor whether they are significant, in terms of total sales volume. The

Price Gap Test addresses these matters. It identifies targeted dumped sale prices that are widely different from non-targeted sales prices, and which are made in noteworthy volumes.

C. Overview of Panel and Appellate Body Findings

In respect of its claim about data collection, China argued against the DOC's "Use of Adverse Facts Available," or "AFA Norm."[191] The DOC systematically drew adverse inferences, and selected adverse facts available ("FA"), whenever it found that a non-market economy ("NME")-wide entity did not cooperate with its dumping margin investigation. China said the AFA Norm was more than mere repetition of conduct.[192] Rather, the Norm was certain and predictable, like any rule. Indeed, China said this Norm is a rule of general and prospective application, and can be challenged "as such" in a WTO dispute settlement proceeding.[193] Further, China argued the AFA Norm violates Article 6:8 and Annex II (Paragraph 7) of the *AD Agreement*. The Panel disagreed with China. It held the AFA Norm was not a rule of "general and prospective" application, and thus was immune from an "as such" challenge.[194]

China did convince the Panel that the DOC violated the second condition of the second sentence of Article 2:4:2 of the *AD Agreement*, with regard to the use of comparisons between weighted averages and individual transactions.[195] China also said the DOC gave no adequate explanation as to why individual transaction-to-individual transaction ("T-T") comparisons are ineffective in revealing targeted dumping. China's point was that Article 2:4:2 (second sentence) means what it says: both methodologies (including weighted average to weighted average comparisons) must be ruled out as incapable of accounting appropriately for pertinent distinctions in the pattern of Export Prices.[196] According to China, the DOC needs to rule out the other alternative, T-T comparisons, too. Moreover, said the Panel, the explanation the DOC did provide about WA-WA comparisons was poor, because it was premised on the DOC's use of zeroing in weighted average-individual transactions comparison methodology, as explained in the following paragraph.[197]

Indeed, said the Panel, Article 2:4:2 (second sentence) does not permit zeroing under the WA-T methodology. Therein was another flaw in the DOC's work, and the result was no surprise:

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191 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 4.2.
192 *See id*. ¶ 5.119.
193 *See id*. ¶ 1.6.c.ii.
194 *See id*. ¶ 4.2.a.
195 *See id*. ¶ 1.6.a.
196 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 1.6.a.
197 *See id*. ¶ 1.6.b.i.

> The WTO over the past two years [2016-2017] has repeatedly rejected the Commerce Department's use of "targeted dumping" and "zeroing" methodologies in anti-dumping investigations on Chinese imports, which have generally resulted in higher duties against Chinese imports.
>
> On average, foreign products are sold in the US at a fair price, but a subset of these products that are sold to one region or group of purchasers, or over a shorter period of time, is sold at less than fair value. This is known as targeted dumping.
>
> The US is concerned that the non-dumped sales mask the dumped sales. One response the Commerce Department historically used was the use of zeroing—essentially, not giving offsets from non-dumped sales against the dumped sales when calculating duty margins.
>
> US trade officials are still reeling from a series of WTO rulings over the past decade that barred Commerce's use of zeroing in all forms of dumping investigations and post-investigation reviews.
>
> The rulings condemned Commerce's ability to assign a margin of zero to merchandise sold at higher prices in the US than in the home market, which resulted in higher duty margins for an array of imported products, such as steel and washing machines, shrimp, and coated paper. The rulings frustrated US trade officials who backed the practice because it led to the higher margins.[198]

Still one other flaw was that the DOC applies WA-T comparisons to all export sale transactions of subject merchandise. The DOC ought to have restricted the comparisons to ones it found fell within the relevant pattern of differing Export Prices.

These Panel rulings were victories for China, and yet the Panel rejected most of China's arguments that the *Nails* Test fails to satisfy the first condition, about whether a "pattern" exists, under Article 2:4:2 (second sentence).[199] So, China appealed three claims it lost at the Panel stage.[200] All such claims were "as applied" ones, and on all three, China lost.[201] In essence, China did well at the Panel stage in defeating the United States on key aspects of the DOC's *Nails* Test and

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198 Bruce Baschuk, *US Must Modify Anti-dumping Regime by Aug. 22, WTO Says*, 35 INT'L TRADE REP. (BNA) 125 (2018).

199 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.2.

200 *See id.* ¶ 4.1.

201 *See id.*

methodology for detecting targeted dumping. But, on appeal, China did not knock out the rest of the problematic American behavior.

Two of China's claims on appeal were about quantitative flaws in the *Nails* Test, concerning the distribution of Export Price data the DOC uses to uncover a "pattern" of targeted dumping. First, does the existence of many low Export Prices preclude a finding that Export Prices to the target differ significantly from other Export Prices, and by extension preclude a finding of a "pattern"?[202] The AB said "no."[203] That is, under Article 2:4:2 (second sentence), even if there are many Export Prices that are low, it is still permissible to find a "pattern" of Export Prices that indicate targeted dumping.[204] Second, is the factual assumption on which China's claims about this flaw rest actually true? The AB again said "no."[205] In other words, China did not prove that there indeed were many low Export Prices in the three investigations at issue. So, ruling in favor of the United States, the AB upheld the finding of the Panel: China did not prove its claim that the DOC failed to identify a "pattern" of targeted dumping.

In upholding the Panel and finding for the United States, and coming to this conclusion, the AB said the Article 2:4:2 (second sentence) requirement for the DOC to identify Export Prices that differ "significantly" mandates both a quantitative and qualitative assessment.[206] For example, "objective market factors" about the nature of the subject merchandise, or the industry at issue, may be relevant. But, the requirement to identify whether Export Prices differ "significantly" does not mean the DOC must explain the reasons for differences in Export Prices, or examine whether the differences are or are not associated with targeted dumping.

Indeed, said the AB, Article 2:4:2 does not prescribe any particular method to identify a "pattern."[207] The provision does not, for instance, mandate comparisons of weighted average or individual transaction Export Prices. China was incorrect in saying the DOC violated Article 2:4:2 when the DOC found a "pattern" using average Export Prices. The second sentence of this provision allows dumping margin calculations based on W-T comparisons, but only to transactions that constitute the "pattern." It does not allow comparison methodologies to be combined, that is, to use both W-T to "pattern" transactions and W-W or T-T comparisons to non-pattern transactions. Accordingly, the Appellate Body set aside Panel statements that were premised on the misunderstanding that combining comparison methodologies was legal; comparison methodologies cannot be combined to establish dumping margins.

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202 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.2.

203 *See id.* ¶ 6.6.

204 *See id.* ¶¶ 6.5–6.6.

205 *See id.*

206 *See id.* ¶¶ 6.2–6.5.

207 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.105–5.107.

D. Issue 1: Article 2:4:2 (Second Sentence) and Alleged Quantitative Flaw with the Standard Deviation Step of the *Nails* Test[208]

Article 2:4:2 is the provision of the *AD Agreement* relevant to all of China's appellate arguments against the *Nails* Test. It says:

> Subject to the provisions governing fair comparison in paragraph 4 [explaining that "[a] fair comparison shall be made between the export price and the normal value"], 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.*[209]

In the first of its two long sentences, Article 2:4:2 identifies two symmetrical comparison methodologies, WA-WA and T-T. These comparisons—(1) Weighted Average Normal Value to Weighted Average Export Price of all comparable transactions, or (2) transaction-specific comparisons of individual Normal Values against Export Prices—"shall normally" be used by an investigating authority like the DOC when it calculates a dumping margin. The second sentence allows for an asymmetric comparison, the W-T method, whereby the DOC juxtaposes a Weighted Average Normal Value against Export Prices from individual transactions.

All three approaches are intuitive. WA-WA comparisons are like measuring marathon race times averaged for all comparable finishers, such as men in the same age division (such as 55-59), in two successive years under the same weather conditions (in effect, "WA1" and "WA2"). T-T comparisons are like measuring the finishing time of one marathoner ("T1") against another ("T2") in the same race. WA-T comparisons are like measuring a single marathoner ("T1" or "T2") against a benchmark ("WA1" or "WA2").

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208 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 4:1(a); 5:1–5:31; 6:1–6:2.

209 Anti-Dumping Agreement, *supra* note 145, ¶ 2.4.2 (emphasis added).

The second sentence consists of two parts, the "Pattern Clause" and the "Explanation Clause."[210] Each Clause sets one condition on when the DOC can depart from the "shall normally" language of the first sentence, and use asymmetric WA-T comparisons. That makes the second sentence non-intuitive, because in most aspects of daily life, including running, comparisons of individuals to an appropriate benchmark are the norm. The condition in the Pattern Clause is that an investigating authority must uncover a pattern of Export Prices that differs significantly across buyers, time, or places. In effect, this condition is targeted dumping, i.e., without using this term, the Pattern Clause mandates that the authority find targeted dumping is occurring. The condition in the Explanation Clause is that the authority explains why neither WA-WA nor T-T comparisons can unmask targeted dumping. This condition requires the authority to prove asymmetric comparisons are the only one of the three methodologies that will work to address these peculiar less-than-fair-value (LTFV) sales.

China challenged the WA-T method the DOC applied in the *Coated Paper*, *OCTG*, and *Steel Cylinders* investigations.[211] To satisfy the Pattern Clause condition, the DOC used the *Nails* Test.[212] With this Test, in the *Coated Paper* investigation, the DOC found a pattern of significantly different Export Prices among purchasers.[213] In the *OCTG* and *Steel Cylinders* cases, the DOC said the *Nails* Test showed significantly different Export Prices across time periods.[214] Hence, in these investigations, the DOC said it satisfied the Pattern Clause.[215] As to the Explanation Clause, the DOC said the differences in dumping margins using the WA-WA comparisons "conceal differences in price patterns between the targeted and non-targeted groups by averaging low-priced sales to the targeted group with high-priced sales to the non-targeted group."[216]

One quantitative flaw with the *Nails* Test, China said, is in the Standard Deviation Test.[217] China said that the DOC's use of a threshold of one standard deviation violates the Pattern Clause of Article 2:4:2.[218] That is because a one standard deviation metric assumes Export Price data fall into a statistical normal distribution (or otherwise have a single peak and are symmetrically distributed).[219]

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[210] *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.4, n.63.

[211] *See id.* ¶ 5.9.

[212] *See id.* ¶ 1.3, n.4.

[213] *See id.* ¶ 5.9.

[214] *See id.*

[215] *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.9.

[216] *Id.*

[217] *See id.* ¶ 5.14.

[218] *See id.*

[219] In a normal distribution, represented on a graph, data such as Export Prices appear as the shape of a bell:

> That bell has a single peak in the middle of the bell curve and two tails, one on the left and one on the right. In that type of

China said the DOC violated the Pattern Clause, because it never proved the Export Price data are normally distributed.[220] No valid conclusion can be drawn from a statistical test that relies on the concept of a standard deviation, unless the data to which that test is applied are normally distributed, because that concept itself presumes some kind of single-peak, symmetrical distribution. Many Export Prices might be below the one standard deviation metric when data are not normally distributed. China pointed out that with a one-standard deviation metric in a normal distribution, 15.87% of Export Prices would be below that threshold.[221] But, with a non-normal distribution, sometimes over 50% of the Export Prices are below one standard deviation.

So, China said the DOC should have examined the underlying Export Price distribution to confirm it was normal, to come to an objective, unbiased conclusion that a "pattern" exists.[222] If Export Price data are not single-peaked and symmetrically distributed, then the *Nails* Test generates arbitrary conclusions about a "pattern." That is what happened, said China.[223] By not checking for a normal distribution, the "pattern" of purportedly dumped prices actually are quite typical of the targeted markets (the 50% group), not exceptional to those markets (the 15.87% range). The *Nails* Test routinely discerns large quantities of sales at Export Prices below the one standard deviation benchmark.[224] That means the *Nails* Test undermines the exceptional nature of WA-T comparisons, wrongly mainstreaming them instead of treating them as genuinely unusual.

E. Holding and Rationale

The Panel rejected the Chinese argument about the first quantitative flaw, holding that China failed to prove that the *Nails* Test could be used only in instances of a normal distribution of Export Prices, hence there was no need for the DOC to verify that such a distribution existed.[225] The *Nails* Test can be used whether or not Export Price data are normally distributed. So, the Panel disagreed with China's contention about a large number of export transactions made at Export Prices that are one standard deviation below the CONNUM-specific WA price.[226] China said such Export Prices cannot form a "pattern," under the Article 2:4:2 (second

distribution, the weighted average of all prices is at the peak. Also, most of the prices are concentrated at the peak, whereas fewer prices are located at the tail. *Id.* ¶ 5.35, n.161.

220 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.14.
221 *See id.* ¶ 5.23.
222 *See id.* ¶ 5.20.
223 *See id.*
224 *See id.* ¶ 5.23.
225 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.19.
226 *See id.*

sentence) Pattern Clause, but the Panel said they could.[227] Moreover, contrary to China's contention, there was no textual basis in Article 2:4:2 (second sentence) to limit a "pattern" to outliers (essentially, deviant Export Prices, where deviance is not computed based on standard deviations). The Panel found that a "pattern" may be composed from many transactions.

On appeal, China made largely the same arguments, and lost again. But, at the outset, the United States urged the AB ought not to be examining the Chinese arguments.[228] That was because, said the United States, the alleged quantitative flaw was a question of fact (i.e., involving a factual finding about the study of statistics and practical operation of the *Nails* Test), not law (i.e., not of legal interpretation of the application of law to facts), and thus not appealable.[229] The AB observed that clear distinctions between purely factual and purely legal questions are hard to draw, and often it is faced with mixed issues of law and fact, such as the consistency of facts with the requirements of a GATT–WTO rule.[230] Rejecting the American characterization of the issue, the AB said the question was a legal one. Reexamining the Panel's work, the AB said the Panel held that: (1) the Pattern Clause allows an investigating authority to uncover a "pattern" from many transactions; (2) China failed to show the *Nails* Test relies, implicitly, on a normal distribution of Export Prices for a proper identification of a "pattern" under that Clause; and, therefore, (3) the Panel identified a "pattern" of "significant difference" under Article 2:4:2.[231] These conclusions are more than merely factual ones about how the *Nails* Test operates and whether it is premised on a normal distribution of data. They are about the words "pattern" and "significance" in the Pattern Clause. So, the conclusions are reviewable on appeal.

However, having lost the question of how to characterize the issue, the United States won the substantive debate on that issue. On the merits, the AB predictably turned to its 2016 precedent, *United States Targeted Dumping Zeroing*—the infamous Korea "Washing Machines" case.[232] The case is "infamous" because, in January 2018, the Trump Administration granted Section 201 Escape Clause relief against Korean and other foreign washers, in part out of concern that AD (and countervailing duty ("CVD")) actions against them were being circumvented.[233] The 2016 precedent teaches that a "pattern," as used in the Pattern Clause of Article 2:4:2 (second sentence), is a "regular and intelligible form

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227 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.19.

228 *See id*.

229 *See id*. ¶ 5.36.

230 *See id*. ¶ 5.18.

231 *See id*. ¶ 5.89–5.100.

232 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.90.

233 Appellate Body Report, *United States–Anti-dumping and Countervailing Duties on Large Residential Washers from Korea*, WTO Doc. WT/DS464/AB/R (adopted Sept. 26, 2016) [hereinafter Appellate Body Report, *US–Washing Machines*]. This decision is reviewed in the *WTO Case Review 2016*. *See* Raj Bhala et al., *WTO Case Review 2016*, 34 ARIZ. J. INT'L COMP. L. 281, 332 (2017).

or sequence discernible in certain actions or situations."[234] The sequence of significant differences in Export Prices to particular purchasers, in particular periods, or across particular regions, must not be random. Rather, the differences, to form a "pattern," must be regular and comprehensible. What makes those Export Prices a "pattern," that is, "regular" and "discernible," is that those Prices are charged only to a particular purchaser, at a particular time, or in a particular region. And, of course, the type of "pattern" that matters for targeted dumping is one where Export Prices regarding some buyers, times, or places are significantly lower than other Export Prices.

The AB quoted a key passage from this precedent:

> [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."[235]

The AB reiterated that this precedent, and the Article 2:4:2 (second sentence) text, tell investigating authorities what they should do (namely, find a "pattern"), but does not tell them how they should go about their work (e.g., using the *Nails* Test versus some other criteria).[236] Rather, an authority "enjoy[s] a margin of discretion regarding the methods or tools they wish to use in establishing the existence of a pattern."[237] In other words, the text preserves their sovereignty on how to do what they are supposed to do.

That was exactly the American point. Nothing in the text of Article 2:4:2 (second sentence) mandates that an investigating authority undertake a specific type of statistical analysis. Indeed, said the United States, the *Nails* Test is not a statistical analysis, in the sense of an inquiry from which statistical inferences are drawn.[238]

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[234] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5:21 (*quoting* Appellate Body Report, *US–Washing Machines*, *supra* note 233, ¶ 5:25, in turn *quoting* Panel Report, *United States–Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WTO Doc. WT/DS464/R, ¶ 7:45 (adopted Mar. 11, 2016)).

[235] Appellate Body Report, *US–Washing Machines*, *supra* note 233, ¶ 5.36 (emphasis original).

[236] *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.41.

[237] *See id*.

[238] *See id*. ¶ 5.24.

Rather, it is "a transparent, predictable, and objective metric to characterize an exporter's pricing behavior."[239]

China also tried a lexicographic argument about the word "significance." Citing (what else?) the online edition of the *Oxford English Dictionary* ("*OED*") China said "significant" means "unlikely to have occurred by chance alone."[240] But, said the AB (again citing its 2016 *Targeted Dumping Zeroing* precedent), "significance" in the context of the Pattern Clause does not have the narrow, or specialized, statistical meaning that China imparts.[241] Rather, "significant" means "important, notable, or consequential," i.e., something more than merely a nominal or marginal difference in Export Prices.

The AB rested its conclusions on familiar textual and contextual rationales drawn from Article 31 of the 1969 *Vienna Convention on the Law of Treaties*. Nothing in the text of Article 2:4:2 (second sentence) dictates how many Export Prices may fall within a pattern in proportion to Export Prices falling outside the pattern, nor whether a pattern can consist of only a small percentage of all transactions. So, China's point about the *Nails* Test routinely discerning large quantities of Export Prices below the one standard deviation threshold may be true, but it also is irrelevant. The text and context do not specify a proportion of Export Prices that must fall below a given threshold. The Americans were correct:

> In our [the Appellate Body's] view, that a large number of Export Prices may fall below the one standard deviation threshold *does not necessarily preclude* an investigating authority from finding that the Export Prices to the "target" (be it a purchaser, a region, or a time period) differ significantly from the other Export Prices and form a pattern within the meaning of the second sentence of Article 2:4:2. . . .
>
> In sum, *that a large number of Export Prices may fall below the one standard deviation threshold where the distribution of the Export Price data is not normal or single-peaked and symmetrical does not necessarily preclude an investigating authority from finding that the Export Prices to the "target" differ significantly from the other Export Prices and form a pattern within the meaning of the second sentence of Article 2:4:2*. . . . China has not established that the standard deviation test as applied by the USDOC in the three challenged investigations is only capable of identifying prices that differ from other Export Prices and form a pattern within the meaning of the second sentence of Article 2:4:2 where the distribution of

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[239] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.24 (quoting the United States appellate brief).

[240] *See id.* ¶ 5.26.

[241] *See id.* ¶ 5.26.

> the Export Price data is normal, or single-peaked and symmetrical.[242]

Again, an investigating authority needs to check for a regular and intelligible sequence of Export Prices that differ significantly from one buyer to another, one-time period to another, or one place to another. What makes them "regular and intelligible" is that they pertain only to that target buyer, time, or region.[243] What makes it possible for the authority to discern which Export Prices constitute the pattern are the significant differences between those Prices and other Export Prices not in the pattern.

6. Issue 2: Article 2:4:2 (Second Sentence) and Alleged Quantitative Flaw with the Price Gap Step of the *Nails* Test[244]

The Price Gap Test, which is Step Two of the *Nails* Test the DOC used in the *Coated Paper*, *OCTG*, and *Steel Cylinder* investigations, is about the "significance" of a "pattern" that the DOC finds in Step One, the Standard Deviation Test. The DOC looks to see, on a CONNUM-specific basis, whether the alleged Target Price Gap is wider than the WA Non-Target Price Gap. China's argument, alleging the DOC violated the Pattern Clause of Article 2:4:2 (second sentence), was again a statistical one.[245] China lost at the Panel stage, made similar arguments on appeal, and lost on appeal.[246] Put bluntly, the United States successfully defended, on the merits, the DOC's *Nails* Test.

China said that for any data distribution bearing a "peak" and "tails," the gap between any two given prices located at the tail is inherently wider than the gaps at the peak.[247] The United States agreed: "Both parties agree that the gaps between any two given prices located at the tail of the distribution are wider than that at the peak of the distribution if there is normal or single-peaked and symmetric distribution."[248]

The DOC computed Target Price Gaps based on Export Prices located at the tail of all Export Prices (whether Normally distributed or not), whereas it computed WA Non-Target Price Gaps based on prices nearer to the peak of all

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242 Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.28, 5.31 (emphasis added).

243 *Id*. ¶ 5.28.

244 *See id*. ¶¶ 4.1(a); 5.32–5:49; 6.3–6.4.

245 *See id*. ¶¶ 5.6, 5.33.

246 *See id*. ¶ 5.45.

247 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.33.

248 Panel Report, *Chinese Targeted Dumping*, *supra* note 182, ¶ 7.80.

Export Prices (again, regardless of whether the distribution was Normal).[249] The DOC said the Target Price Gaps were wider than the WA Non-Target Price Gaps.[250]

China replied, in essence, "of course they were wider, because the WA Non-Target Price Gaps are based on prices located near or at the peak."[251] Target Prices at the tail are spread out, because the tail is spread out. Non-Target Export Prices around the peak are bunched, because the peak is concentrated. Rather than prove "significant differences" within the Pattern Clause of Article 2:4:2 (second sentence), the DOC did nothing more than confirm what is an inherent feature of every peaked distribution with tails.[252]

G. Holding and Rationale

On appeal, China said the Panel wrongly dismissed its argument that even if Export Price data followed a normal distribution, attribution by the DOC of "significance" to wider price gaps in the tail of the distribution compared to price gaps closer to the mean of that Distribution merely confirms the innate characteristic of any normal distribution.[253] In other words, the DOC implicitly assumes (without proof) a normal distribution, finds wider Price Gaps at the tail than the peak, and thus does nothing more than confirm a characteristic of a Distribution that is Normal–kind of a tautology. However, that tautology is arbitrary, because it rests on the implicit assumption. The DOC should test the Export Price databases to see if they are normally distributed and have tails to the left of the mean:

> China argues that, irrespective of the actual distribution of the data in the three challenged investigations and whether the relevant distributions had a left tail at which the alleged Target Price Gap was located, the USDOC failed to identify a pattern of Export Prices which differ significantly because it failed to consider how the Export Prices were distributed.
>
> [T]he focus of China's claim . . . [is] that the USDOC had an obligation to verify, in the three challenged investigations, whether the data had a left tail and whether the alleged target price gap was based on prices located at that tail so as to avoid drawing random or arbitrary conclusions as to the existence of a pattern.[254]

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249 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.34–5.35.

250 *See id*. ¶ 5.36.

251 *See id*. ¶ 5.38.

252 *Id*. ¶ 5:34.

253 *See id*. ¶ 5.38.

254 Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.38.

The United States countered that China's argument was a question of fact, not law, but lost. Hence, the Appellate Body proceeded to consider the argument on the merits:

> [T]he issue on appeal is whether the Panel erred under the second sentence of Article 2:4:2 in rejecting, on the basis of factual considerations pertaining to the distribution of the Export Price data in the three challenged investigations, China's claim that the USDOC failed to identify a pattern of Export Prices which differ "significantly." This closely relates to the legal issue that was before the Panel, namely, whether, because of the . . . [implicit assumption of a Normal Distribution and confirmation of an inherent feature of that Distribution], the USDOC failed to identify a pattern of Export Prices which differ significantly within the meaning of the second sentence of Article 2:4:2. . . . [W]e consider that China's appeal raises a legal issue under Article 2:4:2.[255]

And, on the merits, the AB sided with the United States.[256]

The United States pointed out China's challenge was an "as applied" one.[257] Yet, China's argument was contradictory, because it was independent of actual Export Price sales data. China was making a point about normal distributions generally, regardless of the Export Price data in the *Coated Paper*, *OCTG*, and *Steel Cylinder* investigations.[258] The AB essentially agreed with the American argument. China failed to prove (at the Panel stage) that the DOC's implicit assumption about normal distribution was wrong. China cannot argue "as applied" that the DOC's behavior is inconsistent with Article 2:4:2 (second sentence), unless China proves the Export Price distributions in the three investigations have a left-hand tail, and that the Target Price Gap that the DOC computes is based on that tail.[259] Simply put, China might be right as a matter of statistical theory, but it did not link that theory to the facts of the case to support its as applied challenge.

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255 Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5:39.

256 *See id*. ¶ 5.45.

257 *See id*. ¶ 5.40.

258 *See id*. ¶ 5.41.

259 *Id*. ¶¶ 5.43–5.45. Relatedly, the Appellate Body ruled in favor of the United States that China failed to prove its argument that the Panel failed to make an "unbiased and objective" evaluation of the facts under Article 17:6(i) of the *AD Agreement*, with respect to both alleged quantitative flaws in the *Nails* Test. *See id*. ¶¶ 5.46–5.49.

H. Issue 3: Article 2:4:2 (Second Sentence) and Qualitative Flaws with the *Nails* Test[260]

In addition to the two quantitative flaws China said existed in the *Nails* Test, China urged that the Test suffered from a qualitative flaw.[261] China disputed the way in which the DOC considered qualitative factors when determining whether Export Prices differ "significantly" among purchases, periods, or places.

Article 2:4:2 (second sentence) has both a quantitative and qualitative dimension. As the Panel indicated, purely large quantitative (i.e., numerical) differences in Export Prices cannot, alone, justify the conclusion that those differences, which form a pattern, are "significant" under the Pattern Clause.[262] There must be some consideration as to whether the differences are qualitatively significant.

The Panel did not put it this way, but what it meant was "do not be entirely data driven; think about what the data means in common sense terms." And, in thinking about what the data mean, there are two separate questions to distinguish: "how?" and "why?" With respect to "how," the DOC might discover that a margin of difference in Export Prices is sufficiently great in mathematical terms, but not worthy of attention, and thus not "significant," in qualitative terms.[263] But, the DOC need not bother with the reasons for those differences—"why" they form the relevant pattern—in considering qualitative significance.

With respect to a qualitative analysis about the "significance" of Export Price pattern differences, China argued an investigating authority must consider objective market factors in deciding whether relevant Export Price differences are significant.[264] Such "objective" factors include seasonality (e.g., seasonal price cycles, or changes in consumer demand across different seasons of the years) and market-driven variations in production costs.[265] At the same time, China conceded the DOC is not required to examine subjective factors, like the exporter's motivation, or its intent to orchestrate observed price differences.[266] Specifically, China said the DOC must identify: (1) the reasons for those differences; and (2) whether those differences are connected to, or unconnected with, targeted dumping.[267]

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260 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 4:1(b); 5.50–5.71; 6.5.

261 *See id.* ¶ 4.1(b).

262 *See id.* ¶ 5.2.

263 *See id.* ¶ 5.54.

264 *See id*.

265 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.54.

266 *See id*.

267 *See id.* ¶ 5.51.

The Panel disagreed with China.[268] It was not willing to go so far as China was in telling the DOC what kind of qualitative analysis to perform.[269] China took its claim to the AB, and lost again.[270] At both levels, the judges said an investigating authority is required to determine how Export Prices differ, but not why they differ.[271] They rejected China's argument that the "how" and "why" questions cannot be disentangled.[272] That was the gist of China's losing argument, that "a distinction between *how* and *why* prices differ is meaningless, unless it is equated with a distinction between "objective market factors" and "subjective intent."[273]

I. Holding and Rationale

The Chinese argument never seems to have been spelled out clearly before the AB rejected it. The characterization of the Chinese argument—even after reading and rereading key passages, such as Paragraphs 5:59, 5:63, 5:66, and 5:68—suggests either the AB did not "get" China's argument, or China did not articulate it as powerfully as it should have. That was unfortunate for China, because the Chinese argument appears to have had jurisprudential merit.

Consider this way of framing what China seems to have been saying:

> *Question:*
> How do Export Prices differ?
>
> *Answer:*
> Examine objective market factors like seasonality and market driven production cost fluctuations.
>
> *Question:*
> Why do Export Prices differ?
>
> *Answer:*
> Examine subjective factors like intent of producer-exporter.
>
> *Problem:*
> The distinction between "how" and "why," and thus between "objective" and "subjective," is difficult to draw in practice. "Objective market factors" such as

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268 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.53.
269 *See id*. ¶ 5.52–5.53.
270 *See id*. ¶ 5.71.
271 *See id*. ¶ 5.70.
272 *See id*. ¶ 5.68.
273 Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.54 (emphasis original).

> seasonality and production cost variability may be relevant to a qualitative analysis of the significance of Export Price differences, and include objective reasons why those Price differences exist.

The American response was that seasonality and costs of production do not address the question of "how" Export Prices differ, whether or not those differences are "significant." Rather, seasonality and production cost fluctuations address "why" that is, whether there are reasons for Export Prices other than targeted dumping. The American response was not a bad one, either.

This Sino-American debate is about formalism: how formalistic in constructing categories should targeted dumping jurisprudence be? Conversely, how much flexibility should be allowed to deconstruct those categories?

The AB might have done better to take a "hands off" approach: the same variable can address "how?" in one case, and "why?" in another, depending on the facts of the case. As China intimated, in one case, an investigating authority might use seasonality, such as lower retail prices in post-Christmas sales, to explain how prices differ in January from November. In another case, the authority might regard seasonality as a reason why they differ before and after Christmas.[274] Likewise, as China also suggested, in one case, a drop in production costs might be connected to the significance of Export Price differences, and also be a cause for those differences.[275]

Yet, the AB took a "hands-on" approach. Especially because few if any AB members are deeply experienced in business, its rebuttal to China rings hollow:

> [A] decline in the costs of production is not concerned with the significance of export price differences but rather with the very reasons for, or cause of, such differences. Price differences may be due to a decline in the costs of production rather than to "targeted dumping." We therefore do not agree with China that a decline in production costs should form part of the investigating authority's qualitative analysis in assessing the significance of price differences under the pattern clause. Regarding seasonality, to the extent that seasonal variations in the prices of goods explain why export prices vary over time periods, they relate to the "reasons" for the price differences and thus need not be considered under the Pattern Clause.[276]

The AB's only concession to China's argument was to say:

> [t]o the extent that seasonal price variations—which are inherent in the nature of a product, the industry at issue, or the market

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274 Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.68.

275 *Id*.

276 *Id*.

> structure—speak to the significance, or lack thereof, of such price differences, they may be relevant to the qualitative assessment under the pattern clause of whether identified differences in Export Prices differ "significantly."[277]

But, consider whether the AB is in the best position to draw this distinction in practice, if it even is a legitimate distinction in theory. Predictably, the AB applied its 2016 *United States Targeted Dumping Zeroing* precedent.[278] In that Korea Washing Machines case, the AB held "significantly" as used in the Pattern Clause of Article 2:4:2 of the *AD Agreement* has both quantitative and qualitative dimensions, and an investigating authority cannot base a conclusion that a pattern of Export Prices differs "significantly" among purchasers, regions, or time periods solely on quantitative criteria.[279] The authority needs to do a qualitative analysis, too. In that case, the AB identified "objective market factors" like the nature of the subject merchandise, the industry in question, market structure, and intensity of product competition, and said such factors may affect the qualitative evaluation under the Pattern Clause as to the "significance" of differences among Export Prices.

So, "objective market factors" are relevant only to that inquiry—whether a pattern of Export Price differences is "significant," in the sense of whether the Price differences are "important, notable, or consequential."[280] But, these factors, or indeed any other factors, are not relevant insofar as they provide reasons for those differences or explain whether the differences are connected to targeted dumping. That is because there is no need for the authority to examine the reasons for, i.e., the causes of, those differences. In terms of a textual analysis, Article 2:4:2 (second sentence):

> [D]oes not impose an additional requirement to ascertain whether the significant differences found to exist are unconnected with "targeted dumping. . . ."

> [T]he text of the second sentence of Article 2:4:2 does not imply an examination of the motivation for, or intent behind, the differences in prices. . . . [W]hile the Pattern Clause requires, in addition to a quantitative analysis, a qualitative analysis of the significance of price differences, it neither requires that an investigating authority ascertain the cause of (or objective reasons for) the price differences, nor does it require that an

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277 Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.68.

278 *See id*. ¶¶ 5.57–5.71.

279 *See* Appellate Body Report, *US–Washing Machines*, *supra* note 233, ¶ 5.25.

280 *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.67 (quoting Appellate Body Report, *US–Washing Machines*, *supra* note 233, ¶ 5.62).

> authority ascertain the motivation for (or intent behind) the differences in prices.[281]

A distinction, then, must be drawn between an overall qualitative analysis of a pattern (the causes of Export Price differences), which need not be considered under the Pattern Clause, and a specific qualitative analysis of the significance of the Export Price differences that make up the pattern.[282] Or, put more bluntly, "we, the Appellate Body, care about objective market factors if they speak to the significance of Export Price differences, but we do not care about them if they are used to explain the causes of those differences, because the text of the rule does not require a causation inquiry."

J. Issue 4: Article 2:4:2 (Second Sentence) and Discerning a "Pattern" from Weighted Averages[283]

China supplemented its two quantitative and one qualitative argument against the *Nails* Test with a fourth allegation: the DOC illegally used WA Export Prices to determine the existence of a "pattern."[284] While perhaps less interesting than other matters in the AB Report, this issue is of practical importance, because it goes to how an investigating authority may discern a pattern of targeted dumping.

K. Holding and Rationale

Essentially, the AB held that an investigating authority is not compelled to use individual transaction Export Prices, i.e., T-T comparisons, to determine a "pattern" under Article 2:4:2 (second sentence) of the *AD Agreement*.[285] The 2016 *United States Targeted Zeroing* again furnished the necessary precedent for the AB's rationale. The AB recalled its precepts from the earlier case: a "pattern" under Article 2:4:2 (second sentence) refers to the existence of Export Prices, all of which form a pattern that differs significantly from (namely, is lower than) the remaining

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[281] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.60–5.61 (citing Appellate Body Report, *US–Washing Machines*, *supra* note 233, ¶¶ 5.65, 5.67).

[282] *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.62.

[283] *See id.* ¶¶ 4.1(c); 5.72–5.108, 6.6-6.7. Note that Paragraphs 5.102–5.108 and 6.7 concern the Appellate Body's rendering moot statements by the Panel that permit combining comparison methodologies. Citing its 2016 Korea Washing Machines precedent, it reminded the Panel, and China and the United States, that Article 2:4:2 does not permit combining comparison methodologies, *e.g.*, it is not permitted to use the WA-T methodology to pattern transactions, and the WA-WA or T-T methodology to non-pattern transactions. Its reminder, however, required just one – not eight – Paragraphs.

[284] *See id.* ¶¶ 4.1(c), 5.72.

[285] *See id.* ¶¶ 5.100–5.101.

Prices not in the pattern, and the significant difference concerns sale transactions of subject merchandise among an identifiable group of purchasers, regions, or time periods.[286]

China argued the text of the Pattern Clause mandates the use of T-T comparisons.[287] That is because, said China, when "a large number of observations are collapsed into a single average price," the ability of an investigating authority to read a pattern is diminished.[288] Stuffing individual data points into a single average eliminates "a sufficient number of observations from which an intelligible form or arrangement amongst those data can be discerned."[289] It is not possible to discern a pattern of Export Prices "among" different buyers, times, or places without studying Export Prices within each group, i.e., to each individual buyer, at each time, and/or in each place.

Not true, said the AB.[290] An investigating authority can rely on individual or average Export Prices to find a pattern. Nothing in the text of the Pattern Clause mandates an examination of data "within" targeted purchasers, periods, or places, nor suggests an *a priori* prohibition on the use of averages.[291] To the contrary, the text speaks of differences "among" them:

> The structure of the second sentence of Article 2:4:2 makes clear that this provision has two distinct parts serving different purposes. The first part clarifies that a Normal Value may be compared to prices of "individual export transactions" in order to establish the existence of margins of dumping. This serves the purpose of distinguishing the W-T methodology from the normally applicable methodologies in the first sentence of Article 2:4:2. The second part of the second sentence deals with the conditions that have to be met for an investigating authority to have recourse to the W-T methodology. *We are not convinced that the reference to "prices of individual export transactions" in the first part of the second sentence directly informs or limits how a pattern is to be identified in the second part of the second sentence. China's argument effectively imports the phrase "individual export transactions" into the Pattern Clause*. Moreover . . . a pattern determined on the basis of average prices is nonetheless composed of individual export transactions to which the W-T methodology may be applied. In this respect, we

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[286] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.79–5.81 (citing Appellate Body Report, *US–Washing Machines*, *supra* note 233, ¶¶ 5.25–5.27, 5.30–531, 5.36).

[287] *See id*. ¶¶ 5.29, 5.86.

[288] *See id*. ¶ 5.84.

[289] *Id*.

[290] *See id*. ¶ 5.89.

[291] *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.85.

> agree with the United States that individual prices are not "overlooked" by an investigating authority when those prices are included in the calculation of averages.[292]

In essence, China misread Article 2:4:2. The reference to individual Export Prices in the first clause is limited to that clause, and does not create a stricture on comparison methodologies in the second clause. Rather, the second clause preserves space for investigating authorities to use their discretion as to T-T, WA-WA, or (in unusual instances) WA-T comparisons.

Supplementing this close reading of the text was precedent. In *United States Targeted Zeroing*, the AB explained all individual transaction Export Prices must be accounted for when computing weighted average Export Prices by purchasers, periods, or places, so the average embodies, or is, the collection of, all the individual data points within each grouping.[293] (Its insistence on "all" is why it disallowed zeroing.) As long as an investigating authority discerns a "pattern" among different targeted purchasers, times, or regions from all Export Price data, the scope of the pattern will be the same, regardless of the comparison methodology used.[294] Hence, China gets what it wants via T-T, WA-WA, or W-T comparisons.

L. Issue 5: Article 6:8, and Annex II (Paragraph 7) and AFA Norm[295]

For a measure to be subject to an "as such" challenge, it must be a rule of "general and prospective" application. Why care about this criterion? The AB explained:

> Ascertaining whether the rule or norm has general and prospective application is necessary because *"as such" challenges seek to prevent the responding Member from engaging in certain conduct in general and in the future, as opposed to addressing particular instances of application that are occurring or have occurred* [i.e., "as applied" challenges]. . . . [B]oth written and unwritten measures can be the subject of a challenge in WTO dispute settlement. When written rules or norms are challenged "as such," the precise content, attribution, as well as the general and prospective nature of the rule or norm may be readily discernible from the document itself, its official character, or the manner in which it was elaborated, adopted, or enacted. When an *unwritten* rule or norm is challenged "as such,"

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[292] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.88 (emphasis added).

[293] *See id*. ¶ 5.89, nn.290–291.

[294] *Id*. ¶ 5.90.

[295] *See id*. ¶¶ 4.2, 5.109–5.184, 6.8–6.11.

> a complainant will be required to adduce arguments and supporting evidence to demonstrate the precise content, attribution, and general and prospective nature of the rule or norm.[296]

But, what does "general" mean? And, what does "prospective" mean? In other words, what is the dividing line between an idiosyncratic rule affecting one or a few parties, with little or no prospect of being applied again, and a requirement expected of a large number of actors that probably will be imposed in the future?

China, of course, argued the AFA Norm was an unwritten rule of general and prospective application and, therefore, could be the subject of an "as such" challenge in WTO dispute settlement. This AFA Norm was as follows: "[W]henever [the] USDOC considers that an NME-wide entity has failed to cooperate to the best of its ability, it systematically makes an adverse inference and selects, to determine the rate for the NME-wide entity, facts that are *adverse* to the interests of that fictional entity and each of the producers/exporters included within it."[297] China was unsuccessful in persuading the Panel the AFA Norm was something more than idiosyncratic and particular.[298]

China's appellate argument was that the Panel articulated the wrong legal standard to establish that a rule (or norm) has "prospective application."[299] The Panel, said China, demanded "certainty" of future application to be considered "general and prospective" and, therefore, susceptible to an "as such" challenge. In particular:

> The Panel considered that a measure has "*general application*" to the extent that it *affects an unidentified number of economic operators, including domestic and foreign producers*. In addition, the Panel explained that a measure has "*prospective application*"

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[296] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.127 (emphasis added).

[297] *Id*. ¶ 5.109 (quoting Panel Report, Chinese Targeted Dumping, *supra* note 182, in turn *quoting* China's opening oral argument statement) (emphasis original). China's reference to a "fictional" entity is a bit misleading. If the DOC finds any actual respondent is non-cooperative, then the DOC draws an adverse inference about dumping margin data for that respondent, and computes a margin based on one non-cooperative respondent, the so-called "non-existent NME-wide entity." The DOC then lumps all such actual non-cooperative respondents together, under the banner of the "NME-wide entity," and sticks them with this AFA-based margin. However, the DOC selects the "NME-wide entity" from among the non-cooperative respondents to ensure that the AFA rate for it, and thus for all other such respondents, less favorable than the rate that every non-cooperative respondent would get if it had fully cooperated (otherwise there would be no incentive to cooperate). In effect, the DOC picks the most uncooperative respondent, and on the basis of its AFA margin, applies collective punishment to all other non-cooperative respondents. *See id*. ¶ 5.117.

[298] *See id*. ¶ 5.110.

[299] *See id*. ¶ 5.111.

> if it is *intended to apply in future situations after its issuance*. In this regard, the Panel noted that, for a measure to have prospective application, it must provide the same level of *security and predictability of continuation* into the future typically associated with rules or norms.[300]

China argued "a rule or norm has prospective application where conduct is likely, predictable, possible to anticipate, or can be reasonably expected to continue, and that a complainant is not required to show with 'certainty' that a measure will continue to apply in the future."[301] The American view, in contrast, was that "prospective application" depends on whether a rule is intended to be applied in the future, namely, whether that rule embodies "a deliberate policy that goes beyond mere repetition of conduct."[302]

As to why the Panel was dubious about the AFA Norm not being of "general application" (though the Panel did not issue a definitive ruling on this point, because—as explained below—it rested its conclusion on the Norm not being "prospective"), the Panel relied on the DOC *Enforcement and Compliance Antidumping Manual*, which:

> [P]rovides that the NME-wide rate "*may*" be based on adverse facts available in certain situations. According to the Panel, *the permissive language used in the USDOC Antidumping Manual only recognizes the authority of the USDOC to base an NME-wide rate on adverse facts available; it does not express what approach the USDOC will or should adopt*. The Panel thus considered that the USDOC *Antidumping Manual* does not support China's view that the AFA Norm has general and prospective application.

As to the legal standard for the AFA Norm being of "prospective application," and why this Norm was not "prospective" in application:

> In relation to the 73 USDOC anti-dumping determinations, the Panel noted that several of them refer to the USDOC's "practice" of selecting a rate for a "non-cooperating NME-wide entity" that is "sufficiently adverse" to ensure that the uncooperative party does not obtain a more favorable result by failing to cooperate than if it had fully cooperated. The Panel also observed that the USDOC described the selection of the highest margin in the petition or the highest rate calculated in any segment of the proceedings as a "practice," "standard practice," or "normal

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300 Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.115 (emphasis added).

301 *Id*. ¶ 5.131.

302 *Id*.

> practice," which has consistently been upheld by the USCIT [Court of International Trade] and the United States Court of Appeals for the Federal Circuit (USCAFC). In each of the 73 determinations, the USDOC followed the same course of action: upon finding non-cooperation by the NME-wide entity, the USDOC drew adverse inferences and selected facts that were adverse to the interests of that entity and the exporters within it. The Panel considered that, by referring to its practice in *every determination*, the USDOC's conduct reflected an *invariable and standard approach* whenever the USDOC found that an NME-wide entity failed to cooperate to the best of its ability. The Panel also found it significant that there was no evidence of determinations made during a period of over 12 years in which the USDOC did not follow this practice. . . .
>
> The Panel, however, was not persuaded that the practice reflected in the anti-dumping determinations on the record was sufficient to demonstrate that the AFA Norm has prospective application. This is because *"it [did] not demonstrate that the USDOC will continue to follow the same course of action in the future."* The Panel also considered that "the fact that economic operators could reasonably expect the occurrence of certain conduct, or that the USDOC may find guidance in previous determinations, is *insufficient to ascertain with the necessary level of security and predictability the prospective application of the alleged AFA Norm*." Consequently, the Panel considered that a finding that the USDOC's practice at issue has prospective application "would amount to speculation—albeit well-grounded—about the prospective application of the alleged AFA Norm; *certainty thereof . . . is not supported by record evidence*." The Panel thus concluded that the evidence on the record does not support China's assertion that the AFA Norm has prospective application.[303]

(Note, as the Appellate Body did, that the "security and predictability" language comes straight from the Appellate Body's 2015 *Argentina Import Measures Report*).[304] China asked the AB to overturn this "certainty" (i.e., "will

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[303] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.117, 5.120 (emphasis added).

[304] *See* Appellate Body Report, *Argentina–Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R, ¶¶ 5.181–5.182 (adopted Jan. 26, 2015) [hereinafter Appellate Body Report, *Argentina–Measures Affecting the Importation of Goods*]. This Report is analyzed in the *WTO Case Review 2015*. *See* Raj Bhala et al., *WTO Case Review 2015*, 33 ARIZ. J. INT'L COMP. L. 329, 510 (2016).

continue to follow the same course of action in the future") standard.[305] China also called on the AB to complete the analysis, find that the AFA Norm is one of "prospective application" that is susceptible to an "as such" challenge, and hold that the Norm violates Article 6:8 and Annex II (Paragraph 7).

M. Holding and Rationale

China prevailed on appeal, but only in part. The AB held that any act or omission by or attributable to a WTO Member counts as a measure that may be challenged in dispute settlement, i.e., a broad array of behaviors are within the subject matter jurisdiction of panels and the AB, including the unwritten AFA Norm.[306] To mount an "as such" challenge against an unwritten rule, a complainant needs to prove the rule indeed is: (1) attributable to the respondent; (2) identify the precise content of the rule; and (3) show the rule has "general and prospective" application.[307] China and the United States agreed on the first two elements, but not the third.[308] The AFA Norm indeed was attributable to the United States, and the 73 AD determinations by the DOC that China cited demonstrated its precise content.

Applying its GATT Article X jurisprudence on the term "general application," and relying on its 1998 *EC Poultry* precedent, the AB defined "general applicability" to mean a rule affects an unidentified number of economic operators:

> In *EC–Poultry*, the Appellate Body interpreted the phrase "[l]aws, regulations, judicial decisions and administrative rulings of general application" in Article X:1 of the GATT 1994. It considered that, while a measure addressed to a specific company or applied to a specific shipment would not qualify as a measure of general application, a measure would be of general application to the extent that it "affects an unidentified number of economic operators." We therefore consider that a rule or norm has "general application" to the extent that it affects an unidentified number of economic operators.[309]

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[305] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.111–5.113.

[306] *See id.* ¶ 5.143.

[307] *See id.* ¶ 5.114.

[308] *See id.* ¶ 5.131.

[309] *Id.* ¶ 5.130 (quoting Appellate Body Report, *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WTO Doc. WT/DS69/AB/R, ¶ 113 (adopted July 23,1998) (in turn quoting Panel Report, *United States – Restrictions on Imports of Cotton and Man-made Fiber Underwear*, WTO Doc. WT/DS24/AB/R (adopted Feb. 10, 1997)).

A rule has "prospective applicability" in that it may be imposed in the future. In that respect, the Panel erred.

Reaffirming its 2004 *Corrosion Resistant Steel Sunset Review*,[310] 2004 *Oil Country Tubular Goods Sunset Review*,[311] 2006 *Zeroing (European Communities)*,[312] and 2007 *Zeroing (Japan)* precedents,[313] the AB provided a useful summary of its jurisprudence on "prospective applicability:"

> [A] rule or norm has "prospective application" to the extent that it *applies in the future*. . . . *[W]e do not consider that in order to demonstrate prospective application, a complainant is required to show with "certainty" that a given measure will apply in future situations*. A complainant would not be able to show "certainty" of future application, because *any measure*, including rules or norms, written or unwritten, *may be modified or withdrawn in the future*. The mere possibility that a rule or norm may be modified or withdrawn, however, does not remove the prospective nature of that measure. Rather, *where prospective application is not sufficiently clear from the constitutive elements of the rule* or norm, *it may be demonstrated through a number of factors*. The existence of an *underlying policy*, which is implemented by the rule or norm, is a relevant element in establishing the prospective nature of that rule or norm. In addition, the more *frequent, consistent, and extended the repetition of conduct* is, the more probative such conduct will be in revealing, together with other factors, such an underlying policy. . . . [T]he Appellate Body has explained that relevant evidence may include *proof of the*

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[310] *See* WTO Appellate Body Report, *United States–Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WTO Doc. WT/DS244/AB/R, ¶ 82 (adopted Jan. 9, 2004). This Report is analyzed in the *WTO Case Review 2004*. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99, 217 (2005).

[311] *See* Appellate Body Report, *United States–Sunset Reviews of Anti-Dumping Measures on Oil Country Tubular Goods from Argentina*, WTO Doc. WT/DS268/AB/R, ¶¶ 172, 187 (adopted Dec. 17, 2004). This Report is analyzed in the *WTO Case Review 2004*. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99, 233 (2005).

[312] *See* Appellate Body Report, *United States–Laws, Regulations, and Methodology for Calculating Dumping Margins ("Zeroing")*, WTO Doc. WT/DS294/AB/R ¶¶ 198, 201, 204–05 (adopted May 9, 2006). This Report is analyzed in the *WTO Case Review 2006*. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2006*, 24 ARIZ. J, INT'L & COMP. L. 299, 353 (2007).

[313] *See* Appellate Body Report, *United States–Measures Relating to Zeroing and Sunset Reviews*, WTO Doc. WT/DS322/AB/R, ¶¶ 85–86 (adopted Jan. 23, 2007). This Report is analyzed in the WTO Case Review 2007. *See* Raj Bhala & David A. Gantz, *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 1, 115 (2008).

> *systematic application* of the challenged rule or norm. Where ascertainable, the *design, architecture, and structure* of the rule or norm may also be relevant in identifying the underlying policy and prospective nature of that rule or norm. In addition, the *extent to which a particular rule or norm provides administrative guidance for future conduct* and the *expectations it creates among economic operators* that it will be applied in the future, are also relevant in establishing the prospective nature of that rule or norm.[314]

In sum, China was right: the Panel required "certainty" of future application, and the Panel said China failed to prove "certainty," because the AFA Norm was not, without doubt, going to be applied in the future, it was not a rule of "prospective" application.

That is, the AB said the Panel was wrong: a complainant need not show with "certainty" that a measure will apply in the future to prove the measure has "prospective application."[315] Indeed, there was circularity in the reasoning of the Panel: a rule has "prospective application" only if it has the same degree of continuation into the future that a rule has.[316] In truth, the AB reasoned, whether or not a rule may be imposed in the future need not be known with certainty. After all, the rule may be modified or withdrawn later on.

Suppose the possibility of future application of a rule is unclear from the rule itself. Then, a number of variables may be examined to see if a rule is "prospective." They include (1) whether there is a policy underlying the rule; (2) whether the rule is applied systematically; (3) the design, architecture, and structure of the rule; (4) the extent to which the rule gives administrative guidance about future behavior; and (5) the extent to which the rule creates expectations among economic operators that it will be applied in the future.[317]

So, the AB completed the analysis of the AFA Norm and found it is a rule of "general" application, because it affects an unidentified number of economic actors.[318] The Norm has no express limits on producer-exporters from an NME country that may be included within the NME-wide entity to which the Norm applies.[319] The AB further found this Norm is one of "prospective" application, because it implements an underlying DOC policy, gives guidance for future action, and creates expectations among the actors.[320] The AB also noted a factor the Panel had stressed, namely, that the DOC consistently and systematically applies the AFA

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[314] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.132 (emphasis added).

[315] *See id.* ¶ 5.142.

[316] *Id.* ¶ 5.141.

[317] *See id.* ¶ 5.157.

[318] *See id.* ¶¶ 5.144–5.156, 5.180–5.181.

[319] *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.181.

[320] *See id.* ¶¶ 5.157–5.164, 5.180–5.181, 5.183.

Norm over an extended period of time.[321] That factor suggests a demand for certainty, which is not necessary to prove. Consequently, the AFA Norm is susceptible to an "as such" challenge.

But, the completion was partial. The AB did not judge the AFA Norm to violate Article 6:8 or Annex II (Paragraph 7) of the WTO *Antidumping Agreement*.[322] There were insufficient undisputed record facts and Panel findings to do so. The AB could not evaluate the lawfulness of the DOC process for selecting the "facts available" to be reasonable replacements for missing "necessary information" to make accurate dumping margin determinations. In that sense, China's appeal was an incomplete victory.

N. Commentary

1. Poor Explanation of Facts

The AB again failed to explain the facts clearly. Their rendition, particularly of the *Nails* Test, is nearly impenetrable, and even to International Trade Lawyers, all but inaccessible. It is not clear from the opinion whether the AB itself understood that Test, or merely regurgitated what it was told through briefs and oral argumentation. That uncertainty potentially undermines the legitimacy of the AB Report, perhaps particularly in the eyes of a WTO Member—here China—that loses key arguments in the case.

2. Another Illustration of the Inevitability of Judicial Interpretation

The technical questions at issue in *China Targeted Dumping* are another good example of why the AB is needed both to apply and interpret the terms of GATT-WTO texts. The Pattern Clause of Article 2:4:2 (second sentence) simply does not resolve the question of whether an investigating authority must consider not only how Export Prices differ, but also why they differ, when deciding whether quantitative differences in Export Prices that form a pattern are qualitatively significant. There is no original intent of Uruguay Round framers to consult. There simply is a lacuna in the law that AB members need to fill with the strictest legal reasoning they can provide.

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[321] *See* Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶¶ 5.161–5.163, 5.183.

[322] *See id.* ¶¶ 5.165–5.179, 5.184.

3. Stubbornness and Illogic

The AB holding against China on qualitative flaws in the *Nails* Test rests on formalistic reasoning. China's point was that "objective" and "subjective" factors separated into hermetically sealed categories. The AB clings to its 2016 precedent when its finds, in effect, "the reasons for price differences are not relevant to the determination of whether Export Prices differ significantly." They might be, and its stubbornness means the AB unduly restricts its own precedent.

That stubbornness leads to another mistake. In saying that the reasons for Export Price differences "need not be considered under the Pattern Clause,"[323] the AB sidesteps a vital question: suppose an investigating authority wants to consider those reasons—can it? That is, what is wrong with an authority trying to find out, based on all available variables, objective and subjective, why Export Prices differ? The implication of China's argument is to impose greater discipline on the use of targeted dumping, by at least allowing an investigating authority to examine the overall quality of a pattern, and not limit itself to examining only the quality of the significance of Export Price differences.

Indeed, the entire AB holding about the *Nails* Test qualitative analysis rests on a *non sequitur*. The AB concludes the DOC is not required to evaluate reasons for differences in Export Prices forming the relevant pattern when the DOC determines whether those differences are qualitatively significant within the meaning of the Pattern Clause of Article 2:4:2. But its rationale, as outlined above, essentially is (1) objective market factors that concern the cause of Export Price differences are irrelevant, and (2) the DOC need not explain why those differences exist. How the holding follows from (1) and (2) is unclear.

V. TRADE REMEDIES–COUNTERVAILING DUTIES, IMPORT SUBSTITUTION, AND CONDITIONAL TAX INCENTIVES

A. Citation

WTO Appellate Body Report, *United States – Conditional Tax Incentives for Large Civil Aircraft*, WT/DS487/AB/R (adopted Sept. 22, 2017) ("*Boeing Conditional Tax Incentives*").[324]

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[323] Appellate Body Report, *Chinese Targeted Dumping*, *supra* note 183, ¶ 5.62.

[324] *See generally* Appellate Body Report, *United States–Conditional Tax Incentives for Large Civil Aircraft*, WTO Doc. WT/DS487/R (adopted Sept. 22, 2017) [hereinafter Appellate Body Report, *Boeing Conditional Tax Incentives*]. At the Appellate stage, there were seven Third Party participants: Aust., Braz., Can., China, Japan, Kor., and Russ.).

B. Facts: Washington State Aerospace Tax Measures[325]

The State of Washington provided two tax incentives via its 2013 *Engrossed Substitute Senate Bill 5952*.[326] First, it reduced the Business and Occupation ("B&O") tax rate that it imposes on business activities relating to the production and sale of commercial airplanes—known as the B&O Aerospace Tax Rate.[327] Second, Washington provided tax credits and tax exemptions for product development, and for property, leasehold, sales, and use taxes.[328] Collectively, both the B&O Aerospace Tax Rate, and the assorted tax credits and exemptions, were called the "Aerospace Tax Measures."[329] The EU challenged the Aerospace Tax Measures as illegal Red Light subsidies.[330] The EU said they were import substitution subsidies, contingent on the use of domestic over imported goods, and thus violated Articles 3:1(b) and 3:2 of the WTO *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*). These provisions state:

> 3.1. Except as Provided in the *Agreement on Agriculture*, the following subsidies, within the meaning of Article 1, shall be prohibited. . . .
>
> (b) subsidies *contingent*, whether solely or as one of several other conditions, *upon the use of domestic over imported goods*.
>
> 3.2. A Member shall neither grant nor maintain subsidies referred to in paragraph 1.[331]

The EU targeted what it saw as two "siting" (as in geographic location) provisions in Senate Bill 5952 as evidence for its claim.

The "First Siting Provision" covered the all Aerospace Tax Measures—the B&O Aerospace Tax Rate, and the assorted tax credits and exemptions.[332] The EU said the tax benefits take effect "upon the siting of a significant commercial airplane manufacturing program" in the State of Washington.[333] Specifically, those

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325 *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 1.1–1.16,

326 *See id*. ¶¶ 1.2.

327 *See id*.

328 *See id*. ¶¶ 1.2.

329 *See id*. ¶ 1.2.

330 *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 1.2.

331 *Id*. ¶¶ 5.4–5.5 (emphasis added).

332 *See id*. ¶ 1.3.

333 *See id*.

benefits were manifest with the establishment of the Boeing 777X aircraft program in Washington.

The "Second Siting Provision" pertained only to the continued availability of the B&O Aerospace Tax Rate.[334] (It did not pertain to the assorted tax credits and exemptions). Under it, this reduced Tax Rate no longer applies if the Washington State Department of Revenue determines that final assembly, or wing assembly, of any commercial airplane, which has been the basis for siting a significant commercial airplane manufacturing program under the First Siting Provision, moves outside the State of Washington:

> The Second Siting Provision provides that the B&O Aerospace Tax Rate ceases to apply in a case where the Washington Department of Revenue "makes a determination that any final assembly or wing assembly of any version or variant of a commercial airplane that is the basis of a siting of a significant commercial airplane manufacturing program in [Washington pursuant to the First Siting Provision] has been sited outside the state of Washington." By its express terms, the Second Siting Provision is triggered in the event of a future determination by the Washington Department of Revenue that final assembly or wing assembly "has been sited" outside Washington, and thus the condition contained in the measure concerns the siting or location of the relevant assembly activities.[335]

That is, the B&O tax benefits cease if assembling aircraft wings moves out of Washington State. Only if the Washington State Department of Revenue determines that wing or final assembly of the Boeing 777X program is sited outside Washington would Boeing lose those tax benefits.

The common sense behind the First and Siting Provisions is apparent. The First Siting Provision is an incentive to "set up shop" in Washington State. The Second Siting Provision is a disincentive to leave that State, i.e., an incentive to keep the status quo of in-State operations, and not give a tax break for out-of-state operations.[336]

C. Overview of Panel and Appellate Body Findings

The Panel rendered four key conclusions:[337]

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334 *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 1.3.

335 *Id*. ¶ 5.63.

336 *See id*. ¶ 5.65.

337 *See id*. ¶ 1.4.

(1) The Aerospace Tax Measures (*i.e.*, tax credits and exemptions concerning property development, property and leasehold taxes, and sales and use taxes, and the B&O Aerospace Tax Rate), meet the definition of "subsidy" under Article 1 of the WTO *Agreement on Subsidies and Countervailing Measures* ("*SCM Agreement*").[338]

(2) None of the Aerospace Tax Measures is *de jure* contingent on the use of domestic over imported goods, either under the First or Second Siting Provisions in Senate Bill 5952, *i.e.*, none was a *de jure* import substitution subsidy, under *SCM Agreement* under Article 3:1(b), whether in terms of setting up production operations in Washington State, or leaving that State.

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[338] That definition is:

1.1. For the purpose of this *Agreement*, a subsidy shall be deemed to exist if:

> (a) (1) there is a financial contribution by a government or any public body within the territory of a Member (referred to in this *Agreement* as "government"), *i.e.*, where:
>
> (i) a government practice involves a direct transfer of funds (*e.g.*, grants, loans, and equity infusion), potential direct transfers of funds or liabilities (*e.g.*, loan guarantees);
>
> (ii) government revenue that is otherwise due is foregone or not collected (e.g., fiscal incentives such as tax credits) [footnote omitted];
>
> (iii) a government provides goods or services other than general infrastructure, or purchases goods;
>
> (iv) a government makes payments to a funding mechanism, or entrusts or directs a private body to carry out one or more of the type of functions illustrated in (i) to (iii) above which would normally be vested in the government and the practice, in no real sense, differs from practices normally followed by governments;
>
> or
>
> (2) there is any form of income or price support in the sense of Article XVI of GATT 1994;
>
> and
>
> (b) a benefit is thereby conferred. SCM Agreement, *supra* note 67, arts. 1.1(a)–1.1(b).

> (3) None of the Aerospace Tax Measures, under the First Siting Provision, is *de facto* contingent on the use of domestic over imported goods.
>
> (4) For both the First and Second Siting Provisions, the B&O Aerospace Tax Rate for manufacturing and selling commercial airplanes, specifically with respect to Boeing's 777X aircraft, is a subsidy *de facto* contingent on the use of domestic over imported goods, *i.e.*, it is a *de facto* import substitution subsidy, under *SCM Agreement* Article 3:1(b).[339]

Unsurprisingly, the EU was unhappy with the first three Panel findings, while the United States was unhappy with the fourth of these findings. The EU challenged on appeal the conclusion that the First and Second Siting Provisions of the Aerospace Tax Measures, and the B&O Aerospace Tax Rate, were not *de jure* contingent import substitution subsidies, and that the First Siting Provision was not *de facto* contingent on the use of domestic over imported goods.[340] That is, the EU said the Panel was wrong in its interpretation and application of Article 3:1(b): the Panel should have found the text of the First Siting Provision makes the Aerospace Tax Measures *de jure* contingent on the use of domestic over imported goods, and these Measures are *de facto* contingent on such use.

Conversely, the United States said the Panel was wrong to hold that under the First and Second Siting Provisions; the B&O Aerospace Tax is a *de facto* contingent import substitution subsidy.[341] The US argued the Panel erred in interpreting and applying Article 3:1(b).[342] The Panel thought this provision prohibits subsidies conditional upon the domestic siting of manufacturing activities – but, said the United States, it does not.[343] Further, the Panel was wrong to find that the B&O Aerospace Tax Rate for the Boeing 777X aircraft was contingent on the "use" of wings for the 777X, because Boeing does not "use" wings to make the 777X. The United States also argued the Panel was wrong to find the Rate was contingent on the use of "domestic" over "imported" wings, because the Panel neither defined "domestic" nor "foreign," nor did the Panel check if wings assembled in the State of Washington are "domestic."[344]

The United States won a clean sweep on appeal. The United States beat back all three European challenges concerning *de jure* contingency, plus secured a

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[339] Recall that proof of a Red Light export subsidy or import substitution subsidy, under Article 3.1(a)–(b) of the *SCM Agreement*, respectively, alleviates the need to meet the Specificity Test under Article 1:2 (thanks to Article 2:3), and the need to show adverse effects under Article 5 (thanks to Articles 3–5, read in tandem).

[340] *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.2.

[341] *See id.* ¶ 5.3.

[342] *See id.*

[343] *See id.*

[344] *See id.*

reversal of the Panel ruling on *de facto* contingency of the B&O Aerospace Tax. By way of summary, the reason the United States won on *de jure* contingency was that neither the First nor Second Siting Provision explicitly required use of domestic over imported goods. Instead, those Provisions focused on the location of certain manufacturing and assembly operations. The reason America won on *de facto* contingency was "the total configuration of the facts," as the AB put it:

> [T]he First and Second Siting Provisions are focused on the siting of assembly activities and do not contain any language requiring in explicit terms, or by necessary implication therefrom, the use of domestic over imported goods. . . . [W]e have rejected the European Union's claims that the Panel erred in its interpretation and application of Article 3.1(b) in its analysis of *de jure* contingency. . . . [W]here an analysis of *de jure* contingency does not yield a finding of inconsistency under Article 3:1(b) on the basis of the terms of the measure, or any necessary implication therefrom, a Panel may still make a determination that contingency exists on a *de facto* basis where a contingency to use domestic over imported goods can be inferred from the *total configuration of the facts* surrounding the granting of the subsidy. Analysis of *de facto* contingency may take into account the *measure's design and structure*, and *modalities of operation*, as well as the *factual circumstances providing context* for understanding the subsidy measure and its operation with a view to ascertaining whether a condition requiring the use of domestic over imported goods exists.[345]

The AB would have done well to place this paragraph at the start of its opinion, rather than on page 26 of a 35-page decision. Such placement would have been convenient for curious scholars and busy practitioners, as the passage captures the gist of the entire Report.

D. Issue 1: *SCM Agreement* Article 3:1(b), *De Jure* Import Substitution Subsidies and First and Second Siting Provisions of Aerospace Tax Measures, and *De Facto* Import Substitution Subsidies and First Siting Provision of Aerospace Tax Measures[346]

In interpreting *SCM Agreement* Article 3:1(b), did the Panel articulate a legal standard that mandates the use of domestic goods over imported goods to the complete exclusion of imported goods? That is, does an import substitution subsidy

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345 Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.61 (emphasis added).

346 *See id*. ¶¶ 4.1(a), 5.19–5.35, 6.1–6.2.

signify that only domestic goods are used, and no imported good is used? Or, does the use of even a few imported inputs vitiate the possibility that a subsidy is an import substitution one?

The Panel addressed the topic in the context of a *de jure* contingency analysis of the First and Second Siting Provisions, and a *de facto* contingency analysis of the First Siting Provision. The AB rejected the European characterization of the Panel findings.[347] The EU accused the Panel of activism, establishing a new legal standard for *de jure* contingency under Article 3:1(b), namely, that "only where the measure '*per se* and necessarily exclude[s]' any use of imported goods" is that measure *de jure* contingent on import substitution.[348] In other words, the EU said the Panel developed and applied a new interpretation of what it means to be a Red Light import substitution subsidy, namely, that a subsidy recipient must be required under the law of the subsidy measure to use domestic inputs, to the complete exclusion of imported materials, for that measure to be considered an import substitution subsidy. The EU went so far as to say the Panel set up this test for *de facto* contingency, too, under Article 3:1(b). Thus, the EU challenged the Panel's findings on the *de jure* contingency of both the First and Second Siting Provisions, and the *de facto* contingency of the Second Siting Provision.

E. Holding and Rationale

The AB disagreed with the EU, and instead adopted the American understanding of the Panel Report.[349] The AB said the Panel found the First and Second Siting Provisions concern the location of assembly operations within the State of Washington. These Provisions speak of "siting," and a commitment to "manufacture" or "assemble" certain goods.[350] Both Provisions are silent on the use of domestic over imported goods:

> The Panel considered that, on its face, the First Siting Provision concerns the siting of a "significant commercial airplane manufacturing program," which "in turn requires that a producer commit to manufacture within the state of Washington" a model of a commercial airplane, as well as fuselages and wings for that model. The Panel did not find anywhere "in the words used in the First Siting Provision . . . a requirement that makes the entry into

[347] *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.35.

[348] *Id*. ¶ 5.19 (quoting the EU brief, in turn quoting the Panel Report, *United States–Conditional Tax Incentives for Large Civil Aircraft*, ¶ 7.291, WTO Doc. WT/DS487/R (adopted Sept. 22, 2017) [hereinafter Panel Report, *Boeing Conditional Tax Incentives*]).

[349] *See id*. ¶ 5.35.

[350] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 5.27, 5.34–5.35.

> force of the challenged measures contingent upon a determination that domestic goods will be used instead of imported products." The Panel thus found that, by its words, "the First Siting Provision is silent as to the use of imported or domestic goods." The Panel also found that "the Second Siting Provision is silent as to the use of imported or domestic goods." For the Panel, there is "no express indication in the terms of the [Second Siting Provision] that the subsidy . . . would be lost by importing wings," and its words do not "expressly condition the receipt of a subsidy on the use of domestic over imported goods."[351]

The Panel also considered whether a Red Light import substitution subsidy could be inferred, that is, whether such a subsidy was a "necessary implication" of the language of the Washington State measures.[352] The Panel said "no," and the AB also said "no": "a reading under which Boeing would be required to use domestic over imported goods was *just one among several possible readings* of these [P]rovisions."[353]

Stated differently, the AB did not thrust a single interpretation of disputed language on the United States, but rather supported the Panel's flexible understanding of that language, seeing multiple possibilities and not picking one above all others:

> In the Panel's view, while the terms of the First Siting Provision *could* result in the use by Boeing of some wings and fuselages produced in Washington, this *did not necessarily mean* that the provision, by its terms, requires Boeing to use domestic over imported wings and fuselages. Similarly, with respect to the Second Siting Provision, the Panel found that it *does not inevitably* result from the terms of the provision that the importation of wings would amount to the "siting" of production activities outside Washington, "even if such an outcome is not excluded by [its] text." *Having considered other possible readings of the terms of both Provisions*, the Panel concluded that "[t]he contingency on siting certain production activities within the state of Washington [under the First Siting Provision] does not entail any explicit, or any necessarily implied, requirement to use domestic goods," and that "[n]o express or obvious contingency results from the terms used in the [Second Siting

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351 Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.23 (quoting Panel Report, *Boeing Conditional Tax Incentives*, *supra* note 348, ¶¶ 7.287, 7.290, 7.305).

352 *Id*. ¶ 5.24 (quoting Panel Report, *Boeing Conditional Tax Incentives*, *supra* note 348 ¶¶ 7.291, 7.306).

353 *Id*. ¶ 5.27 (emphasis added).

> Provision], nor can one be derived inevitably from its terms." Thus, the Panel found that the First and Second Siting Provisions do not, by their terms or by necessary implication therefrom, require the use of domestic over imported goods as a condition for receiving the subsidies.[354]

This passage and point are vital. Had the AB overruled the Panel, then it would have played into the hands of critics who charge the AB with activism, that it exceeds its scope of review and fails to exercise due deference either to Panels or domestic authorities.

But, in reaching this pro-American finding, the Panel spoke of "*per se* and necessarily exclu[sion]" of imported over domestic goods. That phrase was what the EU picked on for its argument, yet the AB said the EU failed to interpret the phrase in the context in which the Panel used it. When the Panel said these Provisions do not "*per se* and necessarily exclude" the possibility of Boeing using inputs from outside Washington, the Panel was not forging a legal standard. Rather, the Panel simply was recognizing that their legal terms do not set up a *de jure* requirement for Boeing to use domestic over imported goods:[355]

> [T]he Panel's conclusions that the First and Second Siting Provisions are not *de jure* contingent under Article 3:1(b) were based on its findings that: (i) the contingencies set out in the terms of these provisions relate to the *location* of certain assembly operations within Washington; (ii) the provisions are *silent as to the use of domestic or imported goods*; and (iii) the *terms of the provisions do not, by necessary implication, prevent the possibility of using imported goods*. We therefore do not consider that the Panel, by stating that the terms of these provisions do not "*per se* and necessarily exclude" the possibility of using imported wings and fuselages, was articulating a legal standard under Article 3:1(b) that requires the use of domestic goods to the complete exclusion of imported goods, but rather was casting doubt on the European Union's proposition that the terms of these provisions necessarily required Boeing to use wings and fuselages produced in Washington.[356]

Likewise, said the AB, the Panel did not set up any new rule about proof of a *de facto* contingency when examining the First Siting Provision.[357]

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354 Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.27 (emphasis added).

355 *See id*. ¶¶ 5.28–5.29.

356 *Id*. ¶ 5.30 (emphasis added).

357 *See id*. ¶¶ 5.34–5.35.

Instead, the Panel reviewed the evidence before it, and found no reason to believe this Provision requires, in a *de facto* sense, the use of domestic over foreign inputs as a condition to obtain a subsidy:

> [T]he Panel's conclusion that the First Siting Provision does not demonstrate de facto contingency was based on the absence of any "factual evidence in the Department of Revenue's determination or in how Boeing will organize the sourcing for the production of the 777X indicating a de facto requirement to use any domestic goods, including wings or fuselages," and not on an understanding that, in order to establish a violation of Article 3:1(b), the First Siting Provision must require the use of domestic goods to the complete exclusion of imported goods. Nowhere in its de facto analysis did the Panel express a legal standard requiring that the modalities of operation of the First Siting Provision "per se and necessarily exclude" any possibility of importing wings and fuselages. Accordingly, in our view, the legal standard articulated by the Panel in its de facto contingency analysis of the First Siting Provision is also in keeping with our interpretation of Article 3:1(b) of the SCM Agreement.[358]

One lesson, then, is it is untrue to say "contingency," whether *de jure* or *de facto*, under Article 3:1(b) requires proof of the complete exclusion of imported goods, and the complete use of domestic substitutes. The test for the existence of an import substitution "contingency" "does *not* require demonstrating any particular quantity or level of displacement of imported goods by domestic goods. . . ."[359] Rather, for *de facto* contingency, the AB will demand hard evidence of a slant away from imported and toward domestic goods.

The second lesson is that for *de jure* contingency, the AB will insist on a textual analysis: what do the words of the measure at issue say, what necessarily must follow from them? And, does either the measure or its implication require use of imported over domestic goods for receipt of a subsidy?

F. Issue 2: *SCM Agreement* Article 3:1(b), *De Jure* Import Substitution Subsidies, and First Siting Provision of Aerospace Tax Measures[360]

The EU argued on appeal that the Panel was wrong to hold that the First Siting Provision neither expressly nor by necessary implication requires use of domestic over imported goods. Said the EU, because:

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358 Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.32 (emphasis added).

359 *Id*. ¶ 5.22 (emphasis added).

360 *See id*. ¶¶ 4.1(b), 5.35–5.45, 6.3.

> the First Siting Provision requires Boeing "to establish the 777X production program in Washington State, '*in which*' the wings and fuselages are to be integrated," and since "at least some 777X wings and fuselages" have to be manufactured in Washington, the provision "appropriates Boeing's commercial decision-making, leaving it with precisely one option if it wants to benefit from billions of US dollars in subsidies—to use at least some of the wings and fuselages manufactured in Washington State, in the final assembly of the 777X in Washington State."[361]

The United States' reply was that the First Siting Provision entailed a one-time determination that was triggered only by a decision (by Boeing) to site—that is, to locate production and assembly—of an airplane, and that decision occurred before any economic activity occurred.[362] It is the place of production and assembly that matters, not the origin of the inputs used in the manufacturing process. If the decision is to set up a site in Washington State, then the B&O Aerospace Tax Rate applies, even if no manufacturing or assembly actually occurs. Based on the one-time decision in favor of Washington State as the place of production, the decision-maker receives a tax preference, regardless of the source of the inputs in its subsequent manufacturing activities.

The basis for the Panel ruling for the United States was that the text of the First Siting Provision allows for "several possible readings," that is, interpretations:

> [T]he Panel considered several possible readings of the First Siting Provision. The Panel observed that "[t]he terms actually used in the provision do not preclude a scenario in which separately produced wings and fuselages were 'used' in the manner alleged by the European Union, *i.e.*, that wings and fuselages manufactured in the state of Washington were 'used' in the final assembly of 777X commercial airplanes in the state of Washington." However, according to the Panel, two other "possible and equally reasonable" readings of the terms of the First Siting Provision exist that "would allow the manufacturer to benefit from the subsidies" if it: (i) "used wings and fuselages manufactured outside the state of Washington in the final assembly of 777X commercial airplanes in the state of Washington, so long as it manufactured at least some wings and fuselages in the state of Washington;" or (ii) "stopped manufacturing fuselages, wings, and even commercial airplanes in the state of Washington, as the First Siting Provision involves

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361 Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.36 (emphasis original) (quoting the EU appellate brief).

362 *See id.*¶¶ 5.37, 5.41–5.42.

> a one-time decision on the initial establishment, but not the continuation, of certain manufacturing activities."[363]

The Panel was loath to pick one textual interpretation and impose it on the United States. Given the diversity of reasonable interpretations, the Panel rejected the EU view that the First Siting Provision creates a *de jure* contingency whereby Boeing had "no choice but to use at least some domestically produced wings and fuselages in its production of the 777X aircraft in Washington."[364]

G. Holding and Rationale

The AB agreed with the Panel; while the requirement to make wings and fuselages in the State of Washington "would in all likelihood result in the use of at least some domestically produced wings and fuselages in the final assembly of the 777X," the key question in an Article 3:1(b) inquiry is "not whether the eligibility requirements under a subsidy may *result* in the use of domestic and fewer imported goods."[365] The AB rejected the European argument that when deciding whether *de jure* contingency exists under Article 3:1(b) of the *SCM Agreement*, the relevant question is whether production requirements might lead to the use of more domestic, and fewer imported, goods. Simply because the terms of a subsidy measure do not forbid the use of domestic instead of imported inputs does not mean the measure conditions, as a matter of law, receipt of a subsidy on import substitution.

What matters is "whether the measure, by its terms or necessary implication therefrom, sets out a *condition requiring* the use of domestic over imported goods."[366] Here, the subsidy law at issue is the First Siting Provision for all Aerospace Tax Measures, and the answer is no, there is no such condition. Neither the language of that law, nor any implication from that language, establishes a requirement for Boeing to select domestic over imported goods as a prerequisite for a subsidy. Even if Boeing likely would use some American-made wings and fuselages, that probability is insufficient to establish the existence of a condition, a *de jure* contingency, requiring the use of domestic over imported goods.

To be sure, the language and implication of the First Siting Provision support the observation that Boeing "would likely use" fuselages and wings made in the United States. But that observation, without more, is not enough evidence to support a conclusion that the Provision requires Boeing to use American-made fuselages and wings to get a subsidy. Essentially, the European Union drew an overly strong inference: it forecast a probability of import substitution as a consequence of one textual interpretation, excluded all other textual interpretations,

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[363] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.38 (emphasis added).

[364] *Id*. ¶ 5.39.

[365] *Id*. ¶ 5.40 (emphasis original); *see also id*. ¶ 5.44 (restating this point).

[366] *Id*. ¶ 5.40 (emphasis original); *see also id*. ¶ 5.44 (restating this point).

then reasoned backwards from that consequence that *de jure* contingency was embedded in the text. The AB said the likelihood of import substitution behavior does not equate with *de jure* contingency. So, the Panel did not err; rather, it rightly found in favor of the United States, that neither the terms of the First Siting Provision, nor any necessary implication from them, requires Boeing to use domestic over foreign inputs.

H. Issue 3: *SCM Agreement* Article 3:1(b), *De Jure* Import Substitution Subsidies, and Second Siting Provision of B&O Aerospace Tax Rate[367]

For a third time, the AB rejected the European argument that the Panel erred in its *de jure* contingency analysis of the Second Siting Provision. This portion of the AB Report recounts a fight between the United States and EU as to whether the United States made an admission against interest (to borrow the Evidence Law concept) that the Panel ought to have taken into account in its analysis. The purported "admission" was a response by the United States to a hypothetical factual scenario posed by the Panel, to which the United States essentially opined that if wings or fuselages were made overseas and imported, then the Washington State Department of Revenue "would likely determine that some final assembly or wing assembly had been sited outside Washington, meaning the Second Siting Provision would be triggered."[368] That trigger, said the EU, was evidence of *de jure* contingency on import substitution.[369]

I. Holding and Rationale

The Panel did not examine the American response in the context of its *de jure* contingency analysis of the Second Siting Provision, but it did so in its *de facto* analysis.[370] That is, when looking at "the design, structure, and modalities of operation of the Second Siting Provision in the context of relevant factual circumstances," the Panel considered the American response.[371] The AB said the Panel ought not to have compartmentalized its contingency analyses, i.e., the Panel should not have treated the analyses as entirely separate. Rather, said the AB, "[i]t would have been preferable if it [the Panel] had conducted a more holistic assessment of all relevant elements and evidence on the record."[372] But, compartmentalization was not reversible error.

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[367] *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 4.1(c), 5.46–5.58, 6.4.

[368] *See id*. ¶ 5.46.

[369] *See id*.

[370] *See id*. ¶¶ 5.51–5.53.

[371] *Id*. ¶ 5.53.

[372] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.53.

A Panel has flexibility to examine the evidentiary record. Indeed, it may find the probative value of some evidence goes not to the question of contingency, but rather to understand the "design, structure, and modalities of operation" of a subsidy scheme.[373] That was true with respect to responses the United States submitted to certain questions: the EU wanted the Panel to examine them in the context of its contingency analysis, yet the Panel did not do so. Nevertheless, the Panel's declination did not unduly restrict the scope of evidence the Panel used to determine that the B&O Aerospace Tax Rate was not *de jure* contingent on exportation.

Four interesting and pragmatic teachings emerge from this part of the Report. The AB (1) affirms its precedents that the word "contingent" in Article 3:1 of the *SCM Agreement* has the same meaning for *de jure* or *de facto* contingency; (2) summarizes the different evidentiary bases for *de jure* versus *de facto* contingency; and (3) explains that adverse effects from a subsidy, in the form of displacement of imported inputs in favor of domestic inputs, are not sufficient proof that receipt of the subsidy benefit is *de facto* contingent on import substitution; and (4) says proof of *de facto* contingency requires a case-by-case factual inquiry. For these precepts, the AB Report is worth quoting:

> 5:48. [W]hereas *de jure* contingency is demonstrated on the basis of the very words of the measure, or by necessary implication therefrom, the existence of *de facto* contingency is "*inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy." [The Appellate Body cited its 1999 *Canada Aircraft* precedent, ¶ 167 (emphasis original).] The factors relevant for establishing the existence of *de facto* contingency include the design and structure of the measure, its modalities of operation, as well as the relevant factual circumstances that provide the context for understanding the measure's design, structure, and modalities of operation. [The Appellate Body cited its 2011 *Airbus* precedent, ¶ 1046.] However, *the legal standard expressed by the word "contingent" is the same for both de jure and de facto contingency*. [The Appellate Body cites its 1999 *Canada Aircraft* precedent, ¶ 167.] . . . [T]he relevant question under Article 3:1(b) [for a *de facto* contingent import substitution subsidy] is *whether a condition requiring the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from its design, structure, modalities of operation, and relevant factual circumstances*. The factual circumstances potentially relevant to an assessment of whether a subsidy is *de facto* contingent in the

[373] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 6.4; *see also id.* ¶ 5.46–5.47 (discussing the different ends to which the American "admission" could be put).

circumstances of this case could include, for example, the existence of a multi-stage production process, the level of specialization of the subsidized inputs, or the level of integration of the production chain in the relevant industry.

5:49. [B]oth import substitution subsidies and other subsidies that relate to domestic production *may have adverse effects in respect of imported goods*. Subsidies contingent upon import substitution, by their nature, adversely affect competitive conditions of imported products. Yet, also subsidies that relate to the production of certain goods in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods downstream and adversely affecting imports. In the specific case of subsidies granted for the production of both an input and a final good, subsidy recipients would likely both "produce" and "use" the subsidized inputs in the production of the subsidized final good. Indeed, such subsidies would have consequences for the subsidized producers' input-sourcing decisions to the extent that, having been required to produce an input domestically, and for reasons of production costs and efficiency, they would likely use at least some of these inputs in their downstream production activities. This is even more so in instances where the subsidized input is specialized in nature or where vertical integration between the upstream and downstream stages of the production chain exists. *However, while such subsidies may foster the use of subsidized domestic goods and result in displacement in respect of imported goods, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods*.

5:50. [W]hether a subsidy is [*de facto*] contingent upon the use of domestic over imported goods is to be "*inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy." [The Appellate Body cites its 1999 *Canada Aircraft* precedent, ¶ 167 (emphasis original).] In particular, *factual circumstances, where relevant, may form part of the context for understanding the measure's design, structure, and modalities of operation in a particular market, all of which may assist in discerning whether or not a de facto contingency exists*. The design and structure of a measure granting a subsidy may be adapted to factual circumstances—such as a multi-stage production process where specialized inputs and final goods are subsidized, or where the production chain is vertically integrated.

> The modalities of a measure so designed or structured may then operate, such that conditions for eligibility or access to the subsidy may entail a condition requiring the use of domestic over imported goods. However, *whether a subsidy is simply conditional upon the domestic production of certain goods, or upon the use by the subsidy recipient of domestic over imported goods, should be assessed on a case-by-case basis*.[374]

So, "[i]n determining the existence of contingency, a Panel should conduct a *holistic* assessment of all relevant elements and evidence on the record."[375] The Panel "need *not* compartmentalize its *de jure* and *de facto* analysis to reach an overall conclusion as to whether a subsidy is contingent upon the use of domestic over imported goods."[376]

J. Issue 4: *SCM Agreement* Article 3:1(b), *De Facto* Import Substitution Subsidies, and Second Siting Provision of B&O Aerospace Tax Rate[377]

On this fourth and final substantive issue, the United States won again.[378] The EU persuaded the Panel that the Second Siting Provision was a *de facto* contingent import substitution subsidy. The AB overturned that finding: this Provision did not entail a condition to use domestic over imported goods.

An obvious question about the Second Siting Provision is whether the Department of Revenue might terminate its benefits, the B&O Aerospace Tax Rate, if Boeing uses imported 777X wings.[379] That is, suppose Boeing keeps assembly operations within Washington State, but the wings it assembles are imported from overseas. Would the use of foreign-origin wings vitiate the in-state "siting"? A "yes" answer would mean the Second Siting Provision looks like a *de facto* import substitution subsidy.

A similar obvious question about the Provision is what happens if Boeing manufactures wings both in-State and out-of-State, buying some of the wings from producers not situated in Washington State, or even not situated in the United States? To this hypothetical question, the United States replied:

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[374] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 5.48–5.50 (emphasis added unless otherwise noted). The 1999 Canada Aircraft precedent (Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WTO Doc. WT/DS70/AB/R (adopted Aug. 20, 1999) is discussed in 2 RAJ BHALA, INTERNATIONAL TRADE LAW: AN INTERDISCIPLINARY, NON-WESTERN TEXTBOOK, ch. 63, § 2 (4th ed., 2015).

[375] *Id*. ¶¶ 5.51, 6.4 (emphasis added).

[376] *Id*. ¶¶ 5.51, 6.4 (emphasis added).

[377] *See id*. ¶¶ 4.1(d), 5.59–5.81, 6.5.

[378] *See id*. ¶¶ 5.80–5.81.

[379] *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 5.66, 5.68.

> [T]he Panel asked [in Question Number 80] whether the Second Siting Provision would be triggered [i.e., the B&O tax benefit terminated by the Washington State Department of Revenue] if Boeing would continue manufacturing wings in Washington and, in addition, would purchase them from another producer outside of Washington. With respect to the second hypothetical scenario, the United States explained:
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> Under the Second Siting Provision, the fact that fuselages and wings are imported is irrelevant. Rather, the Second Siting Provision is triggered only if DOR [Department of Revenue] determines that any final assembly or wing assembly is sited outside Washington. It is the siting of that production activity, not the domestic or imported character of any goods, that is relevant.
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> Thus, as the United States noted in response to Question 39—and assuming *arguendo*, contrary to fact, that it is possible for Boeing to import completed fuselages and wings for use in the production of the 777X—if the completed fuselages and wings were produced outside the United States and then imported, DOR would likely determine that some final assembly or wing assembly had been sited outside Washington, meaning the Second Siting Provision would be triggered. However, taking another hypothetical that ignores for the sake of argument what is realistic, and applying the EU's approach to "domestic" and "imported," if Boeing assembled completed fuselages and wings in Washington, sent them to a foreign company to conduct non-assembly operations (e.g., cosmetic painting of logos or testing), and then imported them, the Second Siting Provision would not be triggered, despite that under the EU's approach, Boeing was using imported goods.
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> Again, the Second Siting Provision is focused on the siting of production activity—in particular, the siting of assembly operations. This is significant in light of the distinction drawn by the EU . . . meeting between the use of goods within the meaning of [*SCM Agreement*] Article 3:1(b), and what are "just assembly operations."[380]

On the basis of this US response, the Panel held that:

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380 Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.68.

> the Panel concluded that "the Second Siting Provision is not only aimed at ensuring that [Boeing] itself assemble the 777X wings or conduct the final assembly of the 777X"; rather, for the Panel, "[i]t also concerns the 'use' of certain goods [i.e., wings], and specifically the origin of those goods that enter into the production process for the 777X as a condition for the continued availability of a subsidy." In the Panel's view, whether or not the Second Siting Provision would be triggered would be determined by the origin of the wings. The Panel concluded that "the *only* decision by Boeing to source wings which it would then 'use' in producing the 777X that *would not* trigger the Second Siting Provision would be to source such wings within Washington State, which by definition would be domestic wings." The Panel further considered that the United States' responses clarified that the term "or" in the Second Siting Provision "contemplates, and seeks to prevent *inter alia*, any wings . . . from being produced as separate products outside Washington State . . . that would then be shipped to Washington State for incorporation in the final assembly process." On this basis, the Panel found that no wings can "be sourced by Boeing from outside the state of Washington without the consequence of activating the Second Siting Provision."[381]

In effect, the Panel concluded the Second Siting Provision involves a *de facto* condition about the origin and use of aircraft parts. It is this holding that the AB overturned. The AB found the Panel's basis far too narrow; it was not a "holistic," "total configuration of the facts" analysis required for a *de facto* contingency determination.[382]

K. Holding and Rationale

The AB decided that "a statement by the Panel that a measure may 'concern' the domestic or imported origin of goods" is not, "in itself sufficient to establish the existence of *de facto* contingency to use domestic over imported goods within the meaning of Article 3:1(b)."[383] The AB did not view that statement alone as enough to support a finding that the Second Siting Provision requires use of domestic over imported goods. Indeed, the evidence (specifically, the above-quoted American response to Panel Question Number 80) concerning the chances of the Washington State Department of Revenue providing a tax benefit to Boeing

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381 Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.71.

382 *See id.* ¶ 5.80.

383 *Id.* ¶ 5.71.

emphasized the location of production of fuselages and wings—not the birthplace of those items as imported or domestic.[384]

Put differently, the key question as to whether a *de facto* import substitution contingency exists "is not whether a condition for eligibility under a subsidy may *result* in the use of more domestic and fewer imported," but rather:

> whether *a condition requiring* the use of domestic over imported goods can be discerned from the terms of the measure itself, or inferred from the measure's design, structure, and modalities of operation, in light of the relevant factual circumstances that provide the context for understanding the measure and its operation.[385]

Those facts showed "it is the *location of production, not the imported or domestic origin of the resulting product*, that would trigger the loss of the B&O Aerospace Tax Rate."[386] So, the location of production facilities to make fuselages and wings (within or outside of Washington State), not the origination of particular fuselages and wings used (whether they are domestic or imported), triggers the Second Siting Provision.

Interestingly, even a statement by the Governor of Washington "about the goal of keeping 777X wing production in Washington," which the Panel thought bespoke a *de facto* import substitution contingency, in truth "simply underscore[d] that the Second Siting Provision relates to a requirement not to site certain production and assembly activities outside Washington State."[387] Yet, the Governor's statement raises a problem: obviously, the location of a factory, and the origination of goods made in that factory, are connected. Is the distinction between origin (of inputs) and location (of final manufacturing or assembly), with respect to *de facto* import substitution contingency, a distinction without a difference?

The AB thought not, i.e., it said the distinction was *bona fide*.[388] For it, the distinction turns on what condition triggers the favorable B&O Aerospace Tax Rate. The condition is to set up a factory in Washington State. The condition is not to use fuselages and wings made in Washington State—there is no such condition. Boeing is free to use fuselages and wings made outside the State, indeed, outside the United States, and still receive the favorable Rate—as long as it has established a

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[384] For the Appellate Body's discussion of this response and related evidence, and its scolding of the Panel for over-relying on those responses, see Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 5.77–5.80.

[385] *Id*. ¶ 5.71 (emphasis original).

[386] *Id*. ¶ 5.73 (emphasis added).

[387] *Id*. ¶ 5.74.

[388] *See id*. ¶ 5.73.

production facility in the State. Such a condition certainly is not a *de jure* one, and because this distinction is authentic, it is not a *de facto* one either.[389]

In two key paragraphs, the AB explained:

> 5:75 We consider it significant that the Second Siting Provision is focused on the "siting" of assembly activities. . . . [A]lthough conditions for eligibility and access to a subsidy may entail certain consequences for a domestic producer's sourcing decisions between domestic and imported goods, this alone does not equate to a condition requiring the use of domestic over imported goods. The Panel itself appears to have recognized this when it stated that the focus of its assessment was "not whether the measures at issue have had an import substitution effect or a detrimental impact on imports, as this would [have] require[d] the Panel to trespass into an adverse effects analysis of the type that is not contemplated by Article 3:1 [of the *SCM Agreement*]. Yet, by relying on the consequence that a domestic siting provision has for the importation of goods produced through assembly operations sited abroad, the Panel itself, in our view, built its reasoning on the very observations concerning any consequential "import substitution effect" and "detrimental impact on imports" that the Panel stated would be inappropriate in an Article 3:1(b) analysis.
>
> 5:76 [A] subsidy requiring the siting of certain production activities in a Member's domestic territory can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, which would have the consequence of increasing the use of these subsidized domestic goods in downstream production and adversely affecting imports. In the specific case of subsidies granted for the production of inputs—e.g., wings and fuselages – the subsidy recipient would likely both "produce" and "use" the subsidized inputs in the production and assembly of the subsidized final good. Indeed, subsidies in these circumstances have consequences for the input-sourcing decisions of the subsidized producers to the extent that, having been required to produce an input domestically, and for reasons of production costs and efficiency, they will likely use these inputs in their downstream production activities. This holds

[389] In light of this conclusion favoring the United States, the Appellate Body exercised judicial economy and declined to address other American arguments about the *de facto* contingency of the Second Citing Provision, and also a European claim about the *de facto* contingency of the First Siting Provision. *See* Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 5.82–5.84, 6.6.

> particularly true in circumstances where the subsidized inputs are very specialized in nature and the manufacturing and assembly stages of the production chain are highly integrated. However, while a subsidy may operate in such factual circumstances so as to foster the use of subsidized domestic inputs, and thereby result in adverse effects on imports within the meaning of Part III of the *SCM Agreement*, such effects do not, in and of themselves, demonstrate the existence of a requirement to use domestic over imported goods within the meaning of Article 3:1(b) of that *Agreement*.[390]

Note the correctness of the above reasoning.

Suppose an adjudicator looked at whether a facially neutral measure (i.e., one with no *de jure* contingency), creates an import substitution effect (favoring, in practice, the use of domestic over imported inputs) to determine whether a *de facto* contingency exists. That inquiry would blur the line between the (1) *per se* illegality of a Red-Light subsidy, where no adverse effects need be shown (but rather are presumed); and (2) a Yellow Light subsidy, where adverse effects must be proven for that subsidy to be actionable. Note, too, the AB's explicit embrace of the use of counterfactual scenarios to ferret out the existence, or lack thereof, of *de facto* contingency:

> We also take note of the United States' responses to Panel questions involving certain "counterfactual scenarios" regarding what determination the Washington Department of Revenue would likely make if Boeing were to import completed fuselages and wings. . . . [*U]sing counterfactual or hypothetical scenarios is a permissible tool of legal analysis that may be particularly relevant in WTO dispute settlement*, including in the context of the *SCM Agreement*. Moreover, the absence of evidence pertaining to the actual application of a measure should not preclude the possibility for a Member to challenge a law that has not yet been applied. Especially when the alleged contingency is not clearly expressed in the language of the relevant legal instrument, a thorough analysis of the relationship between the granting of the subsidy and the condition requiring the use of domestic over imported goods on the basis of a careful scrutiny of all relevant factors and factual circumstances is required.[391]

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[390] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶¶ 5.75–5.76.

[391] *Id*. ¶ 5.77 (emphasis added).

There were precedents for judges on the Geneva bench putting hypotheticals to lawyers, which the AB cited: the 1999 *Canada Aircraft* and 2000 *Canada Auto Pact* cases.[392] So, as part of a total-configuration-of-the-facts text, it is fine to include conjectural questions based on *arguendo* assumptions.

The problem the AB found with the Panel's work was not in the Panel's use of hypotheticals, but rather in its "limited consideration" of the American responses:[393]

> [T]he United States emphasized that whether fuselages and wings are imported is "irrelevant" for purposes of the Second Siting Provision because it is the siting of production activities, not the domestic or imported character of goods, that determines whether or not the Second Siting Provision would be triggered. This underscores our assessment that any requirement that is to be discerned in the Second Siting Provision relates to the location of assembly activities, and does not in itself demonstrate the existence of a *de facto* requirement to use domestic over imported goods. In our view, the circumstances present in this dispute—such as the existence of a multi-stage production process, the level of specialization of the subsidized inputs, and the level of integration of the manufacturing and assembly chain in the aircraft industry—should have received more careful consideration by the Panel.[394]

These other circumstances all pointed to the importance in obtaining the Aerospace Tax Benefit of the location of manufacturing and assembly operations of fuselages and wings, not the origin of those aircraft parts.

L. Commentary

1. Fairness in Criticism

This entire case is about *SCM Agreement* Article 3:1(b)—import substitution subsidies. It is fact intensive, as the "Air Wars" in the Boeing-Airbus conflict are.[395] At bottom, the case raises questions of how to determine whether a

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[392] The *WTO Case Review 2000* analyzes the 2000 *Canada Auto Pact* Appellate Body Report (Appellate Body Report, *Canada–Certain Measures Affecting the Automotive Industry*, WTO Doc. WT/DS139/AB/R, WT/DS142/AB/R (adopted June 19, 2000).

[393] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.78.

[394] *Id*. ¶ 5.79.

[395] The 2011 *Airbus* Appellate Body Report (Appellate Body Report, *European Communities and Certain Member States–Measures Affecting Trade in Large Civil Aircraft*, WTO Doc. WT/DS316/AB/R (adopted June 1, 2011) [hereinafter Appellate Body Report,

de jure or *de facto* contingency exists regarding the use of domestic over imported goods. The essential teachings, for all the factual complexity, are simple and accord with common sense. This entire case also is about a clean-sweep American victory over the EU.

So, this case stands in contrast to the rhetoric about the United States losing from trade, and the WTO being a disaster. Far from judicial activism, the AB showed tolerance for multiple reasonable textual readings, and deferred to one that favored the United States. The case is a reminder, then, that criticisms of the AB should avoid broad brush strokes of indelible paint, in favor of narrow, erasable pencil lines. Each case needs to be judged on its merit. And, as the AB still is less than 25 years old, it needs to be seen as an adjudicatory institution that can evolve, not as a condemnable bench stuck forever with its past shortcomings. Otherwise, criticisms are extremist and destructive, rather than balanced and helpful.

2. Stable Jurisprudence and the International Rule of Law

It is hard to see the AB embrace of hypothetical reasoning without thinking of the common law-like approach the AB necessarily takes to adjudicate ambiguities. And, it is hard to see the AB's holding without thinking of *de facto stare decisis*, because as the AB indicated clearly, it was applying its 1999 *Canada Aircraft* precedent. That is the case in which it fashioned the test for *de facto* contingency, namely, "the total configuration of facts constituting and surrounding the granting of the subsidy" are examined, with no single factor "on its own [that] is likely to be decisive."[396] Put directly, the jurisprudence across two decades on how to check for this contingency has been fairly stable.

Perhaps that is how it should be. Stability promotes certainty and predictability for governments and private parties. In turn, certainty and predictability are hallmarks of the international rule of law.

Canada Aircraft]) and 2012 *Boeing* Appellate Body Report (Appellate Body Report, *United States–Measures Affecting Trade in Large Civil Aircraft* (Second Complaint), WTO Doc. WT/DS353/AB/R (adopted Mar. 12, 2012) are analyzed in the *WTO Case Review 2011* and *WTO Case Review 2012*, respectively. *See WTO Case Review 2011*, 29 ARIZ. J. INT'L & COMP. L. 287, 338 (2012); *see also WTO Case Review 2012*, 30 ARIZ. J. INT'L & COMP. L. 207, 343 (2013).

[396] Appellate Body Report, *Boeing Conditional Tax Incentives*, *supra* note 324, ¶ 5.80 (quoting Appellate Body Report, *Canada Aircraft*, *supra* note 395, ¶ 167).

VI. SANITARY AND PHYTOSANITARY MEASURES – SCOPE AND EVIDENCE FOR IMPORT BANS UNDER *SPS AGREEMENT* ARTICLES 6: 1-3

A. Citation

WTO Appellate Body Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WT/DS475/AB/R (adopted Mar. 21, 2017).[397]

B. Facts: African Swine Fever (ASF) and Russian EU-Wide and Country-Specific Import Bans

African swine fever first appeared, as the name implies, in eastern Africa in 1921.[398] The most recent outbreak outside of Africa started in 2007 in Georgia, spreading first to Russia and then to Ukraine and Belarus.[399] Lithuania attempted to protect its Belarussian border from an incursion of ASF.[400] "It was to no avail. In January 2014, two dead boars found on the Lithuanian side of the border tested positive for ASF, marking the first arrival of the disease in the European Union in decades."[401] Other EU-Baltic countries soon reported infections in both wild and domestic suidae.[402] The first outbreak in Poland was confirmed on February 17, 2014.[403] Latvia confirmed its first outbreak on June 26, 2014.[404] Estonia reported its first outbreak on September 8, 2014.[405]

Russia's response after each new incidence was to implement a ban between one day and ten days after ASF was discovered. We recall that the EU-wide ban was initially put in place on January 29, 2014. The European Union's first request for recognition of disease-free areas was addressed to Russia on January 31,

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397 Panel Report, *Russian Federation–Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, WTO Doc. WT/DS475/R (adopted Aug. 19, 2016) [hereinafter Panel Report, *Russia Pigs (EU)*]. At the Appellate stage, there were ten Third Party participants: Austl., Braz., China, Ind., Japan, S. Kor., Nor., S. Afr., U.S., and the Separate Customs Territory of Taiwan, Penghu, Kinmen and Matsu.

398 Erik Stokstad, *African swine fever outbreak alarms wildlife biologists and veterinarians*, SCIENCE (Dec. 20, 2017, 12:10 PM), http://www.sciencemag.org/news/2017/12/african-swine-fever-outbreak-alarms-wildlife-biologists-and-veterinarians.

399 *Id*.

400 *Id*.

401 *Id*.

402 Appellate Body Report, *Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union*, ¶ 5.76, WTO Doc. WT/DS475/AB/R (adopted Mar. 21, 2017) [hereinafter Appellate Body Report, *Russia Pigs (EU)*].

403 Panel Report, *Russia Pigs (EU)*, *supra* note 397, ¶ 7.941.

404 *Id*.

405 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.76.

2014. At that time, the EU-wide ban included the entire territory of the European Union with the exception of Lithuania. This situation changed on February 27, 2014, when the ban on Poland was put in place, then again on June 27, 2014 when the ban on Latvia was put in place, and finally on September 11, 2014 when the ban on Estonia was put in place.[406]

The EU requested the establishment of a Panel on the same day as the Russian ban on Poland's pork and pork products, June 27, 2014.[407] The Panel determined the appropriate investigative period would run from the January 29, 2014, ban until the final ban was implemented on Estonian pork and pork products on September 11, 2014.[408]

The Panel issued its report on August 19, 2016, and found for the EU on all issues except whether the EU had provided, as required by Article 6:3 of the *SPS Agreement*, sufficient evidence that the ASF-free areas within Latvia were likely to remain free of ASF. On that issue, the Panel agreed with Russia that the evidence provided was insufficient to show that Latvia's ASF-free areas would remain so.[409]

Virtually none of the Panel's substantive findings met with satisfaction from both parties, as nearly every major issue was contested on appeal. The main issues before the AB included:

> (1) whether the EU-wide ban was attributable to Russia;
>
> (2) the nature of the exporting Member's obligation under Article 6.3 to provide evidence to the importing Member related to pest or disease prevalence;
>
> (3) what impact the exporting Member's Article 6.3 evidence has on the importing Member's Article 6.1 and 6.2 obligations to adapt SPS measures; and
>
> (4) what it means to "recognize" the concepts of pest- or disease-free areas and areas of low pest or disease prevalence under Article 6.2 of the SPS Agreement.
>
> Russia lost every major substantive issue at the AB level.

406 Panel Report, *Russia Pigs (EU)*, *supra* note 397, ¶ 7.417.
407 *Id*. ¶ 1.3.
408 *Id*. ¶ 7.176.
409 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 1.4(e)(iii).

C. Issue 1: Attribution of EU-Wide Ban to Russia and *SPS Agreement* Article 6

Russia, in its argument to the AB, claims first that the ban is not a ban, and second that any restriction, by whatever name, is not attributable to unilateral Russian action.[410] In its initial panel request, the EU, not caring whether Russia called it a ban or not, accused Russia of actions that did not conform with Member obligations under the *SPS Agreement*.

> [T]he European Union identified as one of the measures at issue the "refusal by Russia to accept imports of the products at issue from the entire EU, amounting to an EU-wide ban." The European Union characterized this measure both as an action (in the form of an import ban or restriction) and, in the alternative, as an omission (in the form of a failure to accept imports from the European Union). The European Union also sought the review of this measure as such and as applied, de jure and de facto, and insofar as it is written or unwritten.[411]

The statement that a ban is not a ban has become something of a familiar refrain in global politics,[412] but the AB had to look at the action itself, not how the action was labelled.

Russia's defense of its not-a-ban rested on bilaterally negotiated veterinary certificates between the EU and the Russian Federation. Ironically, the EU and Russia agreed to these certificates in 2006, which means they were created before the threat of ASF ran in the opposite direction from 2008 to 2014, when Russia had African swine fever, and the EU did not.[413] Russia's argument based on the veterinary certificates essentially followed three points:

> (1) Russia's terms of accession allowed Russia to negotiate bilateral veterinary export certificates;

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410 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.7.

411 *Id*.

412 *Trump says executive order is not a Muslim ban*, BBC NEWS (Jan. 29, 2017), http://www.bbc.com/news/av/world-us-canada-38786462/trump-says-executive-order-is-not-a-muslim-ban.

413 *Compare* A. Gogin et al., *African swine fever in the North Caucasus region and the Russian Federation in years 2007-2012*, US NAT'L LIBR. OF MED. (Apr. 2013), https://www.ncbi.nlm.nih.gov/pubmed/23266725 *with* Erik Stokstad, *African swine fever outbreak alarms wildlife biologists and veterinarians*, SCIENCE (Dec. 20, 2017, 12:10 PM), http://www.sciencemag.org/news/2017/12/african-swine-fever-outbreak-alarms-wildlife-biologists-and-veterinarians.

> (2) requirements of the bilateral veterinary certificates can control the terms of an SPS measure; and
>
> (3) if the EU cannot meet the requirements of the veterinary certificates, then a halt in Russian imports of EU pork is an EU failing, not a Russian action.

The Panel and the AB both agreed with only the first point but differed with Russia on the second and third points.[414] Russia's terms of accession do outline a role for bilateral veterinary certificates, but the language creates "Russia's commitment to acknowledge the validity of the bilateral veterinary export certificates or their amendments for those imports from Members into Russia."[415] In short, the bilateral veterinary certificates are keys with which Members can open the door to Russia's markets, not cudgels with which Russia can beat back exporting Members. In any case, these certificates cannot restrict trade beyond the *SPS Agreement*.

Russia could not argue that its terms of accession could triumph over the obligations in a covered agreement, as the AB had already decided that covered agreements rank higher than accessions in *China Rare Earths*.[416] Russia took a different approach, but both the Panel and the AB were "not persuaded by Russia's argument that its terms of accession to the WTO render the direct or indirect application of the bilateral veterinary export certificates consistent with its obligations under the SPS Agreement."[417] If the requirements in a bilateral veterinary export certificate are more restrictive than would be allowed by the *SPS Agreement*, then the error is with the certificate, not the *SPS Agreement*.

> We do not consider that the commitment set out in paragraph 893 [of the Working Party Report] can be understood as an obligation holding Russia or any other WTO Member captive to the terms of the bilateral veterinary certificates, when acting in accordance with those terms would put that Member at variance with its WTO rights or obligations. We also do not consider that Russia must, as it suggests, choose between violating the terms of its Working Party Report or other obligations in the WTO covered agreements. As the Appellate Body has explained, provisions of the WTO covered agreements must be read "in a way that gives

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414 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶¶ 5.14, 5.22.

415 *Id*. ¶ 5.14.

416 *See generally* Appellate Body Report, *China–Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WTO Doc. WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R (adopted Aug. 7, 2014). Note the element in the full Appellate Body Report title is spelled "molybdenum," *cf.* Eric Witmer, *Lexicographers as Law-Makers: The World Trade Organization Appellate Body and the Oxford English Dictionary* (forthcoming 2019).

417 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.14.

> meaning to *all* of them, harmoniously." Accordingly, while Russia and other WTO Members agreed that the bilateral veterinary certificates would continue to remain in effect until a Customs Union common certificate was agreed, this cannot be read to absolve the Members involved from acting in good faith to make the necessary amendments to the certificates so as to ensure that SPS measures taken on the basis of such certificates are in compliance with their WTO obligations.[418]

A veterinary certificate can restrict trade to protect a Member from SPS risks, but the *SPS Agreement* acts as a cap on how much the certificates can restrict trade. Terms that are too restrictive, even if bilaterally negotiated, must be amended.

D. Holding and Rationale

With the understanding that bilateral veterinary certificates could not move the needle on appropriate SPS measures, the AB easily dispensed with the questions of whether a ban was in place, and who was responsible. First, the restriction of pork and pork products from the EU overstepped a mere enforcement of the veterinary certificates to become an actual ban. The AB followed the Panel's conclusion on this point, based on the same evidence, including:

> (1) Two letters from the Russian Federal Service for Veterinary and Phytosanitary Surveillance (FSVPS), both dated January 29, 2014; and
>
> (2) A list of rejected consignments of pig products, dated August 6, 2014.

The first of the FSVPS letters was addressed to the European Commission's Directorate General for Health and Consumer Protection.[419] The Panel concluded, and the AB agreed, this letter meant "as a consequence of the detection of ASF in the European Union's territory . . . products accompanied with veterinary certificates attesting to the veterinary requirements provided in the bilateral certificates agreed by Russia and the European Union in 2006 would be returned upon arrival to Russia."[420] The second letter from FSVPS was to its territorial departments, saying much the same thing it had told the EU, reminding the departments the bilateral veterinary certificates required an "absence of ASF, for the last three years, in the entire territory of the European Union."[421] The list of

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418 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.34.

419 *Id*. ¶ 5.3(a).

420 *Id*.

421 *Id*. ¶ 5.3(b).

rejected consignments of pig products demonstrated to the Panel, and to the AB, products at issue were not allowed entry into Russia, i.e., that the FSVPS enforced its policy regarding the veterinary certificates.[422] These three documents, along with additional evidence, showed that the actions taken by Russia had constituted an "EU-wide ban" on live pigs, pork, and pork products.

But could this ban be characterized as, in effect, the EU banning itself by failing to meet the requirements it had agreed to in the bilateral veterinary certificates? Or could the ban be the product of agreement between the EU and Russia? No. The AB found "the decision to deny the importation of the products at issue is undeniably an act of the Russian Government."[423] The veterinary certificates were a joint requirement, but the action taken by Russia upon reviewing the certificates was Russia's action.

> Thus, we do not agree with Russia to the extent that it maintains that the fact that the basis for banning the importation of the products at issue emanates from veterinary certificates jointly agreed to by Russia and the European Union somehow undermines the attribution of the EU-wide ban to Russia.[424]

For future SPS disagreements, Members should look to this AB Report for what it does not say as much as what it says. The Panel found (and the AB did not disagree) that the SPS measure at issue began with a failing on the EU's part, in that "as of January 25, 2014, the entire territory of the European Union except for Sardinia is not free of ASF—thus not matching the exact wording in the bilaterally agreed veterinary certificates."[425] Russia at that point had a choice in responding to this failure. Russia chose to ban the products at issue, therefore that is the action the AB addressed. The AB did not address less restrictive, possibly permissible SPS measures. Russia could have, perhaps, required a second veterinary certificate showing that a specific shipment of goods had been tested ASF-free, or required on-site testing upon arrival into Russian customs territory by either EU or Russian scientists, or other measures that stop short of an outright ban. For customs officials and trade ministers asking themselves, "What's the point of the veterinary certificates if you can't do anything about non-conforming certificates," the AB left open a wide range of responses to goods accompanied by export certificates that fail to meet bilaterally-negotiated requirements. The only door closed shut by *Russia Pigs (EU)* is the one leading to a complete territory-wide ban.

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422 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.3(e).
423 *Id*. ¶ 5.20.
424 *Id*.
425 *Id*.¶ 5.12.

E. Issue 2: Evidence and *SPS Agreement* Article 6:3

The application of Article 6.3 of the *SPS Agreement* to the facts of this case shows perhaps a flaw in the drafting of the *SPS Agreement*: it is not chronological. In the order of operations, the exporting Member must *first* show evidence to the importing Member, and *then* the importing Member's obligations to adapt SPS measures to meet Article 6.1 and 6.2 requirements are triggered.

> The duties set forth in Article 6.3 are aimed at facilitating the process of adaptation of measures to the SPS characteristics of areas within an exporting Member's territory. That Member is usually best placed to gather and provide information about the level of pest or disease prevalence in areas located within its territory. In fact, without this cooperation by the exporting Member, it may prove difficult for an importing Member to determine the pest or disease status of such areas and to adapt its measures to their SPS characteristics.[426]

If the paragraphs of Article 6 were written in the order 3-1-2, they would match the chronology laid out by the AB here. But whatever the order, Member obligations remain the same for both exporter and importer. The burden imposed on the exporting Member by Article 6.3 was not contested by either party, in that the language is clear. Once an SPS measure is implemented, the exporting Member must provide evidence to support its request the measure be relaxed or lifted.

> Exporting Members claiming that areas within their territories are pest- or disease-free areas or areas of low pest or disease prevalence shall provide the necessary evidence thereof in order to objectively demonstrate to the importing Member that such areas are, and are likely to remain, pest- or disease-free areas or areas of low pest or disease prevalence, respectively. For this purpose, reasonable access shall be given, upon request, to the importing Member for inspection, testing and other relevant procedures.[427]

The disagreement between the EU and the Russian Federation hinged on how the Article 6.3 requirements are satisfied; not just the type and extent of evidence, but from what perspective it is to be analyzed.

The reading of Article 6.3 at issue in *Russia Pigs (EU)* centered on one phrase of the first sentence. If the exporting member "shall provide the necessary evidence thereof in order to *objectively* demonstrate to the importing Member," then the direction the evidence must travel is clear: it is given "to the importing

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426 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.61.

427 *Id*. ¶ 5.56.1.

Member." But if the operative word is "objectively," that evidence carries a burden of proof, not persuasion. The standard for sufficiency of the evidence is an objective one. US lawyers might call it a "reasonable person" standard, and it would allow an objective third party to determine whether the evidence provided by the EU was sufficient to allow Russia to decide regarding pest or disease prevalence.

Russia's proposed reading of the phrase was "shall provide the necessary evidence thereof to objectively demonstrate *to the importing Member*," arguing that a Panel must put itself in the importing Member's shoes to see if the evidence is sufficient.

> Russia submits that the Panel erred in failing to find that Article 6.3 requires panels to take into account the scientific and technical evidence *relied upon by an importing Member*, as well as *that Member's* assessment of the evidence submitted by an exporting Member, in accordance with the importing Member's appropriate level of sanitary or phytosanitary protection (ALOP).[428]

Russia's reasoning was the importing Member is the one adjusting its SPS measures, so that Member is the one who needs to be convinced of areas which are pest- or disease-free or of low pest or disease prevalence and are likely to remain so.

The problem with this second interpretation is it could lead to bad faith dealings where an importing Member obstinately remains unconvinced of areas within the exporting Member's territory which are pest or disease-free, or areas where pest or disease prevalence is low. In maintaining such a position, the importing Member would be free to maintain overly restrictive SPS measures. The exporting Member would have the obligation to provide ever more evidence while the importing Member endlessly repeats the refrain that the exporter has fallen short of the Article 6.3 requirement of "necessary" evidence.

F. Holding and Rationale

The AB held that the word "objectively" in Article 6.3 is, along with "necessary," the controlling language. The standard applied by the Panel was correct, and the evidence did not need to be viewed from Russia's perspective. The AB agreed the Panel was correct in its findings, but perhaps not explicit enough in the standard it was applying and explicated the applicable standard for Article 6.3 by clarifying the Panel's finding.

> [The Panel's] statement is somewhat ambiguous as to whether the Panel considered that the assessment of whether the European

[428] Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.40 (emphasis added).

> Union had provided the necessary evidence required for an "objective demonstration" of the ASF status of the relevant areas was to be conducted by *the Panel itself*, rather than by the Russian authorities.[429]

The AB held this assessment of the evidence produced must be conducted by the Panel.

The AB did draw a line, however, between the burden to produce and the burden to persuade.

> Russia argues that the words "in order to," followed by the phrase "objectively demonstrate to the importing Member," indicate that the focus of the exporting Member's task of assembling the necessary evidence is "to convince the *importing Member* to accept the proffered zone" as being, and likely to remain, disease-free.[430]

This argument was unconvincing for the AB.[431] The obligation of the exporting Member is not necessarily to convince, but only to provide evidence of a nature, quality, and quantity sufficient to enable the importing Member's authorities ultimately to make a determination as to the pest or disease status of the areas that the exporting Member claims to be pest- or disease-free or of low pest or disease prevalence.[432]

In its Report, the AB tipped its hand somewhat as to which mode of judicial interpretation it was using on this point: pragmatic. A strictly textualist approach to a treaty, statute, or a covered agreement would look only to the plain language of the text. If that language has more than one possible interpretation, a judiciary might ask what the rule should be for future disputes, i.e., the pragmatic approach. The AB typically seeks to give the impression that only textualism is used, but betrayed itself slightly here.

> The situation may arise where, upon review, the evidence provided by the exporting Member proves insufficient for the importing Member to reach a determination as to the pest or disease prevalence in the area concerned in light of its ALOP. In this case, the importing Member may request the exporting Member to supply additional evidence, pursuant to Article 6.3. In this situation, however, the term "necessary" also serves to ensure

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429 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.73 (emphasis original).

430 *Id*. ¶ 5.68.

431 *Id*. ¶ 5.72.

432 *Id*. ¶ 5.72.

> that requests for additional information by the importing Member do not go beyond what is required for determining the pest or disease status of the relevant areas.[433]

In sum, the spirit of Article 6.3 is that the importing and exporting Members are engaged in a dance to fine-tune the SPS measure so the importing Member is protected without overly restricting trade. The AB says this is how the Members should cooperate; the evidence of pest- or disease-free areas and areas of low pest or disease prevalence balances with the adaptation of an SPS measure. When an exporting Member seeks to prove the safety of its exports and re-open trade, the importing Member should not harass, hector, or harangue the exporting Member.

In reaching this conclusion on Article 6.3, the AB is also laying important groundwork for the interplay between 6.3 and 6.1. The AB bifurcates Article 6 by responsibility of each Member. Article 6.3 allocates responsibility to the exporting Member. Articles 6.1 and 6.2 create responsibilities for the importing Member. On this point, the AB also emphasizes the fairness of the dance.

G. Issue 3: Adaptation of Ban and *SPS Agreement* Article 6:1

The relationship between Article 6.3 and Articles 6.1 and 6.2 directly impacts the AB's resolution of Russia's Article 6.1 claims. Russia appealed the Panel's decision.

> Russia asserts that the Panel erred in its interpretation of Article 6.1 by finding that an importing Member can be found to have failed to adapt its measures to the SPS characteristics of areas within an exporting Member's territory even in the situation where the exporting Member has failed to provide the necessary evidence, pursuant to Article 6.3, in order to objectively demonstrate that such areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence.[434]

Russia's argument hinged on the notion that an importing Member cannot adequately adapt an SPS measure in an information vacuum. First, the exporting Member must provide the necessary evidence.[435] To dispense with this argument, the AB used a doctrinal approach to judicial interpretation, citing precedent set by *India–Agricultural Products*.

> Under the first sentence of Article 6.1, Members are required to ensure that their measures are adapted to regional SPS

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433 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.65.

434 *Id*. ¶ 5.42.

435 *Id*. ¶ 5.93.

> characteristics. The Appellate Body has noted that this requirement "is an ongoing obligation that applies *upon* adoption of an SPS measure as well as thereafter." Thus, Members are required to ensure adaptation both when adopting SPS measures and as they maintain them, and may be required to adjust such measures over time as the SPS characteristics of the relevant areas change.[436]

Having laid out the requirements of Article 6.1, the AB addresses their applicability to the case at hand. The AB acknowledges the importing Member is first required to provide the necessary evidence required by Article 6.3, but "Article 6.3 does not address the obligation of the *importing* Member in the context of this process."[437] The AB held the importing Member's Article 6.1 obligation to adapt an SPS measure operates independently.

> [A]n importing Member can be found to have failed to adapt its measures to the SPS characteristics of areas within an exporting Member's territory even in a situation where the exporting Member has failed to provide the necessary evidence, pursuant to Article 6.3, in order to objectively demonstrate that such areas are, and are likely to remain, pest- or disease-free or of low pest or disease prevalence.[438]

Although Article 6 distributes responsibilities between the importing and exporting Members, those responsibilities are not dependent upon each other. Each Member's responsibility would remain even if the other failed to meet its requirements. Here, again, the AB stressed a good faith interplay between Members, as well as the interplay of Articles 6.1, 6.2, and 6.3.

H. Holding and Rationale

The AB first cements the bifurcation of responsibility between Members as the foundation of its holding.

> [T]he obligations of an importing Member in connection with the process of adapting measures to regional SPS characteristics are set forth in Articles 6.1 and 6.2; Article 6.3, in turn, sets out the

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[436] Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.58 (quoting Appellate Body Report, *India–Measures Concerning the Importation of Certain Agricultural Products*, ¶ 5.157, WTO Doc. WT/DS430/AB/R, (adopted June 19, 2015) [hereinafter Appellate Body Report, *India–Agricultural Products*].

[437] *Id*. ¶ 5.70 (emphasis original).

[438] *Id*. ¶ 5.89.

> duties of an *exporting* Member claiming that areas within its territory are pest- or disease-free or of low pest or disease prevalence.[439]

Thus, Russia's obligation to adapt its SPS measure regarding African swine fever remains even if the EU fails to completely fulfill its Article 6.3 obligations in every last detail. However, the independent Article 6.1 obligation does not completely let an exporting Member off the hook. There still is incentive to provide the necessary evidence of pest- or disease-free areas or areas of low pest or disease prevalence.

> [A]n exporting Member claiming . . . that an importing Member has failed to determine a specific area within that exporting Member's territory as 'pest- or disease-free'— and ultimately adapt its SPS measures to that area—will have difficulties succeeding in a claim that the importing Member has thereby acted inconsistently with Articles 6.1 or 6.2, unless that exporting Member can demonstrate its own compliance with Article 6.3.[440]

The "difficulties" are not impossibilities, but an exporting Member that has not complied with Article 6.3 does start from behind in asserting 6.1 and 6.2 claims. Russia pushes this argument too far by making an importing Member's Article 6.1 obligations dependent upon the evidence provided by the exporting Member.

> Russia further submits that the typical administrative steps of the process described in the Article 6 Guidelines, as well as Article 5.3.7 of the Terrestrial Code, all indicate that the importing Member's ability to adapt its measures to the SPS characteristics of areas within the exporting Member's territory depends on the exporting Member's objective demonstration as to the pest or disease status of such areas.[441]

Russia's interpretation here is flawed in a peculiar way; it assumes a type of weakness on Russia's part as an importing Member. Without input from the exporting Member, how could it know the condition of live pigs, pork, and pork products coming from the EU?

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[439] Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.72 (emphasis original).

[440] *Id*. ¶ 5.91 (quoting Appellate Body Report, *India – Agricultural*, supra note 436, ¶ 5.156).

[441] *Id*. ¶ 5.94.

The EU, for its part, argues that not all importing Members operate at the mercy of the exporting Members, but exhibit some agency of their own.[442] "For example, in a situation where sufficient evidence is already in the possession of the importing Member, that Member could be found to breach Article 6.1 even if the exporting Member has not complied with Article 6.3."[443] Here, the EU is arguing for a rule that would favor developing countries in potential future disputes. The example the EU gives and the rule the EU is advocating for would help less developed WTO Members who have less capacity for providing the necessary evidence to objectively demonstrate pest- or disease-free areas or areas of low pest or disease prevalence. Evidence of that sort requires testing, laboratories, and infrastructure. If a Member whose government is small by virtue of a small population, or whose GDP is small, does not have the apparatus to meet its Article 6.3 obligations, then a large and wealthy Member, like the EU itself, would still be required to adapt its SPS measure relying on what data it could.

The AB sides with the EU in this case, creating precedent which would help less developed countries in future cases. Article 6 is not a loose collection of sentences, rather "all the provisions composing Article 6 'need to be read together.'"[444] The three provisions are all "linked to, and interact with, the overarching obligation to ensure that a Member's SPS measures are adapted to the SPS characteristics of the relevant areas."[445]

> Based on a holistic reading of the three paragraphs of Article 6, the Appellate Body explained that, when the importing Member has "received a request from an exporting Member to recognize an area within its territory as 'disease-free,'" the exporting Member "will be able to establish that the importing Member's failure to recognize and determine that disease-free area, and to adapt its SPS measure accordingly, is inconsistent with Articles 6.1 and 6.2 only if that exporting Member can also establish that it took the steps prescribed in Article 6.3."
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> The Appellate Body, however, also clarified that this should not suggest that "a Member adopting or maintaining an SPS measure can *only* be found to have breached the obligation in the first sentence of Article 6.1 after an exporting Member has made the objective demonstration provided for in Article 6.3." Rather, situations exist in which, "even in the absence of such objective demonstration by an exporting Member, a Member may still be

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442 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.95.

443 *Id*.

444 *Id*. ¶ 5.97 (quoting Appellate Body Report, *India–Agricultural Products*, *supra* note 436, ¶ 5.155).

445 *Id*. (quoting Appellate Body Report, *India –Agricultural Products*, *supra* note 436, ¶ 5.144).

> found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1."[446]

Each Panel should conduct a careful case-by-case examination, but it is possible "the importing Member may be required to adapt its measures to regional SPS characteristics irrespective of the exporting Member's showing that it has complied with Article 6.3."[447]

In the case-by-case examination, some cases may resemble the EU's example where "sufficient evidence is already in the possession of the importing Member."[448] However, in this case sufficient African swine fever was already in the possession of the importing Member. While Russia did prevail on one minor point ("the European Union had failed to provide the necessary evidence to objectively demonstrate . . . that the ASF-free areas of Latvia were likely to remain [ASF-free]"),[449] the conditions in Russia were much the same. The Panel quoted Dr. Gavin Thomson, "from an ASF perspective the whole region [the Caucuses, Baltic States, the Russian Federation, and eastern parts of the EU] seems to be in roughly the same position."[450] Therefore, the EU's failure to meet Article 6.3 obligations did not excuse Russia's failure to meet its Article 6.1 obligation to adapt the SPS measure.

> A panel may, in certain specific situations … find that an importing Member failed to comply with Article 6.1 irrespective of the exporting Member's compliance or non-compliance with Article 6.3. However, a panel should provide reasoning explaining why the circumstances of the dispute fall within one or more of those specific situations, or why they otherwise warrant a finding that the importing Member acted inconsistently with Article 6.1. The Panel in this dispute did not provide such reasoning.
>
> Therefore, we modify the Panel's findings, in paragraphs 7.1028 and 8.1.e.ix of the Panel Report, to the effect that the European Union has failed to demonstrate that Russia did not adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of areas within the Latvian territory, pursuant to Article 6.1 of the SPS Agreement. However, given the Panel's finding that Russia failed to adapt the ban on imports of the products at issue from Latvia to the SPS characteristics of areas

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446 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶¶ 5.97, 5.98 (Appellate Body Report, *India–Agricultural Products*, *supra* note 436).

447 *Id*. ¶ 5.99.

448 *Id*. ¶ 5.95.

449 *See, e.g.*, *id*. ¶ 5.102.

450 *Id*. ¶ 5.106.

> *within Russia*, the Panel's conclusion that this measure is inconsistent with Article 6.1 of the SPS Agreement stands.[451]

Russia, in the end, achieved a meaningless victory in showing the EU failed to provide evidence of Latvia's ASF-free areas would remain so. Because of the presence of ASF within Russia, the AB still held Russia's SPS measure to be inconsistent with its obligations under the *SPS Agreement*.

I. Issue 4: Regionalization and *SPS Agreement* Article 6:2

The EU appealed the Panel's findings regarding Article 6.2, arguing implementation should be the deciding factor.

> [W]hat matters for the present analysis 'is not the abstract, *distinct from and taken prior to*, recognition of the concept of disease-free areas in the Russian legislation, but the recognition of this concept *through and upon adoption of the very SPS measure* that is required to be adapted to the SPS characteristics of the relevant areas.[452]

Adapting the SPS measure is, in the EU's view, the proper way to implement Article 6.2's requirement that the importing Member "recognize" disease-free areas within the exporting Member.

The EU points out that a Member could have a regulatory framework in place that complies with Article 6.2 ordinarily, yet still enact a specific SPS measure which is unnecessarily restrictive on trade.[453] "The European Union argues that, in such situations, an importing Member would only 'pay lip service' to the recognition of the concept and at the same time refuse the imports of the products at issue."[454] Russia rebuts that "lip service" is all that Article 6.2 requires.[455]

The AB first looked to the language of Article 6.2 for analysis of the text itself.

> 2. Members shall, in particular, recognize the concepts of pest- or disease-free areas and areas of low pest or disease prevalence. Determination of such areas shall be based on factors such as geography, ecosystems, epidemiological surveillance, and the effectiveness of sanitary or phytosanitary controls.[456]

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451 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶¶ 5.107, 5.108 (emphasis added).

452 *Id*. ¶ 5.115 (quoting European Union's second written submission to the Panel, ¶ 90 (emphasis original)).

453 *Id*. ¶ 5.131.

454 *Id*. ¶ 5.131.

455 *Id*. ¶ 5.132.

456 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.56.

One phrase of Article 6.2 stood out as significant to the AB's "holistic" approach.

> Article 6.2 elaborates on a specific aspect of that overarching obligation. . . . The words "in particular" connecting Article 6.2 to Article 6.1 thus clarify that the obligation in Article 6.2 regarding pest- or disease-free areas and areas of low pest or disease prevalence relates to a subset of the SPS characteristics that are relevant under Article 6.1.

Article 6.2 cannot be read in isolation and must relate to the Article 6.1 obligation to adapt SPS measures.

Read in this light, the word "determination" in the second sentence of Article 6.2 also becomes more of an action than a thought process.

> As we see it, making a determination pursuant to Article 6.2 requires the importing Member to take specific steps, and thus envisages a certain process, for the determination of pest or disease-free areas [or] areas of low pest or disease prevalence. . . . Accordingly, we see Article 6.2 not as an obligation to acknowledge the concept of regionalization as an abstract idea; rather, we see it as an obligation to render operational the concepts of pest- or disease-free areas and areas of low pest or disease prevalence.[457]

Neither "recognize" nor "determin[e]" are typical action verbs like "run," "jump," and "swim," but in the context of Article 6.2, they must be actions. Recognition of pest- or disease-free areas and determination of such areas must be evinced through the importing Member's actions or else there is neither recognition nor determination.

A Member's regulatory framework may make no mention of recognizing pest- or disease-free areas within an exporting Member's territory, but if the SPS measures enacted account for such areas, then the importing Member fulfills its Article 6.2 obligations.[458] The important step is for the importing Member to show such recognition has occurred. "This may be achieved through, individually or jointly: a provision in the regulatory framework; the very SPS measure at issue; and a practice of recognizing pest- or disease-free areas or areas of low pest or disease prevalence."[459]

J. Holding and Rationale

457 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶¶ 5.125, 5.126.
458 *Id*. ¶ 5.128.
459 *Id*. ¶¶ 5.129, 6.8.

Article 6.2 forces the importing Member to put recognition of pest- or disease-free areas into practice, according to the Appellate Body's reading.

> We have concluded that Article 6.2 requires the importing Member to provide an effective opportunity for the exporting Member to make the claim, addressed to the importing Member, that areas within its territory are pest- or disease-free or of low pest or disease prevalence, by maintaining a practice of, or a process for, receiving such claims from an exporting Member affected by a specific SPS measure, and thus render operational the concept of regionalization. Accordingly, we disagree with the Panel that the obligation in Article 6.2 is separate from and "less exigent" or "less stringent" than that of Article 6.1, and that it requires merely an acknowledgement of the concept of regionalization in the form of "abstract ideas."[460]

Russia's "recognition" of ASF-free areas within the EU did not compel Russia to allow imports of live pigs, pork, and pork products from those ASF-free areas. The result was the same as if Russia did not recognize ASF-free areas, and so Russia did not meet its Article 6.2 obligations.[461]

The appropriate reading of Article 6.2, says the Appellate Body, is the same holistic approach from its decision on the relationship between Articles 6.1 and 6.3.

> As explained above, Article 6.2 and Article 6.1 do not set out separate, unrelated obligations. Rather, as the Appellate Body clarified in *India–Agricultural Products*, there are common elements throughout Article 6, which reveal the interlinkages that exist among the paragraphs of that Article. Because Article 6.2 elaborates on one specific aspect of the overarching obligation in Article 6.1 that Members ensure that their SPS measures are adapted to regional conditions, the question of whether a Member recognizes the concepts of pest- or disease-free areas and areas of low pest or disease prevalence may be a relevant consideration under both Article 6.1 and Article 6.2.[462]

The common thread that runs through all of Article 6 is adaptation of SPS measures to regional SPS characteristics.[463] Using a purposive approach to judicial interpretation, the AB looks this "main and overarching" obligation, the purpose of

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460 Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.135.

461 *Id*. ¶¶ 5.138, 5.144.

462 *Id*. ¶ 5.136.

463 *Id*. ¶ 5.33.

Article 6, and arrives at a rule which balances the effectiveness of SPS measures against undue restriction on trade.[464]

K. Commentary

1. Style and Format

Not every AB Report should be written in the same way. Some involve a great deal of math, such as AD/CVD cases, while other Reports, particularly those related to civilian aircraft, may deal with technical expertise. But if any case could serve as an argument for beginning with a "Facts" section, *Russia Pigs (EU)* would be that case. In particular, a single page with a single pictorial timeline would have been of great help to the reader if the timeline marked outbreaks of ASF and the Russian response to each outbreak. From there, the rest of the Report should have proved a much easier read, as well as more coherent.

That said, *Russia Pigs (EU)* is one of the more straightforward, comprehensible, and even enjoyable Reports the AB has published. For example, the explicit and almost tutorial manner with which paragraph 5.57 lays out an appropriate reading of Article 6 provides great precedential value.

> The Appellate Body has noted "the existence of important common elements throughout Article 6", which "reveal the interlinkages that exist among the paragraphs of this provision." The "main and overarching obligation" is set forth in the first sentence of Article 6.1, according to which Members shall ensure that their measures are "adapted" to the SPS characteristics of the areas from which the products at issue originate and to which they are destined. The remainder of Article 6 "elaborates" on aspects of that obligation and sets forth "the respective duties that apply to importing and exporting Members in this connection." The regional "characteristics" that are relevant for the adaptation of an SPS measure are those relating to the specific risk that such a measure seeks to address. In the case of a pest or disease, the specific risk consists of the "likelihood of entry, establishment or spread" of that pest or disease "within the territory of an importing Member" and "the associated potential biological and economic consequences." This risk is relevant to determining the level of protection deemed appropriate by the Member establishing an SPS measure to protect "human, animal or plant life or health within its territory." Therefore, as with any SPS measure, the regulating Member's adaptation of its measures to

[464] Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.33.

regional SPS characteristics may be informed by that Member's ALOP.

The instructions are clear and should prove helpful in providing consistent interpretations of Article 6 for future Panels.

2. Politics

The most impressive aspect of the Report is the restraint with which the AB treats an SPS measure that is inconsistent with a Member's Article 6 obligations. No mention is made of Russia's perhaps less than honest dealings in world affairs. But then, one would not expect the AB to generalize bad behaviors by bringing up a ban by the International Olympic Committee,[465] or intervention in another country's elections.[466] But the AB is also quite careful to use staid and sterile language in describing the obligations related to SPS measures. The AB keeps the tone descriptive where lesser writers could have easily slipped into accusatory tones. For example, in describing parallels between Articles 6.1 and 5.1, the AB drops footnote 188, which reads, "we note that, similar to the obligation under Article 6.1 to adapt measures to regional SPS characteristics, the requirement under Article 5.1 that measures be based on a risk assessment does not apply solely at the time of adoption but, rather, throughout the maintenance of such measures." The AB deftly avoids saying, or even implying, that Russia did not base its SPS measures on a risk assessment or that Russia failed to maintain the measures.

Similarly, the AB says just enough and no more in the next footnote. "Annex A(6) to the SPS Agreement defines a pest- or disease-free area as '[a]n area, whether all of a country, part of a country, or all or parts of several countries, as identified by the *competent* authorities, in which a specific pest or disease does not occur'" (emphasis added).[467] The AB leaves it there, without hinting at the relative competence of authorities in Russia or the EU. In the hands of less careful writers, Russia could have been insulted at one point or another in this Report. Either it could have been implied in these footnotes that Russia was incompetent in concocting, implementing, or enforcing its SPS measures, or at other points a sloppy writer could have impliedly accused Russia of deliberately cheating, i.e., an intentional breach of its *SPS Agreement* obligations. But no, the AB is more politically careful than that. Whatever the temptations might be in writing a Report like *Russia Pigs (EU)*, the AB stuck strictly to the legal issues at hand.

3. Linguistics

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[465] *Russian doping: IOC bans Russia from 2018 Winter Olympics*, BBC SPORT (Dec. 5, 2017), http://www.bbc.com/sport/winter-sports/42242007.

[466] *Russia-Trump inquiry: Russians charged over US 2016 election tampering*, BBC NEWS (Feb. 17, 2018), http://www.bbc.com/news/world-us-canada-43092085.

[467] Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.60, n.189.

But the language of the AB could stand to relax just a bit in certain other respects. What has traditionally been legally operative language now seems antiquated in its overuse. The phrase "not inconsistent" makes for a perfect example, especially in paragraph 5.109 of the Report. The AB is discussing the Panel's finding that Russia's bans are "not inconsistent" with Russia's obligation under Article 6.2 to recognize pest- or disease-free areas or areas of low pest or disease prevalence. Here, rather than a finding or a holding, the text is describing the EU's request to overturn a Panel's conclusion. The shade of distinction between "not inconsistent" versus "consistent" is immaterial to the understanding of the paragraph, or to any legal outcome. The AB is more careful with its language than it is concise and clear, even though it could stand to have it the other way round. The AB could, without any sacrifices, move toward using "consistent" rather than "not inconsistent," a phrase which would benefit from more judicious or sparing use.

Finally, there is a marked improvement in lexicography. The AB has previously leaned too much on the *Shorter Oxford English Dictionary* where it was not necessary. Here, the more specific, and apropos, *Black's Law Dictionary* provides the AB with the definition of "evidence" as used by the legal profession.[468] Where the AB does cite to the *OED*, the best possible version is used: the *OED* online.[469] First, citing to online dictionaries eliminates the problem of different readers owning different condensed, shorter, or full versions of different editions published in different years. Instead, everyone looks at the same online dictionary, particularly thanks to the AB's inclusion here of a URL link in the footnote. Second, the online version is superior to print because of the ability to update a website more frequently than one can publish a new print edition.[470] By embracing the latest and the most specific, the AB is moving in the right direction in terms of defining the operative words in its legal opinions.

[468] Appellate Body Report, *Russia Pigs (EU)*, *supra* note 402, ¶ 5.63, n.194.

[469] *Id*. ¶ 5.121, n.336.

[470] *See, e.g.*, *Frequently asked questions*, OED ONLINE (2017), http://public.oed.com/about/frequently-asked-questions/.