Overview of WTO Jurisprudence in 2014

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Abstract This article presents an overview of the reports (judgments) of panels and the Appellate Body of the World Trade Organization (WTO) circulated in 2014. For each report, we present the key findings on the most salient issues as well as, where appropriate, observations on the systemic significance on a given finding. 2014 was a very busy year for the WTO dispute settlement system. 11 panel reports were circulated, and except for one of these 11 disputes, all of them were appealed to the Appellate Body. The Appellate Body issued five reports in 2014, four of which related to a panel report issued in 2014. One appeal related to a panel report was issued the previous year, in 2013, namely, the EU – Seals dispute. The disputes covered a broad range of issues, including anti-dumping and countervailing duties; import restrictions; sanitary and phytosanitary measures; publication requirements; and import restrictions on agricultural products.

1 WTO Jurisprudence in 2014 at a Quick Glance

2014 was a very busy year for the WTO dispute settlement system. In 2014, eleven panel reports were circulated, namely *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* (DS440); *US – Countervailing and Anti-Dumping Measures (China)* (DS449); *US – Country of Origin Labelling (COOL) (21.5)* (DS384, 386); *India – Measures Concerning the Importation of Certain Agricultural Products* (DS430); *US – Anti-dumping Measures on Certain Shrimp from Viet Nam* (DS429); *US – Countervailing Measures on Certain Products from China* (DS437); *US – Countervailing Measures on Certain Hot-rolled Carbon Steel Flat Products from India* (DS436); *China – Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum* (DS431, 432, 433); *US – Countervailing and Anti-dumping Measures on Certain Products from China* (DS449); *Argentina – Measures Affecting the Importation of Goods* (DS438, 444, 445); and *Peru – Additional Duty on Imports of Certain Agricultural Products* (DS457).

Of these 11 panel reports circulated in 2014, all but one—namely, *China – Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States* (DS440)—were appealed and in four of those instances, the Appellate Body Report was also issued in 2014.[1] Together with one Appellate Body Report relating to a panel report issued in 2013 (*EC – Seals*), this brings the total number of Appellate Body Reports issued in 2014 to five.

The Agreements interpreted and applied in this disputes are primarily the *Agreement on Subsidies and Countervailing Measures* (*"SCM Agreement"*), the General Agreement on Tariff and Trade 1994 (the "GATT 1994"), the *Agreement on Technical Barriers to Trade* (*"TBT Agreement"*), the *Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994 (the "Anti-dumping Agreement")* and the *Agreement on Agriculture*.

As in previous years, the 2014 case law has its fair share of trade remedies, that is, anti-dumping and countervailing duties. Even the dispute in *US – Countervailing and Anti-Dumping Measures (China)* (DS449), which focussed primarily on Articles X:1 and X:2 of the GATT 1994, ultimately concerned the application of trade remedy measures in the US domestic system, namely, the politically contentious issues of applying countervailing duties to non-market economies (NMEs).

On the non-trade remedy side, some remarkable case law has come out of the *Argentina – Measures Affecting the Importation of Goods* dispute, especially certain findings on unwritten measures; as well as *China – Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum*, concerning the status of precedent as well as the relationship between China's Protocol of Accession and the WTO Agreement and the GATT 1994. The dispute *Peru – Additional Duty on Imports of Certain Agricultural Products* (DS457) featured extensive arguments by both parties about the legal import of a free-trade agreement (FTA) for the interpretation and application of WTO law; however, the panel largely sidestepped the issues, since the FTA was not yet in force.

2 US – Cool (21.5)—Panel Report

2.1 Facts of the Case

These proceedings are the continuation of the original *US – COOL* dispute initiated by Canada and Mexico concerning the US country of origin labelling requirements ("COOL measure").[2] In 2012, the Appellate Body declared this measure

[1] *US – Countervailing and Anti-Dumping Measures (China)* (DS449); *US – Countervailing and Anti-dumping Measures on Certain Products from China* (DS449); *US – Countervailing Measures on Certain Products from China* (DS437); and *China – Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum* (DS431, 432, 433).

[2] *US – Country of Origin Labelling (COOL) (21.5)* (DS384,386).

WTO-inconsistent. Subsequently, Canada and Mexico alleged that the United States failed to properly comply with the Appellate Body's findings and, thus, initiated compliance proceedings pursuant to Article 21.5 of the Dispute Settlement Understanding ("DSU").

In terms of substance, the amended COOL measure was largely similar to the original COOL measure. The original measure required retailers to affix a label on certain commodities to indicate their country origin, which was determined according to the country where the animal was born, raised and slaughtered. Four different labels were established for this purpose (A, B, C and D). Label B, for example, referred to multiple countries of origin, and read "Product of country X, product of the US". The amended COOL measures retained this general structure, but rather than requiring that labels simply list the different countries involved in the production, it required an indication of the specific production steps that took place in each country.[3]

2.2 Salient Legal Findings

The Panel found that the amended COOL measure was inconsistent with the national treatment obligation of Article 2.1 of the TBT Agreement. Like in the original case, however, the Panel rejected the complainant's claims under Article 2.2 of the TBT Agreement that the COOL measures are more trade restrictive than necessary.

2.2.1 The Amended Cool Measure is Inconsistent with Article 2.1 of the TBT Agreement

Article 2.1 of the TBT Agreement stipulates: "Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin". This provision, thus, incorporates a national treatment and most-favoured-nation obligation into the context of technical regulations.

Canada and Mexico argued that, just like the original COOL measure, the amended COOL measure was inconsistent with Article 2.1 of the TBT Agreement since it provides treatment less favourable to imported livestock than that accorded to domestic livestock.

The Panel agreed with the complainants. At the outset, the Panel recalled that, according to the Appellate Body's guidance in *US – Clove Cigarettes*, the "less favourable treatment" clause in Article 2.1 involves analysing, first, whether the

[3] For example, under the amended COOL measure, Label B read "Born and raised in Mexico, Raised and Slaughtered in the United States".

technical regulation modifies the conditions of competition to the detriment of imported products vis-à-vis like domestic products, and, second, whether any such detrimental impact does stem exclusively from legitimate regulatory distinctions.[4] Under this standard, even if a technical regulation is discriminatory, it may still be in conformity with Article 2.1 of the TBT Agreement if it truly pursues a legitimate objective.

Concerning the existence of detrimental impact, the Panel found that, compared to the original COOL measure, the amended COOL measure exacerbates the source of the less favourable treatment, that is, the need for segregating meat and livestock. Because the amended COOL measure requires that labels indicate the exact country where each individual production steps took place (i.e. where the cattle was born, raised and slaughtered) upstream producers need to keep even more precise production records. The Panel thus concluded that "the amended COOL measure increases the practical necessity for private actors to choose domestic over imported livestock, and has an increased negative effect on the competitive conditions of imported livestock in the US market".[5] In light of these considerations, the Panel found that the amended COOL measure entails increased detrimental impact on imported livestock.

The second part of the analysis of "less favourable treatment" under Article 2.1 involved examining whether the detrimental impact stems exclusively from legitimate regulatory distinctions. The Panel noted a "disconnect" between the informational requirements imposed on upstream producers and the information effectively communicated to consumers. It stated that "although the amended COOL measure increases the information communicated to consumers through mandatory retail labels, it necessarily increases the associated upstream informational (recordkeeping) requirements in order to do so."[6] The Panel therefore concluded that "under the particular circumstances of this case, the detrimental impact caused by the amended COOL measure does not stem exclusively from legitimate regulatory distinctions".[7]

The Panel's ultimate conclusion was that the amended COOL measure was inconsistent with Article 2.1 of the TBT Agreement.

It is worth noting that this Panel followed the standard for Article 2.1 of the TBT Agreement set out in 2012 by the Appellate Body in *US – Clove Cigarettes*. To recall, the Appellate Body in that dispute was faced with the issue of whether Article 2.1 of the TBT Agreement gives parties policy space to pursue legitimate objectives even though the TBT Agreement lacks any "general exceptions" clause akin to Article XX of the GATT 1994. The Appellate Body found that a measure that causes a detrimental impact on imported products would not violate Article 2.1 if that detrimental impact stems exclusively from a legitimate regulatory

[4] Panel Report, *US – COOL (21.5)*, paras. 7.60–7.62.

[5] Panel Report, *US – COOL (21.5)*, para. 7.167.

[6] Panel Report, *US – COOL (21.5)*, para. 7.266.

[7] Panel Report, *US – COOL (21.5)*, para. 7.283 (emphasis added).

distinction. The Appellate Body's approach does not flow from the text of any provision of the TBT Agreement, but rather from its object, context and purpose. The Panel in the 21.5 proceedings in *US – COOL* followed this approach by first examining whether a detrimental impact exists, and then whether such impact stems exclusively from a legitimate regulatory distinction.

The Panel's application of the Appellate Body's legal standard, however, reveals that the second part of the analysis—whether the detrimental impact stems exclusively from a legitimate regulatory distinction—remains ambiguously broad. This element basically seeks to elucidate whether the reason behind the discrimination is legitimate or illegitimate. The Panel's finding that the measure's detrimental impact does not stem exclusively from a legitimate regulatory distinction was largely based on the "disconnect" between the burdensome informational requirements and the minor increase of information communicated to consumers. While this "disconnect" demonstrates the imbalance between the measure's restrictiveness and the low contribution to its objective, it is unclear why this meant that the discrimination does not stem from legitimate reasons. In order to give clarity and predictability to WTO Members on the content of the obligation under Article 2.1, it is important for the Appellate Body to clarify the precise contours of this second element of the interpretative analysis that it has developed under Article 2.1.

2.2.2 The Complainants Did Not Make a Prima Facie Case of Inconsistency with Article 2.2 of the TBT Agreement

The complainants also claimed that the amended COOL measure violates Article 2.2 of the TBT Agreement because it is more trade-restrictive than necessary to fulfill a legitimate objective.

In the original proceedings, the complainants' claim under Article 2.2 was rejected by the Appellate Body. These compliance proceedings gave the complainants a second opportunity to obtain a finding of inconsistency with Article 2.2 of the TBT Agreement with respect to the COOL measure, albeit in its amended form.

Article 2.2 is another provision of the TBT Agreement that, until a few years ago, had never been interpreted by the Appellate Body. In 2012, in the context of the dispute *US – Tuna II (Mexico)*, the Appellate Body had the first opportunity to clarify the meaning of the core obligation of Article 2.2: "technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks that non-fulfillment would create". As clarified by the Appellate Body, an analysis under Article 2.2 should consider (i) the measure's trade restrictiveness; (ii) the contribution made by the measure towards the country's objective; and (iii) the risks that would arise if the measure does not fulfill the country's objective.[8] On the basis of these three criteria, a Panel may conclude, for example, that the challenged measure is more trade-restrictive than necessary because it is

[8] Appellate Body Report, *US – Tuna II (Mexico)*, paras. 311–323.

highly trade-restrictive, makes a low contribution to the government's policy objective, and the non-fulfillment of the objective would not give rise to serious consequences. This is called a "relational analysis". Panels may complement this analysis with a "comparative analysis", which examines the measure's necessity in light of available alternative measures that the regulating country could have adopted.

It should be noted that, to date, no claim under Article 2.2 has been successful. As the present dispute demonstrates, the above legal standard requires certain factual findings that, in certain cases, a panel may hesitate to make.

The Panel began by conducting the aforementioned "relational analysis", recalling first that the amended COOL measure pursues the same objective as the original COOL measure, i.e. to provide consumer information on origin. While it found that the measure makes some contribution to this objective, and is trade restrictive, the Panel encountered problems with examining the measure's risks of non-fulfilment. The Panel indicated that, based on the evidence submitted, it was unable to ascertain the gravity of not fulfilling the amended COOL measure's objective. For this reason, the Panel noted that it was unable to "draw [] definitive conclusions on the complainants' Article 2.2 claims".[9] The Panel, thus, proceeded to conduct the comparative analysis under Article 2.2. To recall, this analysis entails examining alternative measures that the regulating Member could have adopted instead of the incriminated measure.

The Panel's comparative analysis consisted of examining the four alternative measures submitted by Canada and Mexico. These alternative measures all consisted of modifications to the COOL measure, such as converting certain of its mandatory elements into voluntary options for producers, and imposing a "trace-back" system which involves documenting the precise location of each production step, even if the entire production took place within the United States.

The Panel rejected all four alternative measures. In essence, the Panel found that the complainants: (i) failed to demonstrate and to explain how such measures would make an equivalent contribution to the United States objective; (ii) failed adequately to identify the content of the alternatives; and (ii) failed to explain how the alternative measures would be implemented in the United States. The complainants, therefore, were unable to demonstrate that the amended COOL measure is more trade-restrictive than necessary because, as they alleged, the US had at its disposal other less trade-restrictive means to achieve its objective of consumer information.

The Panel's overall conclusion was that the complainants did not make a *prima facie* case that the amended COOL measure violates Article 2.2 of the TBT Agreement.

The Panel's findings leave a strange aftertaste. The Panel seems to have imposed on the complainants too strict a standard concerning the identification and explanation of the alternative measures. This is particularly the case of the third and fourth alternative measures where the Panel considered that the complainants had failed to adequately identify the alternative measures and explain how they could be

[9] Appellate Body Report, *US – Tuna II (Mexico)*, para. 7.424.

implemented in the United States. This begs the question of what degree of precision complainants should adopt when identifying alternative measures under Article 2.2. In 2011, the panel in *US – Clove Cigarettes* faulted Indonesia for not adequately identifying the alternative measures since "Indonesia simply list [ed] numerous different measures, mostly in bullet point form".[10] It is clear that mere enumeration in bullet point form does not permit a Panel to properly examine the alternative measures. That would appear to be a fair interpretation and application of the law consistent with due process.

In the instant dispute, however, Canada and Mexico explained in detail the substance of their alternative measures. The Panel found that their level of detail was insufficient. The implications of this finding are somewhat worrying. The comparative analysis is a conceptual tool that allows panels to make an overall determination as to whether the challenged technical regulation is more trade restrictive than necessary. Complaining parties are obliged to indicate with reasonable precision the content of their proposed alternative measure. However, they are not required to present a detailed blueprint of how the alternative measure would in fact be implemented by the responding party. This would be an excessive burden on complaining parties that would make even harder to obtain a finding of inconsistency under Article 2.2 of the TBT Agreement. It may be noted that in five disputes, including Article 21.5 proceedings, no complainant has been successful with a claim under Article 2.2. Actual and potential complainants will soon start wondering whether it is at all possible to win a claim under Article 2.2.

3 EC – Seal Products: Appellate Body Report

3.1 Facts of the Case

The Appellate Body heard appeals from the complaining parties (Canada and Norway) and for the respondent (the EU) concerning the Panel's report in this dispute.

Canada and Norway challenged certain EU measures that affect the sale of seal products (the "EU Seal Regime"). The seal products at issue include those processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and tanned fur skins, as well as articles (such as clothing and accessories, and omega-3 capsules) made from fur skins and oil.

Under the EU Seal Regime, the placing of seal products on the EU market is prohibited unless the seal products: (i) result from hunts traditionally conducted by Inuit and other indigenous communities ("IC exception"); (ii) are brought in by travellers for their personal use ("Travellers exception"); or (iii) are by-products of

[10] Panel Report, *US – Clove Cigarettes*, para. 7.422.

hunting conducted for the sole purpose of sustainable management of marine resources ("MRM exception").

The Panel found that the EU Seal Regime contravenes the national treatment and the most-favoured-nation ("MFN") obligations under Article 2.1 of the TBT Agreement, but rejected the claim under Article 2.2 that the measure is more trade restrictive than necessary. For the same reasons, the Panel found violations of the national treatment and MFN obligations under GATT Articles I:1 and III:4, respectively. As an affirmative defence, the EU unsuccessfully invoked the general exception under Article XX(a), which permits measures necessary to protect public morals.

A detailed summary of the findings of the panel in *EC – Seals* can be found in last year's edition of the Yearbook.[11]

3.2 Salient Legal Findings

The Appellate Body found that the Panel erred in concluding that the EU Seal Regime is a technical regulation under Annex 1.1 of the TBT Agreement, and thus declared moot and of no legal effect all of the Panel's findings under the TBT Agreement. The Appellate Body upheld the Panel's findings of violation under Articles I:1 and III:4 of the GATT 1994, but found that the EU Seal Regime is not justified under Article XX(a) of the GATT 1994.

3.2.1 The Measure at Issue Is Not a Technical Regulation Within the Meaning of Annex 1.1 of the TBT Agreement

A threshold issue in any claim under the TBT Agreement is the determination of whether the challenged measure falls within the definition of one of the three types of measures covered by the TBT Agreement: "technical regulation", "standard", or "conformity assessment procedures". Annex 1.1 of the TBT Agreement defines "technical regulation" as follows:

> Document which lays down product characteristics or their related processes and production methods, including the applicable administrative provisions, with which compliance is mandatory. It may also include or deal exclusively with terminology, symbols, packaging, marking or labelling requirements as they apply to a product, process or production method.

The Appellate Body has clarified that a measure qualifies as a "technical regulation" if it satisfies three criteria: (i) it applies to an identifiable product or

[11] Bohanes and Salcedo (2015), pp. 354–363.

group of products; (ii) it lays down product characteristics; and (iii) compliance with the product characteristics is mandatory.[12]

In the instant dispute, the controversy was whether the EU seal regime satisfied the second of the above elements, that is, whether it lays down product characteristics. The particular structure of the EU seal regime made it difficult to ascertain this point. It established rules for the importation of seal products in three ways: (i) it prohibited the marketing of products consisting exclusively of seal; (ii) it prohibited the marketing of seal-containing products; and (iii) it set out the conditions under the three exceptions to sell seal products in the EU market (the travellers exception, the IC exception, and the MRM exception). The Panel acknowledged that the EU's measure contained both permissive and prohibitive elements. Relying on the Appellate Body's guidance in *EC – Asbestos*, the Panel concluded that the EU seal regime was a technical regulation because it "lays down a product characteristic in the negative form by requiring that all products not contain seal".[13]

The EU requested the Appellate Body to reverse the Panel's decision that the measure satisfies the definition of "technical regulation" contained in Annex 1.1 of the TBT Agreement. According to the EU, the Panel erred in not considering the various aspects of the measure at issue.

The Appellate Body agreed with the EU. It noted that while the EU Seal Regime comprised permissive and prohibitive elements, the Panel's conclusion that the measure constitutes a technical regulation rests on an assessment of only one prohibitive element, i.e. the prohibition on the marketing of seal-containing products. The Appellate Body observed that such prohibition is not the "main feature of the measure",[14] but rather "is but one of the components of the EU Seal Regime and has to be analysed together with other components of the measure before reaching a conclusion under Annex 1.1".[15] The Appellate Body concluded that the main feature of the EU Seal Regime is the establishment of conditions for placing seal products on the EU market "based on criteria relating to the identity of the hunter or the type or purpose of the hunt from which the product is derived".[16] The Appellate Body thus concluded that the measure as a whole does not lay down product characteristics.

Following common practice in WTO appellate proceedings, the complaining parties requested in advance that, if the Appellate Body were to reverse the Panel's findings that the EU Seal Regime lays down product characteristics, the Appellate Body complete the legal analysis under Annex I.1 of the TBT Agreement. However, as happens not infrequently, the Appellate Body was unable to complete the

[12] Appellate Body Report, EC – Asbestos, paras. 66–70; See also Appellate Body Report, *EC – Sardines*, para. 176; Appellate Body Report, *US – Tuna II (Mexico)*, para 183.

[13] Appellate Body Report, *EC – Seal Products*, para. 5.25 (quoting the Panel Report, *EC – Seal Products*, para. 7.106).

[14] Appellate Body Report, *EC – Seal Products*, para. 5.58.

[15] Appellate Body Report, *EC – Seal Products*, para. 5.39.

[16] Appellate Body Report, *EC – Seal Products*, para. 5.58.

legal analysis because it considered that the Panel had not sufficiently explored certain relevant factual issues.

Having concluded that the EU Seal Regime falls outside the scope of the TBT Agreement, the Appellate Body declared moot and of no legal effect the Panel's findings under Articles 2.1 and 2.2 of the TBT Agreement, as well as those under 5.1.2 and 5.2.1, which refer to procedures applied by the EU to assess the conformity of the EU Seal Regime, and which only apply to the extent that the underlying measure constitutes a technical regulation.

The Appellate Body's finding that the EU Seal Regime is not a technical regulation thus meant the end of the complainant's claims under the TBT Agreement. This finding came as a surprise to many. In previous rulings, the Appellate Body had signaled its willingness to interpret broadly the concept of "technical regulation". For example, in *US – Tuna II (Mexico)*, it found that a dolphin-safe label was "mandatory" (and thus a "technical regulation") even though producers were not required to obtain it as a condition for selling their tuna in the US market. In contrast, the finding that the EU Seal Regime was not a technical regulation was based on a narrow application of the concept "[d]ocument which lays down product characteristics". This finding may be an attempt by the Appellate Body to limit the application of the TBT Agreement to a small category of measures.

As discussed in next section, however, the finding that the EU Seal Regime is not a technical regulation did not affect the claims under Articles I:1 and III:4 of the GATT 1994.

3.2.2 The Appellate Body Upheld the Panel's Findings That the EU Seal Regime is Inconsistent with Articles I:1 and III:4 of the GATT 1994

The EU appealed the Panel's findings of violation under Articles I:1 and III:4 of the GATT 1994. The EU faulted the Panel for not applying the legal standard of Article 2.1 of the TBT Agreement to the analyses under Articles I:1 and III:4 of the GATT. As noted previously, the Appellate Body stated in *US – Clove Cigarettes* that while Article 2.1 of the TBT Agreement generally prescribes that technical regulations shall not cause a detrimental impact on imports, this type of treatment shall not constitute a violation of Article 2.1 when it stems exclusively from a legitimate regulatory distinction. In the EU's view, the Panel should have applied this legal standard in the context of Articles I:1 and III:4 of the GATT 1994 when analyzing the EU Seal Regime, such that the obligations contained in these provisions would not be contravened if the discriminatory treatment stems exclusively from a legitimate regulatory distinction.

The Appellate Body rejected the EU's appeal. The Appellate Body first recalled that, as found by the Panel, the legal standards under Articles I:1 and III:4 of the GATT 1994 are different from that of Article 2.1 of the TBT Agreement. The non-discriminatory obligations in Articles I:1 and III:4 are balanced against Members' right to regulate under the general exceptions of Article XX of the GATT

1994.[17] The TBT Agreement, however, lacks a clause of general exceptions similar to GATT Article XX, which explains the additional element in the legal standard of Article 2.1, that is, the consideration of whether the discriminatory treatment stems from a legitimate regulatory distinction.[18]

The Appellate Body similarly rejected the EU's argument that the legal standard of GATT Article III:4 requires an additional inquiry into whether the detrimental impact on competitive opportunities stems exclusively from a legitimate regulatory distinction. The Appellate Body disagreed with the EU that a previous Appellate Body finding in *EC – Asbestos* on the issue of "like products" supports its contention.[19]

In conclusion, the EU Seal Regime was found to be inconsistent with Articles I:1 and III:4 of the GATT 1994. The Appellate Body next examined whether this inconsistency could be justified under the general exception of Article XX(a) of the GATT 1994.

3.2.3 The Appellate Body Upheld the Panel's Findings That the EU Seal Regime is not Justified Under Article XX(a) of the GATT 1994

Before the Panel, the EU's defense under Article XX(a) of the GATT 1994 had been unsuccessful. While the Panel agreed that its measure met the requirements of subparagraph (a) of Article XX as a measure necessary to protect public morals, it found that the measure did not satisfy the conditions of the chapeau as the measure was applied in a manner that constitutes arbitrary or unjustifiable discrimination. Since the measure did not satisfy the requirements of the chapeau, the Panel's ultimate conclusion was that the inconsistencies with Articles I:1 and III:4 could not be justified under Article XX(a) of the GATT 1994.

Both the complainants and the EU appealed the Panel's substantive findings under Article XX.

With respect to the chapeau of Article XX, the Appellate Body agreed with the complainants that the Panel's legal standard was erroneous. In assessing whether the EU Seal Regime gives rise to arbitrary or unjustifiable discrimination under the chapeau of GATT Article XX, the Panel improperly applied the same legal test it applied under Article 2.1 of the TBT Agreement. The Appellate Body acknowledged that while there are important parallels between the legal standards of Article 2.1 of the TBT Agreement and the chapeau of GATT Article XX, there are also significant differences between the two provisions.[20] The Appellate Body thus found that, instead of applying the same legal test to both provisions, the Panel

[17] Appellate Body Report, *EC – Seal Products,* para. 5.77.
[18] Appellate Body Report, *EC – Seal Products,* para. 5.77.
[19] Appellate Body Report, *EC – Seal Products,* paras. 5.108–5.110.
[20] Appellate Body Report, *EC – Seal Products,* paras. 5.310–5.311.

should have conducted an independent analysis of the consistency of the EU Seal Regime with the specific terms and requirements of the chapeau.

Having reversed the Panel's finding, the Appellate Body then proceeded to complete the legal analysis under the chapeau of GATT Article XX, which involves an examination of whether the IC and MRM exceptions are "applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade". The Appellate Body observed that while the EU maintains a different regulatory treatment for IC hunts and commercial hunts, the EU failed to demonstrate how this discrimination can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. For example, the EU did not explain why the protection of economic and social interests of Inuit communities prevents the EU from protecting the welfare of seals in the context of hunts conducted by those communities. The Appellate Body found that the EU failed to demonstrate that the EU Seal Regime is designed and applied in a manner that meets the requirements of the chapeau of Article XX of the GATT 1994.

In summary, although for different reasons, the Appellate Body arrived at the same final conclusion as the Panel, that is, that the EU Seal Regime does not meet the requirements of the chapeau, and thus cannot be justified under Article XX(a) of the GATT 1994.

4 US – Carbon Steel (India): Panel Report

4.1 Facts of the Case

This dispute concerns countervailing duties imposed by the United States in 2001 on imports of certain hot-rolled carbon steel flat products from India. India challenged the original investigation of 2001, the subsequent administrative reviews of 2002, 2004, 2006, 2007 and 2008, as well as the sunset reviews of 2007 and 2013. In addition, India challenged "as such" certain provisions of the United States Tariff Act of 1930.

Article VI of the GATT 1994 and the Agreement on Subsidies and Countervailing Measures ("SCM Agreement") allow WTO Members to impose countervailing duties on imports when the country of importation has determined, through an investigation, that (i) those goods are produced by entities receiving governmental subsidies from the exporting country; and (ii) that the industry in the country of importation is suffering injury as a result of the subsidized imports.

The United States investigating authority, the US Department of Commerce ("USDOC"), found that certain Indian exporters of carbon steel received subsidies from India's National Mineral Development Corporation ("NMDC"). The alleged subsidy consisted of the provision of iron ore at less than adequate remuneration by

the NMDC to certain Indian companies, namely Essar, ISPAT, JSW and Tata. The USDOC found that this subsidy was provided under the "Captive Mining of Iron Ore Programme" and the "Captive Mining of Coal Programme".

4.2 Salient Legal Findings

The Panel found that the USDOC's determination that the NMDC is a "public body" is not inconsistent with Article 1.1(a)(1) of the SCM Agreement. The Panel concluded that the USDOC's determination that the grant of mining rights constitutes a provision of goods did was not inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement. The Panel also found that the United States' practice of cross-cumulation (considering together the volume of subsidized imports and imports found to be dumped in another investigation) is "as such" and "as applied" inconsistent with Articles 15.1–15.5 of the SCM Agreement.

4.2.1 The Panel Rejected India's Claim That the USDOC's Determination That the NMDC is a "Public Body" was Inconsistent with Article 1.1(a)(1) of the SCM Agreement

India claimed that, by finding that the NMDC was a "public body", the United States acted inconsistently with Article 1.1(a)(1) of the SCM Agreement.

Article 1.1 of the SCM Agreement stipulates that a "subsidy" exists if "there is a financial contribution by a government or any public body within the territory of a Member".[21]

Past WTO disputes concerning the SCM Agreement show that, in certain cases, it is difficult to determine whether an entity qualifies as a "public body". In particular, this difficulty arises when a financial contribution is not granted by a governmental agency, but by an entity whose links to the government are unclear. In *US – Anti-Dumping and Countervailing Duties (China)*, the Appellate Body rejected the Panel's interpretation of "public body" as meaning an entity that is *owned* by the government. Instead, the Appellate Body clarified that a critical criterion in identifying a "public body" is whether the entity is *vested with governmental authority*, that is, whether it has the authority to perform governmental functions.[22]

In the present dispute, India claimed that the USDOC's determination that the NMDC is a public body was based solely on the fact that the Government of India holds 98 % of shares in this entity. According to India, this is at odds with the

[21] According to Article 1.1, the other element of the concept of "subsidy" is that the financial contribution confers a benefit to the recipient.

[22] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties (China)*, para. 317.

Appellate Body's reasoning that the fact that a government is the majority shareholder does not mean that the government exercises meaningful control over that entity's conduct.

The Panel rejected India's claim. It noted that, according to evidence in the record, the NMDC is under meaningful control of the Indian Government. For example, the Indian Government was involved in the selection of directors of the NMDC, which, in the Panel's view, is "extremely relevant"[23] as "government involvement in the appointment of an entity's directors suggests that the relationship between the government and that entity is closer than it would be if the government simply hold a shareholding in that entity".[24]

The Panel concluded that government shareholding, when combined with other factors, may well be indicative of the government's meaningful control. The Panel thus found that the "USDOC's determination, when viewed in light of the above-mentioned record evidence, effectively amounted to a determination that the NMDC was under the 'meaningful control' of the [Government of India]".[25] For these reasons, the Panel rejected India's claim that the USDOC's determination that the NMDC is a public body is inconsistent with Article 1.1(a)(1) of the SCM Agreement.

4.2.2 The Panel Rejected India's Claim That the USDOC Acted Inconsistently with Article 1.1(a)(1)(iii) of the SCM Agreement by Determining That the Grant of Mining Rights Constitutes a "Provision of Goods" and, Thus, a Financial Contribution

The USDOC determined that the Government of India provided financial contributions to steel producers by providing them with iron ore and coal through the grant of captive mining rights, that is, rights allowing steel producers to mine iron ore and coal for their own use.

India alleged that, because of the uncertainty inherent in mining activities and the need of significant intervention through private work, the mining licence does not lead to a guaranteed transfer of marketable minerals. This, in India's view, means that there is no reasonable proximate relationship between the mining rights and the actual iron ore and coal extracted.

The Panel rejected India's argument. By granting the right to mine, the Government of India essentially made those minerals available to, and put them at the disposal of, the beneficiaries. On this basis, the Panel concluded that the grant of mining rights is "reasonably proximate" to the use or enjoyment of the minerals such that it constitutes a provision of goods within the meaning of Article 1.1(a)(1)(iii) of the SCM Agreement. Additionally, the Appellate Body distinguished the

[23] Panel Report, *US – Carbon Steel (India)*, para. 7.84.
[24] Panel Report, *US – Carbon Steel (India)*, para. 7.85.
[25] Panel Report, *US – Carbon Steel (India)*, para. 7.89.

facts of this case from its findings in *US – Softwood Lumber IV* where it accepted that, in certain cases, extraction rights may not be a provision of goods given the uncertainty as to what and how much the beneficiary may find. Whereas in *US – Softwood Lumber IV* the Appellate Body referred to "the right to explore and, if anything is found, extract the goods", this case involves the grant of mining rights to extract minerals from *known* sites.

For these reasons, the Panel rejected India's claim that the USDOC's determination was inconsistent with Article 1.1(a)(1)(iii) of the SCM Agreement.

4.2.3 The Panel Found That United States Acted Inconsistently with Article 15.3 of the SCM Agreement by Applying Cross-Cumulation in Injury Determinations

India argued that Section 1677(7)(G) of the U.S. Code was inconsistent with Article 15.3 of the SCM Agreement "as such" (i.e. the law itself) and "as applied" in the original countervailing duty investigation (i.e. anti-subsidy investigation) on Indian carbon steel. India explained that, pursuant to this provision of US law, the US investigating authority in charge of assessing the existence of injury to the domestic industry is required to conduct a cumulative assessment of the effects of all "unfairly traded imports", which includes considering the effects of subsidized imports as well as the effects of imports subject to a different type of investigation, namely an anti-dumping investigation.

Article 15.3 of the SCM Agreement stipulates that "[w]here imports of a product from more than one country are simultaneously subject to countervailing duty investigations, the investigating authorities may cumulatively assess the effect of such imports [. . .]".

Article 15.3 allows authorities to cumulate the effects of subsidized imports from all countries simultaneously investigated. For example, if an authority initiates simultaneous anti-subsidy investigations on imports from countries A, B and C, the authority may take into account the cumulated effects of imports from all three sources when assessing whether the domestic industry suffers injury. The cumulative assessment of subsidized imports from various sources logically increases the possibility that injury is found to exist. In this context, the issue before the Panel was whether Article 15.3 permits "cross-cumulation", that is, the cumulative assessment of the effects of imports subject to a countervailing investigation with the effects of imports of the same product subject *only* to an anti-dumping investigation.

The Panel upheld India's claim that Article 15.3 does not allow cross-subsidization. The Panel noted that, according to the text of Article 15.3, cumulation is permitted when products from different countries are "simultaneously subject to countervailing duty investigations". The Panel observed that "[i]mports

which are only the subject of a parallel, simultaneous anti-dumping duty investigation plainly do not satisfy this requirement as a matter of fact".[26]

The Panel rejected the United States' argument that, while Article 15.3 only addresses cumulation in the context of simultaneous countervailing duty investigations, it leaves open the possibility to conduct cross-cumulation of other imports subject to other types of investigation. The Panel considered that it was "unable to reconcile the United States' position with the text of Article 15.3 in the overall context of Article 15 of the SCM Agreement".[27]

The Panel thus found that Section 1677(7)(G) of the U.S. Code is inconsistent with Article 15.3 of the SCM Agreement "as such" and "as applied" in the original investigation at issue.[28]

5 US – Carbon Steel (India): Appellate Body Report

5.1 Facts of the Case

As discussed above, India challenged the countervailing duties imposed by the United States on Indian imports of hot-rolled carbon steel products, which resulted from the anti-subsidy investigation conducted by the United States Department of Commerce (USDOC). The Panel sided with India on various claims, but rejected other important claims, such as India's challenge against the USDOC's determination that the NMDC is a "public body", and that the grant of mining rights qualifies as a "provision of goods". India appealed these and other findings by the Panel.

5.2 Salient Legal Findings

The Appellate Body reversed the Panel's conclusion that the USDOC's determination of "public body" was inconsistent with Article 1.1(a)(1) of the SCM Agreement. In contrast, the Appellate Body upheld the Panel's finding that the USDOC did not act inconsistently with Article 1.1(a)(1)(iii) of the SCM Agreement by determining that the grant of mining rights qualifies as a provision of goods. Finally, the Appellate Body partially upheld the Panel's conclusion that the practice of "cross-cumulation" is inconsistent "as such" and "as applied" with Article 15.3 of the SCM Agreement.

[26] Panel Report, *US – Carbon Steel (India)*, para. 7.341.
[27] Panel Report, *US – Carbon Steel (India)*, para. 7.343.
[28] Panel Report, *US – Carbon Steel (India)*, para. 7.356.

5.2.1 The Appellate Body Reversed the Panel's Finding That the USDOC's Determination on the Issue of "Public Body" Was Not Inconsistent with Article 1.1(a)(1) of the SCM Agreement

India challenged the Panel's finding that the USDOC did not act inconsistently with Article 1.1(a)(1) of the SCM Agreement by concluding that India's NMDC was a "public body". According to India, the Panel erred in interpreting the term "public body" as an entity that is "meaningfully controlled" by a government. India argued that, for an entity to be a "public body", it must be vested with governmental authority, which India interprets as having the power to regulate, control, or supervise individuals or otherwise restrain their conduct.[29]

The Appellate Body rejected India's interpretation. It stated that, although certain entities that constitute "public bodies" may possess the power to regulate, it did "not see why an entity would necessarily have to possess this characteristic in order to be found to be vested with governmental authority or exercising a governmental function and therefore to constitute a public body".[30] Nevertheless, for the different reasons, the Appellate Body agreed with India that the Panel erred in concluding that the USDOC's determination of "public body" was not inconsistent with Article 1.1(a)(1) of the SCM Agreement. The Appellate Body indicated that the evidence examined by the panel could more properly be characterized as "formal indicia of control". This evidence involved the Government's ownership interest in NMDC, the Government's power to appoint and nominate directors, and the reference to the organization's website indicating "administrative control" by the Indian Government. The Appellate Body found that this amounts to a failure by the Panel to "evaluate whether the USDOC had properly considered the relationship between the NMDC and the [Government of India] within the Indian legal order, or the extent to which the [Government of India] in fact 'exercised' meaningful control over the NMDC as an entity and over its *conduct*".[31]

After reversing the Panel's finding, the Appellate Body completed the legal analysis on this issue. It recalled its earlier observations that the USDOC did not properly evaluate the relationship between the NMDC and the Indian Government, and that the USDOC merely examined formal indicia of control, such as the Government's ownership interest in the organization and its power to appoint and nominate directors. Hence, the Appellate Body concluded that the "USDOC did not provide a reasoned and adequate explanation of the basis for its finding that the NMDC is a public body within the meaning of Article 1.1(a)(1) of the SCM Agreement".[32]

[29] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.11.

[30] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.17.

[31] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.43 (original emphasis).

[32] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.54.

5.2.2 The Appellate Body Upheld the Panel's Rejection of India's Claim Regarding the USDOC's Determination on "Provision of Goods" as a Final Contribution Under Article 1.1(a)(1)(iii) of the SCM Agreement

Before the Panel, India claimed that the USDOC acted inconsistently with Article 1.1(a)(1) of the SCM Agreement by determining that the grant of mining rights constitutes a financial contribution. India argued that no reasonable proximate relationship exists between the mining rights and the iron ore and coal actually extracted. The Panel rejected India's claim, finding that the grant of mining rights allows firms to extract minerals from known sites, such that there is a reasonably proximate relationship between the grant of mining rights and the extraction of minerals.

India appealed the Panel's ruling. India reiterated its arguments made before the Panel, namely that while the GOI did grant mining rights to Indian firms, the complexity and uncertainties associated with the extraction process undermined any reasonably proximate relationship between those mining rights and the final goods extracted. According to India, the circumstances of this case are different from those in *US – Softwood Lumber IV*, in which the Appellate Body examined "the connection between a right to harvest standing timber, and the standing timber itself".[33] India's point was that in *US – Softwood Lumber IV* the grant of stumpage rights implied a quasi-automatic access to timber because the extraction process was fairly simple, i.e. cutting standing trees. India argued that the connection between the grant of mining rights and the extracted iron ore and coal is severed by a series of significant actions performed by the beneficiary at its own risk and cost.

The Appellate Body disagreed with India's interpretation of the findings in *US – Softwood Lumber IV*. As explained by the Appellate Body, in *US – Softwood Lumber IV* the right over felled trees was an inevitable consequence of the harvesting rights, which meant that making timber available was the *raison d'être* of the stumpage rights. Applying this reasoning to the present case, the Appellate Body found that "rights over extracted iron ore and coal follow as a natural and inevitable consequence of the steel companies' exercise of their mining rights, which suggests that making available iron ore and coal is the *raison d'être* of the mining rights."[34] In the Appellate Body's view, this supports the conclusion that the grant of mining rights is reasonably proximate to the use or enjoyment of the minerals by the beneficiaries of those rights.

The Appellate Body, thus, upheld the Panel's rejection of India's claim that the USDOC's contravened Article 1.1(a)(1)(iii) of the SCM Agreement by determining that the granting of mining rights amounted to a provision of goods.

[33] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.74.

[34] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.74.

5.2.3 On the Issue of "Cross-Cumulation", the Appellate Body Partially Upheld the Panel's Finding that Section 1677(7)(G) of the U.S. Code is Inconsistent with Article 15.3 of the SCM Agreement

The Panel had found that the Section 1677(7)(G) of the U.S. Code is inconsistent with Article 15.3 of the SCM Agreement "as such" and "as applied" in the original countervailing duty investigation. At the heart of the Panel's finding was its interpretation that Article 15.3 does not permit "cross-cumulation" in injury determinations, that is, cumulation of the effects of imports subject to countervailing duty investigations with those of imports subject only to anti-dumping investigation. On the basis of this interpretation, the Panel also found violations of Articles 15.1, 15.2, 15.4, and 15.5 of the SCM Agreement.

Importantly, the Panel not only found "as applied" violations (i.e. with respect to the specific original investigation at issue), but also that Section 1677(7)(G) of the U.S. Code was "as such" inconsistent with the SCM Agreement as those provisions allowed the U.S. investigating authority to conduct "cross-cumulation" in "certain situations".

The United States appealed the Panel's findings on two separate grounds.

First, the United States argued that the Panel incorrectly interpreted Article 15.3 as prohibiting cross-cumulation. For this purpose, the United States basically repeated its original argumentation previously made before the Panel.

Focusing on the phrase "simultaneously subject to countervailing duty investigations" in Article 15.3, the Appellate Body observed that "[t]he text is clear in stipulating that being subject to countervailing duty investigations is a prerequisite for the cumulative assessment".[35] The Appellate Body rejected the United States' argument that Article 15.3 does not prohibit cross-cumulation because this provision is silent on that issue. The Appellate Body found that "Article 15 is not silent on the question of cumulation of the effects of subsidized imports with the effects of non-subsidized imports".[36]

The United States argued that the interpretation of Article 15.3 of the SCM Agreement should reflect the Appellate Body's findings in *EC – Tube or Pipe Fittings* that cumulation under Article 3.3 of the Anti-Dumping Agreement is permitted given the need to consider the injurious effects from imports originating from several countries that affect the domestic industry. Furthermore, the United States referred to the Appellate Body's findings in *US – Oil Country Tubular Goods* where Article 11.3 of the Anti-Dumping Agreement was interpreted as permitting cumulation in sunset reviews even though it is not expressly authorized in the Anti-Dumping Agreement. The Appellate Body rejected these arguments. It considered that its findings in *EC – Tube or Pipe Fittings* and *US – Oil Country Tubular Goods* are inapposite because they addressed regular cumulation (i.e. cumulation of effects of imports all subject to anti-dumping investigation), as opposed to cross-

[35] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.579.

[36] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.589.

cumulation (i.e. cumulation of the effects of dumped imports with those of subsidized, non-dumped imports). The Appellate Body thus saw "no basis in the text of Article 15.3 of the SCM Agreement for cumulatively assessing the effects of subsidized imports with those of non-subsidized imports".[37]

On the basis of the above, the Appellate Body found that the Panel did not err in concluding that Articles 15.1–15.5 do not authorize cross-cumulation.

The Appellate Body then addressed the United States' argument that the Panel acted contrary to Article 11 of the DSU because, by finding that Section 1677(7)(G) of the U.S. Code requires in certain situations the practice of cross-cumulation, the Panel failed to make an objective assessment of the matter before it. The United States' complaint therefore goes to the manner in which the Panel assessed the municipal law at issue. The Appellate Body agreed with the United States. It said that the "Panel neither analysed the text of Section 1677(7)(G) nor considered any relevant practice" and that the Panel failed to provide "reasons based on the text of the measure as to why it required the USITC to cumulate the effects of subsidized imports with the effects of dumped, non-subsidized imports".[38] Accordingly, the Appellate Body found that the Panel failed to comply with its duty under DSU Article 11 to conduct an objective assessment of the matter before it, and therefore reversed the Panel's findings that Section 1677(7)(G) is "as such" inconsistent with Articles 15.1–15.5 of the SCM Agreement.

After reversing the Panel's findings, the Appellate Body examined whether it was in a position to complete the legal analysis, that is, whether it could resolve for itself the legal issue originally before the Panel. The Appellate Body proceeded to examine whether any of the different subparagraphs of Section 1677(7)(G) indeed require the United States' investigating authority to cumulate the effects of subsidized imports with those of dumped, non-subsidized imports.

With respect to Sections 1677(7)(G)(i) and (ii), the Appellate Body concluded that it is unclear whether these provisions require cross-cumulation. It noted that "[i]n the absence of an analysis by the Panel to this effect, and given the paucity of evidence regarding the application of the measure at issue on the Panel record, we are unable to complete the legal analysis with regard to the measure in these respects".[39] However, with respect to Section 1677(7)(G)(iii), the Appellate Body found that its wording makes clear that cross-cumulation is required in certain situations, namely when petitions to initiate countervailing duty investigations or anti-dumping duty investigations are filed on the same day and either investigation is initiated by the investigating authority. Consequently, the Appellate Body found that Section 1677(7)(G)(iii) of the U.S. Code is inconsistent "as such" with Articles 15.1–15.5 of the SCM Agreement.

[37] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.593.
[38] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.611.
[39] Appellate Body Report, *US – Carbon Steel (India)*, para. 4.628.

6 Argentina: Import Measures—Panel Report

6.1 Facts of the Case

In this dispute, the EU, Japan, and the United States challenged alleged Argentine import restrictions covering a broad range of sectors, including foodstuffs, automobiles, motorcycles, mining equipment, electronic and office products, agricultural machinery, medicines, publications, and clothing. The complaint referred to two main measures:

First, an unwritten measure, described by the complainants as a "combination of actions" under the label of "Restrictive Trade-Related Requirements" (which the Panel referred to as "TRRs"). The complainants argued that the various "actions" taken by the Argentine government created a requirement on importers to agree to certain conditions to import into Argentina. These conditions included five distinct elements, namely, commitments: (i) to export a certain value of goods from Argentina; (ii) to limit the volume and value of imports; (iii) not to repatriate funds from Argentina to another country; (iv) to undertake investments in Argentina; and (v) to use local content in domestic production. The panel referred to each one of these five sets of actions as "trade-related requirements" (TRRs); the panel also referred to the combined single measure, consisting of these five actions taken together, as the "trade-related requirements measure" (TRRs measure).

The second measure was the Advance Sworn Import Declaration (DJAI). The DJAI was in essence an import license that a prospective importer had to fill out and submit, and that number of Argentine government agencies could review and comment on. A comment could prevent the completion of the DJAI procedure, and the importer had to submit additional information. Only upon satisfactory completion of the review process would an importer be entitled to import the goods covered by the DJAI.

6.2 Salient Legal Findings

The dispute revolved to a significant extent around evidentiary issues and the definition of a "measure" for purposes of WTO law.

6.2.1 Findings of Violation Under Article XI of the GATT 1994

Drawing on a broad range of evidence, the panel found that Argentina had imposed the five different unwritten sets of TRRs alleged by the complainants.[40] The panel also found that these five individual sets of measures together constituted a single overarching measure because they contributed "in different combinations and degrees -- as part of a single measure -- towards the realization of common policy objectives that guide Argentina's 'managed trade' policy, i.e. substituting imports and reducing or eliminating trade deficits".[41]

The panel then found that this single TRR measure constituted an "other measure" within the meaning of Article XI that had a limiting effect on imports into Argentina. This was because the various components of the measure either had a direct limiting effect (the balancing, import limiting, and local content requirement) or were linked to the right to import (the investment and non-repatriation requirement). The panel also highlighted the "uncertainty generated by the unwritten and discretionary nature of the requirements" and the additional costs resulting from activities unrelated to an operator's business activity.[42] The panel also reflected previous case law that, in order to prove a violation of Article XI, it was not necessary to establish actual trade effects based on data of trade flows.[43]

In addition, Japan requested the panel to make findings about the TRR measure "as such", which in WTO parlance refers to a measure independently of any case-specific application. "As such" challenges are routine in WTO dispute settlement; however, in this case, the "as such" challenge faced the hurdle that the alleged overarching measure—just like its five individual components—was an unwritten measure. The panel applied the criteria that the Appellate Body had previously defined for "as such" challenges of unwritten measures—namely, that the alleged rule or norm be attributable to the responding Member; its precise content; and that it has "general and prospective application".[44] The panel found that these criteria were satisfied in the present case.

Particularly interestingly, on the criterion of *general* application, the panel emphasized that the TRR measure affects a wide range of sectors and could affect any sector and was part of a broader policy implemented by the Argentine government, rather than isolated measures taken with respect to individual importers. With

[40] Appellate Body Report, *US – Carbon Steel (India)*, Panel Report, paras. 6.166–6.177 (for the requirement to balance imports with exports); Appellate Body Report, *US – Carbon Steel (India)*, paras. 6.178–6.195 (for the requirement to limit the volume and value of imports); Appellate Body Report, *US – Carbon Steel (India)*, paras. 6.196–6.207 (for the local content requirement); Appellate Body Report, *US – Carbon Steel (India)*, paras. 6.208–6.212 (investment requirement); Appellate Body Report, *US – Carbon Steel (India)*, paras. 6.213–6.216 (for the requirement not to repatriate profits from Argentina).

[41] Panel Report, *US – Carbon Steel (India)*, para. 6.228.

[42] Panel report, *US – Carbon Steel (India)*, paras. 6.249–6.263.

[43] Panel report, *US – Carbon Steel (India)*, para. 6.264.

[44] Panel report, *US – Carbon Steel (India)*, para. 6.322–6.342.

respect to *prospective* application, the panel focussed on what it considered the "deliberate policy" character of the measure, its year-long application and the resulting likelihood that it would continue to be applied in the future.[45]

With respect to the DJAI—which was a written measure—the complainants relied on Article XI, whereas Argentina argued that the DJAI was an import formality covered exclusively by Article VIII. The panel found that DJAI procedure was not a mere formality, but rather related to the right to import; and that, in any event, even if Article VIII were triggered, this would not exclude the applicability of Article XI, because these two provisions are not mutually exclusive.[46] On substance under Article XI, the panel found that the DJAI was a necessary condition to import into Argentina and the process of obtaining a DJAI in "exit" status was not automatic. Moreover—as in the case of the TRR measure—the panel found that uncertainty existed concerning the application of the measure, which uncertainty itself affected import opportunities; and that the operation of the measure also imposed a burden on importers unrelated to their business activity.[47] The panel also rejected Argentina's argument that, in order to violate Article XI, the measure had to restrict imports by reference to quantity or in a way that was "quantifiable". Rather, the panel found that Article XI:1 protects Members' expectations as to the competitive relationship between their products and those of other Members in respect of importation itself.[48]

Article III:4 The panel also found that the local content requirement—one of the five individual sets of TRRs—violated Article III:4 of the GATT 1994, because it resulted in less favourable treatment of imported products when compared to domestic products. In this rather straight-forward finding, the panel confirmed previous case law that origin-based distinctions between products created a presumption that products are "like"; that the requirement affected the level of imports purchased; and that the Argentine measured created an incentive to use domestic products over imported products."[49]

6.2.2 Examination and Evidence of an Unwritten Measure

One of the key challenges for the complainants in this case was the unwritten character of the TRRs and the TRR measure. The complainants could not point to a single written document that would set out the import-restrictive measures. Instead, they relied on a range of evidence from which the existence of these requirements

[45] Panel report, *US – Carbon Steel (India)*, paras. 6.329–6.342.
[46] Panel report, *US – Carbon Steel (India)*, paras. 6.433–6.445.
[47] Panel report, *US – Carbon Steel (India)*, paras. 6.471–6.473.
[48] Panel report, *US – Carbon Steel (India)*, paras. 6.476–6.478.
[49] Panel report, *US – Carbon Steel (India)*, paras. 6.273–6.294.

could be deduced. Argentina objected to some of this evidence. The panel therefore made certain interesting statements on the probative value of that evidence.

By way of example, with respect to *articles from newspapers and magazines*, Argentina argued that the articles in question had been published in media traditionally critical of the government and, in any event, were tainted by the "bias" of the reporters. The panel rejected this criticism, finding that previous panels had relied on newspaper articles and that it was within a panel's right to assess the objectivity and accuracy of a newspaper article on a case-by-case basis. If a party considered that a particular article contained incorrect information, the panel stated, that party could rebut that evidence.[50]

With regard to statements by Argentine officials—statements that strongly suggested the will of the Argentine government to restrict imports and provide relief to domestic industries—Argentina argued that it could not be simply presumed that such statements would necessarily translate into specific measures. However, the panel found that, even if such statements should be considered with "caution", "[c]onsistent public statements made on the record by a public official cannot be devoid of importance, especially when they relate to a topic in which that official has the authority to design or implement policies."[51] Interestingly, the panel also relied on a statement by the International Court of Justice in *Military and Paramilitary Activities In and Against Nicaragua*, to the effect that statements made by public officials "are of particular probative value when they acknowledge facts or conduct unfavorable to the State represented by the person who made them".[52]

6.2.3 Proposed Procedures for Considering Sensitive Evidence

Of additional interest in this case was a particular procedure proposed by the panel, but ultimately not accepted by the parties. The panel had intended to create a mechanism to incentivize the parties to submit particularly sensitive evidence. The panel understood from the complainants' arguments that the Argentine government's import-restriction policy was reflected, among other things, in agreements between the Argentine Government and importers/economic operators, or in letters addressed by importers/economic operators to the Argentine Government. These agreements and letters described the specific commitments stipulated by the government. However, numerous economic operators were reluctant to authorize the complaining governments to present this evidence, because they feared retaliatory action by the Argentine government.

The panel therefore proposed a set of special procedures, under which an independent expert (a Geneva-based notary public) would assess the evidence

[50] Panel report, *US – Carbon Steel (India)*, paras. 6.69–6.72.
[51] Panel report, *US – Carbon Steel (India)*, paras. 6.78–6.79.
[52] Panel report, *US – Carbon Steel (India)*, paras. 6.80.

and respond to the panel's questions, subject to particular conditions.[53] However, due to systemic concerns, the parties did not agree to the adoption of such procedures. The panel also requested Argentina to provide these documents, given that they were all in the government's possession. Faced with Argentina's reluctance to do so, the panel ultimately concluded that the substance of the complainants' allegation—including on the basis of other evidence—had been demonstrated. The panel did not explicitly draw "adverse inferences"; nevertheless, it chastised Argentina for refusing to submit the evidence on the grounds that it was not relevant, reminding all parties that "[t]here is nothing in the DSU that supports the proposition that, faced with a panel's request for specific information, a Member can decide whether that information is relevant for the settlement of a dispute or whether the other party has already made a *prima facie* case that would justify the panel's request." It also stated that, under Article 13.1, Members are "under a duty and an obligation 'to respond promptly and fully' to requests made by panels for information".[54]

6.2.4 Observations

This panel report is interesting not only because it throws a light on long-standing formal and informal import restrictions imposed by the Argentine government, policies that have for a long time been a source of professed frustration for certain other WTO Members. Once the panel found that the alleged import restrictions existed and constituted a WTO-law-relevant "measure", the resulting findings were unsurprising. However, getting to a finding that unwritten measures existed represented a challenge for the complainants, because at least with respect to the TRRs, the Argentine government had deliberately not reduced these measures in written form.

The panel report is also remarkable for its treatment of unwritten measures as well as the flexibility of a WTO dispute settlement panel to accommodate evidentiary challenges faced by complainants against trade-restrictive measures that the defendant government has made a deliberate effort not to enshrine in written measures. The panel was visibly sympathetic to the complainants' situation, even explicitly acknowledging that the complainants had a "plausible motive" for not submitting certain evidence that was in their possession or in the possession of their economic operators.[55]

[53] Panel report, *US – Carbon Steel (India)*, paras. 1.27–1.28. Such as, for instance, that the final assessment of the facts would remain the sole prerogative of the panel and that the parties would always be in a position to comment on the expert's statements.

[54] Panel report, *US – Carbon Steel (India)*, para. 6.59.

[55] Panel report, *US – Carbon Steel (India)*, para. 6.63.

7 Peru: Additional Duty on Imports of Certain Agricultural Products—Panel Report

7.1 Facts of the Case

In this dispute, Guatemala challenged the Peruvian "price range system" (PRS), which applied to four sets of agricultural products, including sugar, an important export commodity for Guatemala. Under the PRS, the Peruvian government would impose a fluctuating "additional variable duty" whose amount depended on the precise numerical relationship between a so-called reference price and the PRS. This additional duty was imposed on top of any otherwise applicable ordinary duty (which, however, for most of the covered products was zero).

The PRS consisted of a "price range floor" and a "price range ceiling", both of which were based on 5-year world market price data for a given commodity and were updated every 6 months. The reference price, for its part, was the average world market price for the previous 2 weeks (fortnight) for a given commodity; it was updated every fortnight. If the reference price was below the price range floor, the additional variable duty equaled the difference between these two values. If the reference price was between the price range floor and the price range ceiling, no additional duty was imposed. Finally, if the reference price was above the price range ceiling, the differential was subtracted from the otherwise applicable normal duty, by way of a "duty rebate". However, the rebate could not be higher than the normal duty; in any event, because most of the covered products attracted a zero tariff, the system almost never resulted in a rebate.

In essence, and by its explicit design, the PRS was a price stabilizing mechanism for imports. When current world market prices were low, in relation to a 5-year average, the value of imports would be artificially elevated to at least the price range floor. When current world market prices were within the pre-defined price band—as desired by the Peruvian government—no additional duty was generated and only the ordinary customs duty (zero for most products) would apply. When the current world market price exceeded the ceiling of the price band, the system would generate a rebate from any applicable ordinary customs duty. While the additional variable duty protected producers, the rebate from any applicable customs duty reflected a concern (although much weaker a concern) for consumers.

The PRS bore a conspicuous resemblance to the so-called price band system previously operated by Chile and challenged by Argentina during the 2000s.

7.2 Key Findings of the Panel

Guatemala challenged the additional duties under Articles 4.2 of the Agreement on Agriculture, as a variable import levy, a minimum import price or a measure "similar" to these two. Guatemala also challenged the measure as an impermissible

"other duty and charged" that Peru had not recorded in its schedule of commitments. Guatemala also brought a range of claims under Article X:1 and X:3(a) of the GATT 1994, against the perceived failure by Peru to publish certain elements of the PRS as well as certain perceived discrepancies between the wording of the measure and its actual application by the Peruvian government.

The Panel first had to deal with a procedural objection by Peru. The background to this objection was a negotiated and signed free-trade agreement (FTA) between Guatemala and Peru. That agreement had been signed, but was not yet in force because Peru had decided not to ratify it; pursuant to public statements by Peruvian officials, the decision not to ratify was in direct retaliation against Guatemala's WTO challenge of the PRS. The text of the FTA stipulated that Peru was permitted to maintain the PRS; however, it also stated that both parties confirmed their WTO rights and obligations and that, to the extent of any conflict between the two, the FTA would prevail.

Peru pointed to these FTA provisions and argued that Guatemala had acted against the good faith requirement under Article 3.10 of the DSU; had failed to exercise judgment as to whether the initiation of the dispute would be fruitful (Article 3.7 of the DSU); and was frustrating the object and purpose of the FTA, under Article 18 of the Vienna Convention on the Law of Treaties (Vienna Convention). Peru argued that, for all these reasons, Guatemala was barred from bringing the dispute to the WTO. The panel rejected these objections, relying essentially on the fact that the FTA was not in force. With respect to Article 18 of the Vienna Convention, the panel stated that it was not convinced that "the violation by a Member of the obligation contained in Article 18 of the Vienna Convention with respect to a treaty that does not form part of the WTO covered agreements can constitute evidence of lack of the good faith required by Articles 3.7 and 3.10 of the DSU"; in any event, the panel found that it could not determine that the object and purpose of the FTA had been violated, because the FTA was not within its terms of reference.[56]

On substance, the panel found that the additional duty resulting from the PRS was a variable import levy, because it was "inherently variable"—namely, because it varied according to a formula built into the Peruvian legislature which ensures constant and automatic variation, without any intervening discretionary act of the Peruvian executive. The panel also found that the measure was characterized by a lack of transparency and predictability, and isolated the Peruvian market from international price fluctuations. The panel also rejected Peru's argument that domestic price trends were correlated with international price trends. The panel thus found a violation of Article 4.2 of the Agreement on Agriculture. As a consequential finding, the panel found that the additional duty was an "other duty and charge" within the meaning of Article II:1(b) of the GATT 1994 and violated this provision, because it had been not recorded in Peru's schedule of concessions.

[56] Panel Report, *Peru – Additional Duty on Imports of Certain Agricultural Products* (DS457), para. 7.92.

In contrast, the panel ruled that the additional duty was neither a minimum import price nor a measure similar to a minimum import price. Guatemala had argued that the price range floor price (or an alternative, implicit threshold) constituted such a minimum import price and that the additional duty would elevate the transaction price of shipments to at least that threshold. The panel's contrary view on both counts (minimum import price or a similar measure) revolved around the fact that the PRS did not ensure that a minimum import price would be reached in each and every case; the panel in essence relied on the fact that the reference price was different from the transaction value of a given shipment, and that Peru had demonstrated the existence of transactions whose transaction value plus any additional duty was below the PRS floor applicable at the time of shipment.

Finally, the panel exercised judicial economy on Guatemala's claims under Articles X:1 and X:3(a), on grounds that ruling on these claims would not meaningfully add to the resolution of the dispute.

7.3 Observations

The panel's finding of a violation under Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 was hardly surprising. The measure was very obviously "inherently variable" within the meaning of the Appellate Body's previous case-law, given its multiple mathematical formulae, its automaticity and constant updating in the light of evolving world-market prices. Of interest were the panel's modulation of the Appellate Body's criteria of "lack of transparency" and "lack of predictability", which are not treaty language. The panel was clearly trying to reconcile the Appellate Body's somewhat opaque precedent, treaty text as well as the common meaning of these concepts.

In contrast, the panel's ruling on "minimum import price" or a "measure similar to a minimum import price" betrayed a surprisingly narrow scope for that term. The measure was quite obviously geared towards ensuring that imports would not enter the Peruvian market below the long term average world market price. Although the panel did not explicitly state so, the linchpin of its analysis was that the additional duty imposed by the PRS did not correspond to the difference between the PRS floor price and the transaction value of a given shipment, but rather to the difference between the floor price and the reference price. However, the reference price was at least intended to function as a proxy for transaction values, a point that the panel did not explicitly analyse. Moreover, the panel's finding could mean that, by relatively simple manipulation of the design of a measure, WTO Members could escape a finding of violation under the "minimum import price" component of Article 4.2. However, they would still be condemned under the "variable import levy component".

The dispute also attracted attention because it touched on the relationship between FTA and WTO law. However, the panel ultimately failed to make any

findings of material import on this issue. The panel dodged the issue by relying heavily on the fact that the FTA was not yet in force.

8 China: Rare Earths—Panel Report

8.1 Introduction and Facts

This dispute featured a challenge by the EU, Japan and the United States concerning Chinese export restrictions on certain rare earths and other elements. China uses export duties and export quotas to limit the exportation of 15 sets of rare earths (including many sub-variations) as well as certain other minerals, going by the not universally familiar names such as Praseodymium, lanthanum, tungsten and molybdenum. These elements occur either naturally in the soil or are produced after some basic processing. The commercial and policy stakes of this dispute were high. Rare earths are important elements for producing many products that are essential for modern life—cell phones, computer hard drives, loudspeakers, green technologies such as wind turbines or hybrid cars, cameras and telescope lenses. Contrary to what their names suggest, rare earths are generally abundant, but are hazardous to extract.

Over the years, China had become the dominant global supplier of these materials. China's export restrictions on rare earths (as well as on other raw materials, which had been subject to a previous similar dispute) have been used by China as an aspect of its industrial policy, namely, to reserve a significant portion for the Chinese domestic industry. They have also become a political tool and were perceived as a potential strategic economic threat by the complainants.

The Chinese export restrictions took the form of export duties and export quotas. As will be seen below, legally speaking, the crux of the dispute had been decided in the previous dispute, which went by the name of *China – Raw Materials*.[57] Nevertheless, China requested the panel to review the previous analysis.

8.2 Salient Legal Findings

In essence, the complainants challenged three sets of measures: export duties, export quotas, as well as the administration and allocation of the export quotas.

[57] China—Measures Related to the Exportation of Various Raw Materials (DS394).

8.2.1 The WTO Consistency of China's Export Duties

The complainants challenged a range of export duties imposed by China on the products at issue. Export duties—although not export quotas—are normally legal under WTO law. Nevertheless, China's Protocol of Accession contains a prohibition on export duties, unless these duties are imposed on products enumerated in an Annex to the Protocol. This is a so-called "WTO-plus" obligation, imposed on China during its long accessions process between 1988 and 2001. Frequently, countries or customs areas acceding to the WTO after 1995—that is, countries or customs areas that are not original WTO Members—have had to assume obligations that go beyond the obligations of original WTO Members. This concerns not only the extent and depth of tariff concessions, but also tightened substantive rules. In the case of China (as well as other countries, e.g. Viet Nam), these WTO-plus obligations include the prohibition of export duties. As noted above, under "standard" GATT/WTO obligations, Members are unconstrained with respect to export duties, even though relevant proposals have been made as part of the Doha Round.

China did not dispute the obvious, namely, that it was applying export duties inconsistently with Article 11.3 of its Protocol of Accession. However, China invoked Article XX of the GATT 1994 to justify this breach, arguing that the export duties at issue were intended to serve as a complement to Chinese environmental policy concerning the extraction and production of rare earths and the other minerals at issue.

An obvious problem in this regard for China was that both a panel and the Appellate Body in *China – Raw Materials* had ruled Article XX of the GATT 1994 inapplicable to China's Protocol of Accession. The basic idea behind that ruling was that, although the Protocol of Accession is part of the WTO's legal architecture, defenses under Article XX of the GATT are available only to justify violations of the GATT 1994 itself, and not also violations of other WTO legal agreements or documents. The only exception to that rule is where that other WTO legal agreement or document specifically and expressly refers to Article XX.

The panel's dilemma was to what extent it could do as requested by China—namely, to engage in a re-assessment of a legal issue previously decided by the Appellate Body in the light of what China alleged were new arguments. The Appellate Body had previously ruled that, absent "cogent reasons", panels are expected to follow the legal interpretations developed by the Appellate Body. The panel ultimately decided to engage with China's arguments, justifying this decision by referring to certain "particular circumstances", including: that it would examine these arguments to determine whether they constituted the "cogent reasons" mentioned by the Appellate Body; that doing so would assist the Appellate Body and the DSB with respect to a complex legal question; that no other party objected to the panel doing so; and that the parties to the dispute were not identical to the parties in *China – Raw Materials*.

Ultimately, the panel rejected China's arguments and reached the same decision as the Appellate Body had reached previously. It ruled that the silence in Article

11.3 of China's Protocol of Accession with respect to Article XX of the GATT (or the GATT more broadly) had to be given meaning; that the fact that the Protocol of Accession had been made an integral part of the WTO Agreement and that Article XII of the WTO Agreement provided that an accession "shall apply to the [WTO] Agreement and the Multilateral Trade Agreements annexed thereto" the did not mean that the GATT 1994 was applicable to the obligations in the Protocol or that individual provisions of the Protocol were made part of the Multilateral Agreements annexed to the WTO Agreement. The panel therefore declined to see the "systemic relationship" between the Protocol and the GATT as a cogent reason to depart from the Appellate Body's previous reasoning.

The panel also rejected the argument that the words "nothing in this Agreement" in Article XX could be read to encompass the Protocol. Similarly, the panel disagreed that non-availability of Article XX would deprive China of the ability to regulate trade on the grounds of non-trade concerns; the panel ruled that the non-availability concerned only one type of trade instruments, namely export duties (as opposed to export quotas).

8.2.2 Separate Opinion by One of the Panelists on the Availability of Article XX

Remarkably, one of the panelists issued a dissenting ("separate") opinion on this issue, siding with China. The central point in this panelist's reasoning revolves around the relationship between Article 11.3 and Article XX; the "WTO-plus" nature of Article 11.3; the alleged close relationship between Articles II and XI of the GATT 1994; the fact that in Russia's case, a prohibition on export duties was stipulated in Russia's schedule, rather than in the Protocol; and the object and purpose of the WTO Agreement.

Wherever one stands on the applicability of Article XX and on the Appellate Body's caselaw, it is safe to say that the separate opinion lags far behind the majority's view in terms of detail and thoroughness of the legal argument; at times, the separate opinion has an almost political character. For this reason alone, arguably, it is not particularly convincing.

8.2.3 The Justification of Export Duties and Export Quotas Under Article XX

A very large part of the panel's reasoning concerns Article XX and whether this provision could justify the Chinese export duties and export quotas. With respect to export duties, the panel engaged in this analysis on an arguendo basis, given that it had already found Article XX not applicable. With respect to the export quotas, the panel was required to address China's reliance on Article XX.

With respect to export duties, China invoked Article XX(b). The panel accepted that mining and production of rare earths, tungsten and molybdenum caused harm

to the environment and to human, animal and plant life or health. However, the panel was not convinced that the export duties were designed so as to protect the environment or public life or health; found that the duties were not apt to make a material contribution to these goals; and also found that China had not explained why it could not, as an alternative to export duties, increase volume restrictions and pollution controls and the so-called resource or pollution taxes, which are taxes imposed on mining operations. The panel also found that China had not substantiated its arguments under the chapeau of Article XX.

With respect to export quotas—found to be illegal under Article XI of the GATT 1994 and other certain paragraphs of China's Working Party Report—the panel's analysis of Article XX was significantly longer. Here, China invoked Article XX (g). The panel examined this justification separately for rare earths, tungsten and molybdenum, respectively.

The key elements in the panel's rejection of China's arguments for all three minerals were certain asymmetrical, not "even-handed" features of China's regime. In essence, China was not restricting domestic consumption in the same manner as exports/foreign consumption. In essence, once the materials at issue had been produced, China did not apply consumption limitations to the domestic industry, but did limit foreign consumption/export by means of export quotas. The panel did not accept the defence that the quota had not been filled in the most recent period. The panel also considered that the export limitations had the "perverse" effect of increasing domestic supply and lowering prices, thereby encouraging domestic consumption, rather than limiting it (moreover, unused quota amounts were reallocated to the domestic industry). Moreover, the panel failed to see a connection between the manner in which export quotas were set and the ways in which China alleged domestic consumption was regulated. In a nutshell, the panel viewed the export restriction as China's way of ensuring a secure supply of the materials at hand for the domestic industry, as part of China's industrial policy, rather than as an element in China's environmental policy. The panel also faulted China for not explaining why it was unable to implement alternatives, such as higher production volume restrictions or higher pollution controls.

8.3 Observations on Salient Aspects of the Panel Report

The panel's finding can be described as remarkable for the following aspects.

With respect to the treatment of Appellate Body precedent, the panel very carefully walked a balancing act between adherence to the Appellate Body's previous decisions, on the one hand, and the claim by China that it deserved a fresh look at the core legal issue, on the other hand. All in all, the panel explained lucidly why it decided not simply to follow Appellate Body precedent without further analysis; but at the same time produced a systemically healthy outcome that respects the quasi-precedent status that Appellate Body decisions enjoy.

In its Article XX(g) and chapeau analysis, the panel found that the search for alternatives to WTO-inconsistent behaviour could be analysed under the chapeau. This thought has never previously been explicitly articulated and serves to underscore that the consideration of alternatives is—rightly—less driven by particular treaty terms (such as "necessary" under Article XX(b), but more by the inherent logic of weighing and balancing trade and non-trade concerns.

Finally, continuing with the analysis of "alternatives", the panel found that doing more of an already existing category of regulation (e.g. stricter pollution controls or stricter maximum mining volumes) can serve as an alternative measure. This is important, because defendant governments increasingly argue in WTO dispute settlement that the incriminated measure is part of a "comprehensive suite of measures"; doing so is sometimes driven by the wish to fight off suggestions of alternative measures on the grounds that the proposed alternatives are already being implemented. If the argument were accepted that doing more of something is not alternative, it would make it significantly more difficult to ever identify alternative measures to WTO-inconsistent behaviour. This would make challenges to regulatory protectionism much easier under, for instance, Article III and XI of the GATT 1994, Article 2.1 of the TBT Agreement or Article 5.6 of the SPS Agreement.

9 China: Rare Earths—Appellate Body Report

9.1 The Appellate Body's Ruling in a Nutshell

The Appellate Body's review of the panel findings in the China—Rare Earths dispute focussed on the relationship between the WTO Agreement (Marrakesh Agreement) and Paragraph 1.2 of China's Accession Protocol, as well as on Article XX(g).

Although the Appellate Body quibbled with certain aspects of the panel ruling, it upheld the essential core of the panel's determination. China was unable to convince the Appellate Body that its measures could be justified as environmental measures.

9.2 Salient Legal Findings

9.2.1 The Relationship Between Article XII of the WTO Agreement and Paragraph 1.2 of China's Accession Protocol

China appealed the panel's finding that Article XII of the WTO Agreement—which provides that an accession "shall apply to the [WTO] Agreement and the Multilateral Trade Agreements annexed thereto"—did not imply that the Accession Protocol was made part of each Multilateral Trade Agreement, such that an Article XX

defense would be available to violations of obligations enshrined in the Accession Protocol. The panel had concluded that, by virtue of paragraph 1.2 of the Accession Protocol, the Protocol had to be treated as an "integral" part of the WTO Agreement, but not also as an integral part of each Multilateral Trade Agreement.

The thrust of the Appellate Body's detailed engagement with China's argument was that Article XII reinforces the concept of "single undertaking", whereby all WTO Members are subject to all covered agreements. However, Article XII does not create a substantive relationship between China's Accession Protocol and provisions of the covered agreements. Nor did paragraph 1.2 of the Accession Protocol contain relevant guidance on this point; instead, it simply confirmed Article XII of the WTO Agreement. The Appellate Body acknowledged that the term "WTO Agreement" in the Accession Protocol can also be understood as building a "bridge" between the Protocol and all the covered agreements. However, that "bridge" was of a general nature and had to be specified with respect to individual provision of the Protocol.

The Appellate Body pointed out that the same applied to the relationship between the covered agreements, as well as between the covered agreements and the WTO Agreement, which had to be assessed on a case-by-case basis. For instance, Article 3 of the TRIMs Agreement explicitly referred to GATT exceptions; in contrast, the Appellate Body recalled that it had declined that Article XX could be available to justify a breach of the TBT Agreement. The answer always depended on the specific wording of the relevant provision and on the closeness of the link established in the provision. Thus, China's general argument of an "intrinsic relationship" between the Protocol and the WTO Agreement was not sufficient.

9.2.2 Article XX(g) and Measures Relating to Conservation

China also appealed the panel's conclusion that its export quotas do not "relate to" conservation under Article XX(g); and that these export quotas are not "made effective in conjunction with" domestic restrictions under Article XX(g).

With respect to the interpretation of Article XX(g), the Appellate Body confirmed that the panel had not erred by focussing on the "design and structure" of the export quotas, in determining whether they "relate to" conservation. It also found that the panel did not err when it found that this analysis did not require an evaluation of actual effects of the concerned measures, although "predictable effects of a measure may be relevant for the analysis". The Appellate Body also rejected a number of arguments of China as mischaracterizing the panel's findings.

The Appellate Body also addressed the panel's use of the concept of "even-handedness". It found it unclear whether the panel had considered even-handedness to be a separate requirement or whether it considered that this concept was embodied in paragraph (g). The Appellate Body clarified that even-handedness was not a separate concept or element in the Article XX(g) test and found an error by the panel to the extent that the panel considered this criterion as a separate analytical element. As a separate point, the Appellate Body also clarified that

Article XX(g) required that, if there were limitations on international trade in the name of conservation, then domestic restrictions also had to exist that would impose limitations on domestic production or consumption; and such restrictions had to be "real", rather than merely "on the books". At the same time, it was not necessary for a successful invocation of Article XX(g) that the burden on domestic and foreign consumers be "evenly distributed".

With respect to the application of Article XX(g), the Appellate Body rejected China's appeal for more or less the same reasons as it had articulated with respect to the interpretation of Article XX(g). The Appellate Body also rejected a number of arguments by China as to the panel's treatment of evidence, under Article 11 of the DSU.

9.2.3 Simultaneous Timing of Appeals

Beyond the substance of this dispute, an interesting issue arose with regard to the timing of the appeal. The US appeal in this dispute was filed simultaneously with the appeal by China of the panel report in the US—Countervailing and Anti-dumping Measures (China) dispute. The Appellate Body assigns appeal numbers on a sequential basis, depending on the day of filing of the appeal. The random selection of the Appellate Body division is then linked to these appeal numbers. Hence, the simultaneous appeals created a problem as to how to assign appeal numbers to these two appeals. The Appellate Body resolved this problem by a random draw in the presence of the parties. It also expressed regret about this situation, exhorting parties to "coordinate, communicate and cooperate amongst themselves, as well as with the Appellate Body and the Appellate Body Secretariat, in the planning, filing and conduct of their appeals".

9.3 Observations on Salient Aspects of the Appellate Body Report

One noteworthy point is the Appellate Body's reaffirmation of its caselaw concerning Article XX and its applicability to legal texts other than the GATT 1994. The Appellate Body has emphasized that the relationship between the Protocol of Accession and Article XX cannot be determined in the abstract, but rather must be clarified on a case-by-case basis, in the light of the precise wording of a given provision. This approach has the usual virtues and drawbacks of a "case-by-case" approach—on the minus side, little predictability; on the plus side, greater flexibility for the adjudicating body.

The Appellate Body also helpfully clarified the concept of "even-handedness" under Article XX(g). For one, it emphasized that it is not a treaty term and not a separate criterion under Article XX(g), but rather a short-hand for the "made

effective in conjunction with"-criterion, which obviously *is* treaty language. Secondly, the Appellate Body clarified that the "made effective in conjunction with" standard does not require precise equality in the "burden" on the domestic and on the export/import side, but does require—in the present case—that there be some equivalent limitations on domestic consumption. These limitations were missing on the domestic side in this dispute, making China's defense a very challenging task.

10 US: Countervailing and Anti-Dumping Measures (China)—Panel Report

10.1 Factual Background

The factual background to this dispute reaches back to the early 1980s. At that time, the United States Department of Commerce (USDOC) decided not to apply countervailing duties (CVDs) to non-market economies (NMEs). The basic idea behind this decision was that NMEs were so distorted due to the pervasive influence of the government on the national economy that it made little sense to determine to what extent pricing decisions by exporters were distorted through subsidies.

This practice of not imposing CVDs on exports from NMEs lasted until 2006/2007. Presumably under pressure from domestic interest groups, USDOC decided to apply CVDs to NMEs. It argued that its previous practice flowed from the discretion vested in it under the applicable legislation; in other words, the non-application practice was not mandatory, but rather discretionary, and thus could be changed.

This decision by USDOC was challenged before the US judiciary. In 2011, in the so-called GPX V case, the Court of Appeals for the Federal Circuit (CAFC) determined that the USDOC's decision to apply CVDs was in violation of US statutes. In reaction to this decision, the United States Congress promulgated a new law that requires USDOC to apply CVDs to NMEs and provides the conditions for doing so.

An interesting additional wrinkle to this legislation is that the requirement to apply CVDs to NME exports was retroactive—concerning investigations initiated on or after November 2006; however, the new statute took effect only in 2012. At the same time, an important concomitant aspect was not applied on a retrospective basis. This concomitant aspect concerned so-called "double remedies" that can arise when anti-dumping duties and CVDs are applied to the same exports from NMEs. These double remedies arise because, when an investigating authority calculates a dumping margin for exporters in NMEs, it uses a surrogate normal value that is typically derived from a proxy country (e.g. using Indonesia as a surrogate country for China, to account for the perception that prices in that industry in China are distorted through governmental intervention). By using this proxy country, one eliminates the effects of any subsidy that may have existed in the

country of origin (in our example, China). If the investigating authority were now to apply both anti-dumping duties and CVDs in the full amount, it would (at least partially) double-count the effect of the subsidy, creating "double remedies", which is prohibited under WTO law. The panel phrased this problem in the following manner: "[T]o the extent that a subsidy leads to a reduction in the export price of a product, that subject will necessarily be captured in the dumping margin if that dumping margin, and the resulting antidumping duty, are calculated using a nonmarket economy methodology that calculates normal value based on surrogate values from a third country."

In recognition of this risk of double remedies, the new US statute provided the necessary tools for avoiding double remedies. However, the relevant provisions—concerning the avoidance of double remedies—were applicable only prospectively, counting from the time of promulgation of the statute. Hence, for the period between 2006 and 2012, USDOC was required to impose CVDs on NME exports, but did not have the legal tools to avoid the imposition of double remedies.

10.2 Salient Legal Findings

10.2.1 Prompt Publication of Trade Regulations: GATT Article X:1

China claimed that the United States violated Article X:1 of the GATT 1994 because the measure at issue applied over 5 years retrospectively. As is known, Article X:1 of the GATT 1994 requires Members to publish their laws, regulations, judicial decisions and international agreements related to trade matters. The overarching objective of Article X is greater transparency of national legislation, for the benefit of both exporting countries as well as of private commercial operators. Article X:1 does not specify how publication should occur, but it requires that publication occur "promptly".

China argued that, by applying to events going back to 2006, the measure had been "made effective" with respect to that year and thus had not been published "promptly". The panel disagreed, finding that the term "made effective" referred to the legal effect of the measure at the time of its promulgation, rather than referring to the temporal scope of the measure's application. The upshot of this finding is that Article X:1 does not discipline at all a Member's decision to backdate a measure and apply it retroactively. Rather, this task seems to fall on the shoulders of Article X:2.

10.2.2 No Enforcement Before Publication Pursuant to Article X:2

Article X:2 provides that trade laws and regulations that effect "an advance in a rate of duty or other charge on imports under an established and uniform practice", or a "new" or "more burdensome" requirement may not be enforced before the measure

has been officially published. Thus, unlike under Article X:1, Article X:2 appears to specifically prohibit retroactive application of certain measures.

The panel agreed that the measure had been "enforced" prior to its official publication. The panel found that the term "enforced" also referred to the temporal scope of application of a measure, in the sense of a set of past events and circumstances—that occurred prior to the enactment of the measure—to which the measure was being applied retroactively.

Nonetheless, the majority of the panel found that the measure fell outside the scope of Article X:2, because it neither effected an "advance" in a rate of duty or other charge on imports under an established or uniform practice, nor imposed a "new" or "more burdensome" requirement or restriction on imports. The key question here was which aspect of domestic law should serve as the benchmark for determining whether an "advance" or a "new" or "more burdensome" requirement had been imposed. For instance, should the benchmark be the law as it stood before 2006, that is, the non-application of CVDs to NMEs? Or rather the USDOC's practice of applying CVDs, since 2006, even though it had been subsequently declared illegal by US courts?

The panel majority chose the USDOC practice between 2006 and 2012 as the benchmark—that is, the practice of applying CVDs to NMEs. This choice was in part driven by the words "under an established and uniform practice" in Article X:2. The panel majority did not consider that the practice was unlawful under US law, because no US court had, at the time when the new law was introduced, formally ordered USDOC to revise its practice. The panel majority then found that no "advance" in a duty had been "effected", because the new rates of countervailing duties, whatever rates were those appropriate in the light of the applicable U.S. CVD provisions, just like the rates previously applicable under USDOC's established and uniform practice after 2006. For the same reasons, the panel majority found that the measure at issue did not create a "new" or "more burdensome" requirement. Therefore, the panel majority concluded that the US did not act inconsistently with Article X:2 of the GATT 1994.

However, one panelist dissented from this part of the panel majority finding and reached the opposite conclusion. The dissenter used as the relevant benchmark not the post-2006 USDOC practice, but rather the applicable legal provisions before and after the legislative change. The dissenter found that, prior to the enactment of the measure, US CVD law did not apply to imports from NMEs; subsequent to the enactment, CVD law did apply to such imports. Absent the new measure, USDOC would have had to revoke all pending CVD orders. The dissenter also rejected the US argument that the measure at issue merely "clarified" the previously applicable law; it also found that—even accepting this "clarification" argument—the new state of the law required USDOC to apply CVDs to NME imports, whereas before there was discretion to do so. The dissenter ended on the interesting note of accusing the majority of eviscerating Article X:2; it stated that, under the majority's approach, a Member could circumvent Article X:2 by applying a higher rate or a more burdensome requirement some time before publishing the relevant measure; the new

measure would then be compared to that pre-publication more burdensome practice, and a violation of Article X:2 would never be found.

10.2.3 Claim Under Article X:3(b)

China's third claim concerned the requirement in Article X:3(b) that tribunals "be independent of the agencies entrusted with administrative enforcement and their decisions shall be implemented by, and shall govern the practice of, such agencies unless an appeal is lodged." China contented that, if legislation such as the measure at issue were permissible, it would not be meaningful to seek judicial review of what an interested party considers to be unlawful agency conduct. This, according to China, would be because an independent tribunal's favourable finding could always be superseded by the enactment of a new law that renders the agency's actions lawful "after the fact".

The panel rejected this argument and ruled that Article X:3(b) does not prohibit a WTO member from taking legislative action such as the measure at issue, that is, supersede a judicial determination that is pending when the legislation comes into force. The key argument of the panel was that the measure at issue did not narrowly target pending court cases but amended the law in a more general manner.

10.2.4 Claim Concerning "Double Remedies"

As described above, the new 2011 "GPX" legislation required USDOC to apply retroactively CVDs to NME exports in investigations initiated as early as 2006. However, the requirement to avoid double remedies was applicable only as of 2012. Due to this time "gap", China argued that the United States had failed to investigate and avoid double remedies in 26 countervailing duty (CVD) investigations and administrative reviews initiated over the period 2008–2012.

The panel found no "cogent reason" to depart from a previous Appellate Body finding that Article 19.3 requires an investigating authority to investigate and to avoid double remedies when concurrently imposing CVDs and anti-dumping duties. The notion of "double remedies" was described in the factual background section of this summary. The Appellate Body finding made previously in DS379 has two aspects, namely, "(i) the imposition of double remedies arising from the concurrent imposition of CVDs and anti-dumping duties calculated under an NME methodology is inconsistent with the obligation in Article 19.3 to levy CVDs' in the appropriate amounts; and (ii) the burden is on an investigating authority imposing such concurrent duties to 'investigate' whether it is offsetting the same subsidies twice."[58] The United States requested the panel to review and depart from this Appellate Body finding, including by invoking specificities of the United States

[58] Appellate Body Report, *US – Anti-Dumping and Countervailing Duties,* para. 606.

trade remedy system; however, the panel declined to do so, as it saw no "cogent reasons" for departing from this Appellate Body precedent.

The panel then considered the 26 investigations at issue and found that the United States had failed to investigate whether double remedies could arise.

10.2.5 Examples of "Cogent Reasons" to Depart from Prior Appellate Body Case Law

In confronting the issue of double remedies, the panel noted that the Appellate Body had previously addressed this issue in the *US – Anti-Dumping and Countervailing Duties*.[59] The panel then considered to what extent it was bound by this Appellate Body decision and referred to the Appellate Body's statement that, absent "cogent reasons", panels were expected to follow previous Appellate Body decisions on the same issue. The panel noted that the Appellate Body had not defined the concept of "cogent reasons" and provided examples of what it considered to be such cogent reasons, namely: (i) a multilateral interpretation of a provision of the covered agreements under Article IX:2 of the WTO Agreement that departs from a prior Appellate Body interpretation; (ii) a demonstration that a prior Appellate Body interpretation proved to be "unworkable in a particular set of circumstances falling within the scope of the relevant obligation at issue"; (iii) a demonstration that the Appellate Body's prior interpretation leads to a conflict with another provision of a covered agreement that was not raised before the Appellate Body; or (iv) a demonstration that the Appellate Body's interpretation was based on a "factually incorrect premise."[60] In this dispute, the panel found that none of these scenarios existed.

10.3 Observations on Salient Aspects of the Panel Report

Our observation on this panel report is set out in the description of the Appellate Body report in the same dispute, as set out below.

[59] WT/DS379/AB/R.

[60] Panel Report, *US – Countervailing and Anti-Dumping Measures,* para. 7.317.

11 US: Countervailing and Anti-Dumping Measures (China)—Appellate Body Report

11.1 Salient legal Findings

Aside from certain procedural findings—on the sufficiency of China's panel request and the admissibility of certain evidence—the Appellate Body report in this dispute is entirely focused on the interpretation and application of Article X:2 of the GATT 1994.

It may be recalled that the panel majority found that no "advance" in a rate of duty or a "new" or "more burdensome" requirement existed, because the majority compared the new measure with the USDOC's post-2006 practice of applying CVDs to NMEs. In contrast, the dissenter compared the relevant US statute as it stood prior to and subsequent to the measure at issue. China appealed against the majority's finding.

The Appellate Body reversed the majority's finding. It characterized the function of Article X:2 as "ensuring transparency and protecting traders' expectations as to the publication and enforcement of certain measures is relevant to the interpretation of the obligations contained in this provision." For this reason, these traders' expectations about the applicable measure were the "proper baseline" for Article X:2.

The Appellate Body specified that the baseline of the comparison under Article X:2 to determine whether a measure "effects an advance in a rate of duty" should be made between the new measure and the prior published measure that it replaced or modified. The Appellate Body rejected the use of USDOC practice as such a benchmark, in part by correcting the panel majority's reliance on the phrase "under an established and uniform practice" in Article X:2. Rather, it found, the analysis should start with the language of the previous measure and its meaning should be ascertained on the basis of objective criteria. In that context, the practice of the administering agency—here, the USDOC post-2006 practice—could be relevant. However, the Appellate Body disagreed with the panel majority's approach of ascribing decisive importance to the USDOC practice, subject only to the requirement that the practice was lawful. The Appellate Body therefore reversed the panel majority's finding.

The Appellate Body then attempted to "complete the analysis" and come to its conclusion on the consistency of the US measure with Article X:2 based on the corrected legal standard. The key issue was the precise meaning of the relevant US statute prior to the enactment of the measure at issue in 2012. The Appellate Body considered that to determine this precise meaning required a comprehensive examination of legislation, judicial decisions, and expert legal opinions pertaining to CVD law in the United States. Needless to say, the legislation, decisions, and opinions relating to US CVD law that the Appellate Body had at its disposal were amenable to different interpretations. The Appellate Body also considered that USDOC's inconsistent application of CVD law to NMEs complicated the

analysis.[61] Because many of the criteria for examining the meaning of US domestic law were factual in nature, and because the Appellate Body cannot establish new facts, the Appellate Body concluded that it was unable to complete the analysis. Hence, the Appellate Body was unable to resolve the question of the legality of the US measure.

11.2 Observations on Salient Aspects of the Appellate Body Report

Although this dispute was ultimately unsatisfactory from China's perspective, because the Appellate Body could not complete the legal analysis and find a violation of Article X:2, the Appellate Body's finding is nevertheless important. As the panel dissenter correctly pointed out, the panel majority's view carries in it the risk of a circular comparison, where a new measure retrospectively "blesses" a particular practice by an administering agency. Put differently, where an administering agency begins—contrary to previous practice, under the same statutory language—to apply a different practice; and that practice is subsequently cast into statutory language that differs from the previous statutory language; the panel majority's approach would deny a violation of Article X:2. The Appellate Body's approach of focussing on the statutory language as the key criterion—all the while examining administrative practice (as well as judicial decisions) as a manifestation of the meaning of domestic law—appears more principled and correct.

12 China: Anti-Dumping and Countervailing Duties on Certain Automobiles from the United States

12.1 Facts of the Case

The dispute concerned the anti-dumping ("ADDs") and countervailing duties ("CVDs") imposed by China in December 2011 on certain automobiles imported from the Unites States, as set out in Notices 20 and 84 of the Chinese Ministry of Commerce ("MOFCOM").[62] MOFCOM had identified six main respondent companies, among which were General Motors LLC, Ford Motor Company, Mercedes-Benz USA and Chrysler Group LLC.

[61] Appellate Body Report, *US – Countervailing and Anti-Dumping Measures,* para. 4.165.

[62] MOFCOM, *Announcement No. 20* and Appendix, "Final Determination of the People's Republic of China concerning the Anti-dumping and Countervailing Investigation on Imports of Certain Automobiles Originating in the United States" (5 May 2011); MOFCOM, *Announcement No. 84* (14 December 2011).

The duties concerned specifically certain automobiles from the US with an engine capacity of 2.5 litres or bigger. ADDs ranged from to 21.5 %, while CDDs ranged from 6.2 to 30 %.

China's ADDs and CVDs were challenged by the United States in July 2012. The US raised a series of allegations under the *Anti-dumping agreement ("ADA"), Agreement on Subsidies and Countervailing Measures ("ASCM")* and the GATT 1994.

While the WTO dispute was pending, China announced that it would discontinue the duties it had imposed on the vehicles at issue. This, however, did not prevent the Panel from making a ruling, notably on the ground that China "has not brought any official documentation that would support this contention". The DSB issued a report in May 2014. In the absence of an appeal by either party, the DSB adopted the Panel Report in June 2014.

12.2 Salient Legal Findings

The Panel found a series of Chinese duties on imports of US-made cars and SUVs to be inconsistent with the *ADA* and the *SCM Agreement*, notably because of procedural and substantive violations. As is well-known, these two agreements prevent WTO Members from imposing AD or CVD measures unless its relevant authorities conduct an investigation that determines the existence of dumping or subsidization respectively as well as consequential injury to the domestic industry.

The United States argued that China had not followed the appropriate procedures when examining potential subsidies and dumping and applying these particular duties, determined by MOFCOM. According to the US' complaint, the investigations were based on insufficient evidence; entailed a faulty definition of the domestic industry; withheld relevant data and calculations; failed to objectively examine the evidence; and made unsupported findings of injury to the domestic industry.

12.2.1 Confidential Data and Non-Confidential Summaries

Anti-dumping and anti-subsidy proceedings involve considerable amounts of confidential and sensitive business information because they require exporting companies to submit to the importing Member authorities information concerning price and cost of the products in a detailed manner. In order to build a strong case, interested parties ideally need access to the confidential information submitted by the opposing side. At the same time, they will be reluctant to provide their own confidential information to their opponents. Thus, equal access to information should be given to the parties.

Article 6.5 of the *ADA* and Article 12 of the *SCM Agreement* contain a principle that information, which is by nature confidential, should be treated as such by the

authorities and should not be disclosed without the authorization by the party submitting it. However, the authorities require interested parties providing such confidential information to present meaningful non-confidential summaries thereof. The summary should allow a reasonable understanding of the information withheld in order for the opposing party to respond and defend its interests.

The United States challenged the adequacy of 12 non-confidential summaries submitted in the petition. The Panel found some of them to be consistent with Articles 6.5.1 of the *ADA* and Article 12.4.1 of the *SCM Agreement*, since they permitted a reasonable understanding of the redacted confidential information. However, the Panel also found that MOFCOM failed to require the submission of adequate non-confidential summaries of confidential information concerning certain other injury factors in the petitions for both ADDs and CVDs. These findings of violation are part of a longer series of disputes against China in which findings were made against MOFCOM with respect to non-confidential summaries of confidential information.[63] It remains to be seen to what extent these findings will lead to adjustment in MOFCOM practice that may in the future give rise to fewer challenges.

12.2.2 Determination of the "Residual Rate"

The panel faced a series of claims by the United States about how China determined what the panel called the "residual rate". This is the rate applied to exporters who were not known to the investigating authority and were therefore not included in the investigation. The panel distinguished this rate from the "limited examination" rate, which is the rate applied to exporters that are known to the investigating authority, but not included in a sample pursuant to Article 6.10 of the Anti-dumping Agreement. The panel deliberately declined to use the term "all others rate", which is popular among trade remedy lawyers but, according to the panel, obfuscates the difference between the "limited examination" rate and the "residual rate".

It may be noted that it is not clear—either from the text of the Anti-dumping Agreement or from the case law—whether investigating authorities may indeed apply to unknown exporters a rate that is different (or higher, as investigating authorities typically do) from the "limited examination" rate. This point was described in detail in the analogous article in the last edition of the Yearbook.[64] This panel assumed that it was permissible. It would, of course, be useful for the Appellate Body to clarify this important point.

The panel found that China violated Article 6.8 and Annex II, because the notice of initiation did not sufficiently inform exporters about the precise information required of them (volumes and prices) and therefore did not satisfy the "facts

[63] Panel Report, *China – GOES,* para. 7.223–7.225. Panel Report, *China – Broiler Products,* para. 7.65. Panel Report, *China – X-Ray Equipment,* para. 7.364.

[64] Bohanes and Salcedo (2015), pp. 346–349.

available" requirements. In other words, there was a mismatch between the information requested in the notice of initiation, and the facts available used. However, the panel rejected the United States' claim that China had not properly disclosed the essential facts relevant to this residual rate; and that it had not provided sufficient public notice.

Interestingly, the panel found that, the SCM Agreement does not contain the equivalent of Articles 6.10 and 9.4 of the Anti-Dumping Agreement, and that it was therefore also not clear whether the notion of a "residual rate" applied to countervailing duties. However, the panel assumed that this was the case, for reasons of logic. The panel also assumed that, although the SCM Agreement does not contain an Annex II of the Anti-dumping Agreement, nevertheless the same requirement apply under the SCM Agreement for purposes of determining the legality of the recourse to facts available. The findings under the SCM Agreement mirrored the analogous claims under the Anti-dumping Agreement.

12.2.3 Definition of the Domestic Industry

An interesting finding was made in the context of defining the domestic industry. During an investigation, the investigating authority must determine the domestic industry for purposes of the injury determination. This requires examination of which domestically produced products are like the exported products. Article 4.1 of the Anti-dumping Agreement establishes two methods for the determination of the domestic industry: either the domestic industry is constituted of the domestic producers of the like product, or it corresponds to a group of producers whose collective output constitutes a major proportion of the domestic production of the like product.

The Appellate Body had indicated that given the context in which the term "a major proportion" is situated, it should be properly understood as a "relatively high proportion of the total domestic production", so as to ensure that the domestic industry defined on this basis is capable of providing ample data that ensure an accurate injury analysis.[65]

The Appellate Body had also noted that while an investigating authority is provided with a certain flexibility to define the domestic industry in the light of what is reasonable and practically possible, the determination should be made in an unbiased manner. Particularly, an investigating authority "must not act as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product."[66]

In *EC – Fasteners*, the European Commission contacted and received information from a large number of domestic producers and from that number it excluded those who did not indicate a willingness to be part of the sample. The Commission

[65] Appellate Body Report, *EC – Fasteners,* para. 412–413.

[66] Appellate Body Report, *EC – Fasteners,* para. 414.

further concluded that this smaller group still qualified as a "major proportion" since it represented more that 25 % of total domestic production. The Appellate Body had found that the Commission acted inconsistently with the requirement of objectivity by defining the domestic industry as only those producers willing to be included in a sample for the injury determination, because this introduced the possibility of bias towards an affirmative finding of injury.[67]

Unlike in the *EC – Fasteners*, the panel did not find a similar inconsistency in the fact that MOFCOM had excluded certain producers from the scope of the domestic industry.[68] Specifically, the United States relied on the *EC – Fasteners*, claiming that China had defined the industry in a biased fashion by including within the domestic industry only those producers that had been "registered", based on their willingness to provide data for the injury investigation.

The panel rejected this claim, stating that the mere use of a registration requirement by MOFCOM did not introduce a material risk of distortion. Furthermore, the Panel found that, unlike in *EC – Fasteners*, MOFCOM had not defined the domestic industry on the basis of willingness to be included in a sample, and that the US had not shown that the process used by MOFCOM to define the domestic industry was biased towards a category of domestic producers. Indeed, MOFCOM communicated its notices, forms and questionnaires in an open manner, allowing any interested party to participate in the investigations. The choice of some of the producers not to participate in the investigation could not be attributed to the investigating authority or the registration process, since these producers were equally aware of the need to register in order to participate.

Moreover, MOFCOM did not define the domestic industry on the basis of willingness to be included in a sample, since there was no sampling in the investigations at issue, and thus no question of excluding some of the producers unwilling to be included in a subset of the domestic industry.

This finding highlights the difficult balance to be found between administrative efficiency and an investigating authority's need to be pragmatic in its investigation, on the one hand; and the need for objectivity, on the other hand. Limiting the injury determination to producers that are willing to participate in the investigation creates, as the United States argued, a serious risk of distortion and bias. As difficult as this issue may be in practice, it is not clear whether this panel finding adequately balances the competing concerns and whether it is not tilted too much in favour of administrative expedience and too lenient on an investigating authority.

[67] Appellate Body Report, *EC – Fasteners,* paras. 422 and 427.

[68] Panel Report, *China – Broiler Products,* para. 7.428.

13 India: Agricultural Products—Panel Report

13.1 Facts of the Case

The dispute concerned an import prohibition series of measures imposed by India on certain agricultural products from countries reporting Notifiable Avian Influenza ("NAI") to the World Organization for Animal Health ("OIE"). The WTO uses the OIE as the reference organization for standards relating to animal health and infectious diseases of animals. The Terrestrial Animal Health Code ("OIE Code") is the principle reference for WTO members for purposes of the *Sanitary and Phytosanitary Measures Agreement ("SPS Agreement")*. Chapter 10.4 of the OIE Code deals specifically with avian flu, requiring members to notify the OIE of any cases of domestic highly pathogenic notifiable avian flu ("HPNAI") in birds and the occurrence of certain types of low pathogenicity notifiable avian flu ("LPNAI") in poultry.

The measures at issue were: the Indian Livestock Importation Act 1898 ("Livestock Act"); a number of orders issued by India's Department of Animal Husbandry, Dairying, and Fisheries pursuant to the Livestock Act, most recently Statutory Order ("S.O.") 1663 (E); as well as any amendments, related measures, or implementing measures.

India's import ban on US poultry and other farm goods was challenged by the United States in 2012, raising a series of allegations under the *SPS Agreement* and the GATT 1994.

The DSB issued a report in October 2014. In January 2015, India notified the DSB of its decision to appeal to the Appellate Body certain issues of law and legal interpretation in the panel report. The Appellate Body report in this dispute was issued in June 2015, and is therefore not covered by this article.

13.2 Salient Legal Findings

The Panel found that India had violated WTO law on a number of counts. The following five sections highlight the most salient legal findings from a systemic perspective.

13.2.1 Presumption of Consistency Under Article 3.2

SPS measures vary across countries due to the differences in national regulations, interests of domestic stakeholders, consumers' preferences etc. The resulting diversity of SPS measures has a negative impact on trade, as exporters must ensure to comply with different standards in order to gain market access. The *SPS Agreement* intends to address this issue by promoting harmonization of SPS measures, by

providing an obligation and an incentive for WTO Members to use international standards for their domestic legislation. Members are required to "base" their domestic legislation on international standards, unless certain exceptions apply.

Harmonization around international standards is encouraged in the *SPS Agreement* by means of a presumption of consistency of measures conforming to international standards with the GATT 1994 and the *SPS Agreement*. Indeed, pursuant to Article 3.2, when a Member's legislation "conforms" to an international standard—rather than merely being "based on" that standard—that legislation enjoys a presumption of consistency with the SPS Agreement.[69]

The concept of "conformity" requires greater adherence to the international standard than the concept of being "based on". However, the precise boundary between the two is not clear and has not been illustrated by many disputes so far. With regard to the meaning of "based on", the Appellate Body stated that one thing is commonly said to be based on another if the former stands or is founded or built upon or supported by the latter. Further, it stated that a measure based on a standard does not necessarily conform to that standard, such as where only some of the elements of the standard are incorporated into the measure.[70]

In *EC – Hormones* the Appellate Body also explained that for a measure to "conform to" an international standard, it should "embody the international standard completely". It thus appears that the national standard must be identical to the international standard.

The United Stated argued that India's measures did not comply even with the lower of these two standards, in that it was not "based on" the relevant OIE standard. Surprisingly, India responded to this allegation by arguing that its measure "conformed" to the OIE standard—the higher of the two standards.

The Panel found for the United States, mainly because the Indian measure categorically prohibited importation of poultry from entire countries currently or previously affected by LPNAI, and did not permit importation from particular zones of those countries that were free of NAI or HPNAI. This, in the Panel's view, represented a "fundamental departure" from the OIE Terrestrial Code, because the Code precisely envisaged such regional differentiation. The Panel rejected India's contention that an importing country may choose as a "condition of entry" the NAI-free status of the entire exporting country and apply that condition only on a countrywide basis.

13.2.2 Necessity and Scientific Principles: Relationship Between Articles 2.2, 5.1 and 5.2

The *SPS Agreement* aims to ensure that SPS measures are scientifically justified and take relevant scientific factors into account. According to Article 5.1 of the *SPS*

[69] Appellate Body Report, *EC – Hormones,* para. 170.

[70] Appellate Body Report, *EC – Hormones,* para. 163.

Agreement, Members are required to ensure that their SPS measures are based on a risk assessment.

According to well established jurisprudence, this provision should be read together with Article 2.2, which in turn lays down two requirements for SPS measures, namely that: (i) they be applied only to the extent necessary to protect human, animal or plant life or health; and (ii) they have a basis in scientific evidence, except certain cases.

The United States claimed that India's AI measures were inconsistent with Article 2.2 automatically as a result of breaching the risk assessment requirement under Article 5.1. That means that, to find a violation of Article 2.2, the Panel would base its analysis on a mere presumption of inconsistency, without going through a two-tier test of the article.

The Panel ruled on the inconsistency of India's AI measures with Article 2.2, solely basing its reasoning on the presumption of inconsistency, which was previously developed and upheld by the AB in *Australia-Salmon,*[71] *EC-Hormones,*[72] and *Australia-Apples*.[73] While the Panel announced the requirements of the Article 2.2, i.e. that a measure should be based on scientific principles and not maintained without sufficient scientific evidence, it did not conduct the legal analysis further and did not address India's claims, notably the scientific evidence it presented.

Thus, the Panel's finding makes the presumption almost automatic and complainants are likely to argue a violation of the "necessity" requirement of Article 2.2 along with the violation of obligations relating to risk assessment under Article 5 of *SPS Agreement*. Given a rather strict standard of review, the question arises whether would it at all be possible for a respondent to rebut a presumption of Article 2.2 inconsistency.

13.2.3 National Treatment

Member's right to adopt SPS measures is limited in several ways, including the non-discrimination provision, similar to Article I:1 and III:4 of the GATT.

The Panel, relying on the experts' appreciation whether India's surveillance activities would reliably detect LPNAI in poultry, concluded that India's AI measures discriminate between India and other Members. Indeed, while prohibiting imports of certain products listed in S.O. from WTO Members who notify LPNAI to the OIE, India did not have in place a surveillance system capable of detecting that same risk within its territory.

The Panel qualified India's AI measures as "rigid and unbending requirements"[74] because they did not take into account differences that may exist between

[71] Appellate Body Report, *Australia – Salmon,* paras. 137 and 138, footnote 166 to para. 213.

[72] Appellate Body Report, *EC – Hormones,* para. 180.

[73] Appellate Body Report, *Australia – Apples,* para. 340.

[74] Panel Report, *India – Agricultural Products,* para. 7.435.

and among WTO Members from which India imports the poultry products at hand. Consequently, the Panel found that India's treatment of foreign poultry amounted to unjustifiable discrimination within the meaning of Article 2.3 of the *SPS Agreement*.

The crux of India's defence under Article 2.3 was that LPNAI is exotic to India. However, after consulting with the OIE experts, the Panel had found that India did not maintain a regime for the surveillance of AI that could reliably detect LPNAI. Indeed, a visual observation "where possible" of "unusual sickness" in birds, qualified by "passive surveillance" by one of the experts, does not seem to be a reliable method of detection of LPNAI. Consequently, India's rationale to rebut the US claim could not be qualified as a "rational connection" between the reasons given for the discriminatory application of the measure and the objective of the measure, the requirement set out by the Appellate Body in *Brazil – Retreated Tyres*.[75] Therefore, the India's AI measures were found to be inconsistent with Article 2.3 of the *SPS Agreement*.

13.2.4 Appropriate Level of Protection Under Article 5.6

The Panel had also made a finding that India's AI measures were more trade-restrictive than required to achieve its appropriate level of protection ("ALOP") under Article 5.6 of the *SPS Agreement*. The Panel reached this finding relying on the arguments put forward by the US.

In order for a complainant to successfully challenge the inconsistency of other Member's measure with Article 5.6 of the *SPS Agreement,* it should establish that there is a reasonably available alternative measure taking into account the technical and economical feasibility. The alternative should also achieve the desired ALOP and should be less trade restrictive than the challenged measure.

The Panel was required to identify India's ALOP in order to adjudicate the claims raised by the US.

In the context of identifying the level of protection achieved by the proposed alternative measures, the Panel found that the OIE Code "provides for an optimal level of security, under which safe trade may be facilitated in order to prevent AI from being introduced into an importing country".[76] Then, the Panel concluded that the measures based on the recommendations of the OIE Code would achieve "a level of protection that is at least as high as India's 'very high' or 'very conservative' level of protection".[77]

The Panel's finding implicitly encourages Members to identify their ALOP as precisely as possible in order for it not to be requalified by the Panel. And since the

[75] Appellate Body Report, *Brazil – Retreated Tyres,* para. 227.
[76] Panel Report, *India – Agricultural Products,* para. 7.581.
[77] Panel Report, *India – Agricultural Products,* para. 7.582.

ALOP is merely an "objective"[78] and not the instrument of implementation of that measure, the clarity and the correct establishment of a Member's appropriate level of protection may play a difference in the analysis of Article 5.6.

13.2.5 Adaptation of SPS Measures to Regional Conditions

When a pest or disease occurs within a country, many countries in the past have banned imports from the entire country, even if the prevalence is limited to certain regions. However, in order for the importing country to comply with its WTO obligations, it is required by Article 6 of the *SPS Agreement* to adapt its SPS measures to the conditions prevailing in the region of origin of the product. This highly improves market access possibilities since imports from the pest-free areas or regions are allowed.

The US had challenged the meaning and the content of the AI measures on their face, because they did not recognize the concept of disease-free areas or areas of low disease prevalence. Consequently, by precluding the recognition of disease-free areas with respect to AI, India's measures precluded it from determining the AI-free areas.

The Panel accepted the US' claim that the measure at issue was not adapted to regional conditions.

Reference

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[78] Appellate Body Report, *Australia – Salmon,* para. 200.