INTERNATIONAL TRADE LAW:
A Comprehensive E-Textbook

6th Edition, 2025 (Eight Volumes)

VOLUME TWO:
FUNDAMENTAL MULTILATERAL OBLIGATIONS

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There are seven sins in the world: Wealth without work, Pleasure without conscience, Knowledge without character, Commerce without morality, Science without humanity, Worship without sacrifice, and Politics without principle.

Mahatma Gandhi (1869-1948)

Dedication

For Shera and Her Generation,
That They Are Not Scourged by Poverty, Extremism, or a Clash of Civilizations,
But Rather Blessed by Peace through Sustainable Trade and Development.

And for the Glory of God.

About the Author

Born in Toronto, Rakesh (Raj) Kumar Bhala is a dual Canadian-U.S. citizen. He is the inaugural Leo. S. Brenneisen Distinguished Professor (2017-present) at the University of Kansas School of Law (KU Law), before which he was the Rice Distinguished Professor (2003-2017). Both are university-level chairs. He served as KU Law's Associate Dean for International and Comparative Law (2011-2017). Raj teaches *International Trade Law*, *Advanced International Trade Law*, *Law and Literature*, and *Islamic Law*. *Ingram's Business Magazine* designated him as one of "50 Kansans You Should Know" (https://ingrams.com/article/50-kansas-you-should-know-the-class-of-2020/).

Before joining KU Law, Raj was the Patricia Roberts Harris Research Professor at The George Washington University School of Law (1998-2003). He began his teaching career at William & Mary Marshall-Wythe School of Law (1993-1998), where he was voted tenure and full professorship. At both, he headed the International Law programs.

Raj has been a Visiting Professor at Duke, Michigan, La Trobe University (Melbourne), Tel Aviv University, University of Auckland (where he was the 2017 New Zealand Legal Research Foundation Visitor), Washington University in Saint Louis, and World Trade Institute (Berne). He has guest lectured around the world, including across India, and held fellowships at the Bank of Japan and University of Hong Kong. An International Bar Association (IBA) member since 1995, Raj has served in officer positions on the Academic and Professional Development and Customs and International Trade Law Committees.

Raj practiced at the Federal Reserve Bank of New York (1989-1993), where he twice won the President's Award for Excellence thanks to his service as a delegate to the United Nations Conference on International Trade Law (UNCITRAL), along with a Letter of Commendation from the U.S. Department of State. He was Senior Advisor to Dentons U.S. LLP (2017-2023), the world's largest law firm, focusing on International Trade Law. He is a member of the State Department's Speaker Program.

Raj is a Harvard Law School graduate (1989, *Cum Laude*), where he wrote his first book – *Perspectives on Risk-Based Capital* (1989) – as a third-year J.D. student. As a Marshall Scholar (1984-1986), Raj earned two Master's degrees, from the London School of Economics (LSE, 1985) in Economics, and from Oxford (Trinity College, 1986) in Management (Industrial Relations). His undergraduate degree is from Duke (1980-1984, *Summa Cum Laude*, *Phi Beta Kappa*), where he was an Angier B. Duke Scholar and double-majored in Economics and Sociology. At Harvard and Duke, he served as a Research Assistant (RA), respectively, in International Financial Law to Nomura Professor

Hal S. Scott (1987-1989) and Development Economics to James B. Duke Professor Allen C. Kelley (1981-1984).

Raj is author of 100 scholarly articles published in law journals world-wide, including three trilogies: on *stare decisis* in International Trade Law; the failed Doha Round of multilateral trade negotiations; and India's trade law and policy. He has written 13 books. They include *International Trade Law: A Comprehensive Textbook* (5th edition, 2019, 4 volumes) www.dropbox.com/s/78sagrsm4g30k4g/R%20Bhala%20Book%20Launch.mp4?dl=0), which is one of the world's leading references and has been used at over 100 law schools world-wide, plus the first treatise on GATT in nearly 50 years, *Modern GATT Law* (2nd edition, 2013, 2 volumes). His monographs, *Trade War: Causes, Conduct, and Consequences of Sino-American Confrontation* (2024), and *TPP Objectively: Legal, Economic, and National Security Dimensions of CPTPP* (2nd edition, 2019), were the first interdisciplinary analyses of their subjects by a legal scholar. *Trade, Development, and Social Justice* (2003) was a rare application of Catholic Social Justice Theory to GATT. Raj is the first non-Muslim American scholar to write a textbook on Islamic Law, *Understanding Islamic Law (Sharī'a)* (3rd edition, 2023). That textbook, too, has been widely used, including for 10 years (2010-2019) in his course for U.S. Special Operations Forces at the Command and General Staff College, Fort Leavenworth, Kansas.

Raj's current project is a new book, *Principles of Law, Literature, and Rhetoric: A Shakespearean Approach*. Covering legal interpretative methodologies as well as legal themes in classic works, in both a theoretical and practical sense, this work aims to help organize the subject for use in teaching and research.

In 2022, Raj testified before the U.K. Parliament, House of Commons, International Trade Committee, on trade and human rights. Media world-wide have frequently called upon Raj. He has been quoted in the *Associated Press*, *Bloomberg*, CNN, *Financial Times*, *Fortune*, *Frankfurter Allgemeine Sonntagszeitung*, *Hutch Post*, *Los Angeles Times*, *National Law Journal*, *Nikkei Asia*, *Reuters*, *South China Morning Post*, and *The Christian Science Monitor*, *New York Times*, *Washington Post*, and *Weekly Standard*. He has been on radio in America, Bulgaria, and New Zealand, and TV in the EU, India, and Korea. From January 2017-October 2022, across 65 consecutive months, "On Point" was his column on International Law and Economics, which Bloomberg Quint / BQ Prime (Mumbai) published (www.bqprime.com/author/92714/raj-bhala) and distributed to approximately 6.2 million readers globally.

Raj has served on the Executive Board of Directors of the Carriage Club of Kansas City, including as its Treasurer. He also been on the Alumni Association Board of the University School of Milwaukee (USM), his high school *alma mater* (Class of 1980). He is grateful to his USM teachers for a liberal arts education that made all good things possible. Raj loves fitness training, has finished 115 marathons, including the "Big Five" of the "World's Majors" (Boston twice, New York twice, Chicago twice, Berlin, and London). He enjoys studying Shakespeare and (especially since becoming Catholic at Easter Vigil 2001) Theology – and watching baseball.

Summary of Contents for All Eight Volumes

The Part and Chapter titles in this Summary of Contents cover all eight Volumes of the Sixth Edition of *International Trade Law: A Comprehensive E-Textbook*. The Detailed Contents of each individual Volume are set out in the pertinent Volume.

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Preface

Dating to 1993, this *E-Textbook* is based on 32 years of research and teaching around the world. So, it aims to provide students, scholars, and practitioners around the world with a world-class reference – for free. All eight Volumes of the *E-Textbook* are available Open Access.

These Volumes may be used as a set, in sequence, as I do in my *International Trade Law* and *Advanced International Trade Law* courses, covering Volumes 1-4 and 5-8, respectively. Or, one of them may be assigned as a stand-alone Volume for a specialty course or seminar, such as Volume Four for a class on *Trade and National Security*, Volume Seven for a class on *FTAs*, or Volume Eight for a class on *Trade and Development*. Or, any one or more of them may be used for research papers, articles, and books on subjects that implicate multiple Volumes. The only constraint on how the *E-Textbook* is read is the imagination of the reader. As trade negotiators sometimes say, the "geometry is variable."

The five previous Editions of this work were published by Michie (1st Edition, 1996), LexisNexis (2nd Edition, 2001, 3rd Edition, 2008, and 4th Edition, 2 Volumes, 2015), and Carolina Academic Press (5th Edition, 4 Volumes, 2019). All were available as a hard copy, and eventually as an electronic book, or "e-book." An earlier Edition was translated into Vietnamese.

The prior Editions, whether print or electronic, became ever-more expensive. Since its 1st Edition, and particularly since its 5th Edition, printing costs increased dramatically. Publishers went out of business or were merged into other publishers. (Sadly, many of my editors, who were my friends, lost their jobs.) Contemporaneously, in a world of curt social media communications, patience for thick books decreased. As the endurance of attention spans diminished, bottom-line answers mattered more than cognitive reasoning processes. Authors were pressured to jam more material into less space, and convey all of it faster.

These trends – adversely affecting both the supply and demand curves for lengthy, conventionally published, law school teaching materials – increasingly impeded access to the previous Editions. That was especially true for students of modest means in America and across the world. The cost of those materials became a non-*de minimis* element in calculating student indebtedness to earn a law degree. Some students could not afford to take my *International Trade Law* and *Advanced International Trade Law* courses. Others cobbled together resources, borrowed or shared the book, or made do with old editions. All the while, good teachers, seeking to be good shepherds, cared about serving their students with instructional materials exceed their teachers.

Thanks to the University of Kansas, School of Law, Wheat Law Library, and its Director, Professor Chris Steadham and Team, the problem of rising supply costs is solved. All eight Volumes of this 6th Edition are published by the Library. Thanks also to Marianne Reed, Digital Publishing and Repository Manager, KU Libraries. Because of her, they may be downloaded from KU ScholarWorks quickly and easily at zero cost. No student, teacher, scholar, or practitioner is left behind for want of eight PDF files.

Likewise, all relevant primary and secondary source documents are freely available on the Library's International Trade Law Research & Study Guide Web page (https://guides.law.ku.edu/intltrade). Not one dollar or *dirham*, *riyal* or *rupee* need be spent on paying for a Documents Supplement.

As for demand, no background in the subject matter is presumed. What is required is intellectual curiosity about the subject, an open-hearted willingness to fall ever-more in love with it – and, yes, patience. Learning the subject pays off handsomely, both in professional and personal returns. What also is needed is an appreciation for the reality that the boundaries of the subject continue to widen, its theory and practice continue to deepen. There is a canon, a common core that is the language for a common dialogue. Yet, this canon evolves.

Accordingly, the 1996 single-volume 1st Edition of this work was 1,450 pages. The work has grown with the 30 years' worth of developments in the field, avoiding trade-offs that disrespect its controversies and grandeur. The eight Volumes of this 6th Edition span approximately 6,666 pages. The Volumes are organized thematically into 188 Chapters, thus averaging 36 pages per Chapter.[1] A cursory nutshell (summarizing assorted topics), or a slender work on one aspect of the field (*e.g.*, the WTO), have their place. But they can take a reader only so far. This *E-Textbook* embraces a different challenge: take all readers ***further***.

[1] Volume One (Interdisciplinary Foundations), 753 pages, 25 Chapters; Volume Two (Fundamental Multilateral Obligations), 885 pages, 28 Chapters; Volume Three (Customs Law), 440 pages, 16 Chapters; Volume Four (National Security), 1,089 pages, 25 Chapters; Volume Five (Remedies), 1,085 pages, 33 Chapters; Volume Six (Special Sectors), 628 pages, 16 Chapters; Volume Seven (Free Trade Agreements, Labor, and Environment), 1,196 pages, 30 Chapters; and Volume Eight (Growth, Development, and Poverty), 590 pages, 15 Chapters. (Please note page counts are approximate.)

Acknowledgments

A publication of this breadth and depth results from many skilled minds. I am blessed by such minds around me that not only contribute to a better product than possibly could be achieved alone, but also make the research and writing process every bit as fun as quiet contemplation (an equally indispensable activity).

Each Volume of this *E-Textbook* is "Made in the Midwest." That origination is thanks in part to my Research Assistants (RAs). They came from near and far to the University of Kansas School of Law (KU Law) for their *Juris Doctor* (J.D.) degree, plus earned a Certificate in International Trade in Finance. I asked these talented, cosmopolitan RAs to treat me not as a Professor, but a colleague, and take a "hard look" at the drafts. They worked diligently on hundreds of draft pages. I am grateful for their contributions and personal sacrifices.

Listed alphabetically, my KU Law School RAs on this and previous editions of this work are:

Jacob C. Barefield, J.D. Class of 2023
Bridget Beran, J.D. Class of 2023
Matthew Walter Cooper, J.D. Class of 2015
Owen Andrew Grieb, J.D. Class of 2007
Katie Charlotte Hahn, J.D. Class of 2023
Madeline Renee Heeren, J.D. Class of 2015
David Roy Jackson, J.D. Class of 2007
Lauren E. Johannes, J.D. Class of 2019
Shannon B. Keating, J.D. Class of 2013
Viet Q. Le, J.D. Class of 2019
Heidi Minnihan, J.D. Class of 2014, M.B.A. Class of 2014
Corrine (Cori) Moffett, J.D. Class of 2021
Quan M. Nguyen, J.D. Class of 2025
Aqmar Rahman, J.D. Class of 2015
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Sarah Schmidt, J.D. Class of 2013, M.A. Economics Class of 2013
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Devin S. Sikes, J.D. Class of 2008
Dan Spencer IV, J.D. Class of 2006
Brien C. Stonebreaker, J.D., M.P.H. Class of 2024
Kaitlyn E. Taylor, J.D. Class of 2025
Chalinee Tinaves, J.D. Class of 2014
Spencer Toubia, J.D. Class of 2015
Eric Witmer, J.D. Class of 2016
Cody N. Wood, J.D. Class of 2017

It is a joy to see each one of them flourish, professionally and personally, in their extraordinary endeavors across the world.

Hearty thanks also go to Professor Chris Steadham, Director, Wheat Law Library, University of Kansas, School of Law. In every respect, at every step, Chris and his Team – which includes W. Blake Wilson, Assistant Director for Instructional and Faculty Services, and Pamela Crawford, Assistant Director for Public & Technical Services (*Emerita*) – have been efficient, supportive, and responsive. They consistently worked hard to produce, promote, and distribute a product for teaching and research useful around the globe. They are fun professionals with whom to collaborate. Ditto for Marianne Reed, Digital Publishing and Repository Manager, KU Libraries.

This publication is the blessing of a splendid family. The family improves its quality. There is my immediate family: my smart and lovely wife and best friend, **Kara**; and our poised daughter, **Shera**, our little gift who has matured beyond our best dreams into a smiling Dartmouth graduate and Fulbright Scholar with a big heart, world class intellect and *très chic* sense of fashion. And, there is my **Research Assistant** family (above). Thank you.

I also gratefully acknowledge the law firms of Crowell & Moring LLP, Washington, D.C., and Miller & Company, P.C., Kansas City, Missouri. Their monthly client alerts on International Trade Law are superb. In addition to quoting and citing renowned media sources (especially *Bloomberg*, *Financial Times*, *Nikkei Asia*, Reuters, and *The New York Times*), I have relied on these alerts for valuable explanations and insights on key developments (especially concerning customs classification, AD-CVD, and safeguard cases, and export controls and trade sanctions).

Since the initial version of this work, all previous Editions underwent extensive editing by their publishers: Michie for the 1st Edition, 1996; LexisNexis for the 2nd Edition, 2001, 3rd Edition, 2008, and 4th Edition (Two Volumes), 2015; and, Carolina Academic Press for the 5th Edition (Four Volumes), 2019. Across these Editions, my Research Assistants poured over the manuscript, and my students furnished corrections. Thank you all.

Still more scrutiny was applied to this 6th Edition to ensure all Eight Volumes of the *International Trade Law E-Textbook* are as universally user-friendly as possible. Toward this goal, I exercised editorial judgment, though in a light-handed manner that in no way impinged on the meaning of any quoted or excerpted materials. Specifically, I: (1) standardized spelling according to American (not British) English; (2) used international dating (day-month-year); (3) occasionally made minor stylistic (but not substantive) changes (*e.g.*, converting bullet points to numbers, adding an Oxford comma, simplifying ellipses, fonts, and indents, and normalizing "emphasis original" and "emphasis added" notations); and (4) providing full citations (thus avoiding the tyranny of the *Blue Book*).

For over three decades, dating to my research and teaching in 1993, this work has been a joyful passion shaping my career, and more importantly, serving readers globally. No further Editions are anticipated. Any significant updates may be offered through a *Supplement* and/or posted materials, to which the same editorial standards would apply.

Table of Abbreviations

AANZFTA	*ASEAN-Australia-New Zealand Free Trade Agreement*
AB	WTO Appellate Body
AB InBev	Anheuser-Busch InBev SA/NV
ABA	American Bar Association
ABI	Automated Broker Interface
ACA	*America Competes Act of 2022*, *i.e., America Creating Opportunities for Manufacturing, Pre-Eminence in Technology, and Economic Strength Act of 2022*, sometimes abbreviated as *COMPETES Act* (House of Representatives bill)
ACDB	WTO Accession Commitments Data Base
ACFTA (*AfCFTA*)	*African Continental Free Trade Area* (entered into force 30 May 2019, operational 7 July 2019, with staged implementation on 1 January 2021 and concluding with full implementation by 2030)
ACFTU	All China Federation of Trade Unions
ACI	Anti-Coercion Instrument (EU)
ACP	African, Caribbean, and Pacific
ACS	Automated Commercial System
ACTRAV	Bureau for Workers' Activities (ILO)
ACWL	Advisory Center on WTO Law
AD	Antidumping
AD Agreement	WTO *Antidumping Agreement* (*Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994*)
ADB	Asian Development Bank
Additional Protocol	*Model Additional Protocol* (associated with *NPT*, *CSA*)
ADP	Automatic data processing
ADR	American Depositary Receipt
ADVANCE Democracy Act	2007 *Advance Democratic Values, Address Non-democratic Countries and Enhance Democracy Act*
AECA	*Arms Export Control Act of 1976*
AEO	Authorized Economic Operator
AEOI	Atomic Energy Organization of Iran
AES	Automated Export System
AFA	Adverse Facts Available
AfCFTA	*African Continental Free Trade Area*

(*ACFTA*)	
AfDB	African Development Bank
AFIP	*Administración Federal de Ingresos Públicos* (Argentina, Federal Public Revenue Administration)
AFL-CIO	American Federation of Labor-Congress of Industrial Organizations
AFP	*Agence France-Presse*
AFR	Application for Further Review (U.S. CBP)
AFTA	*ASEAN Free Trade Area*
AG (1st meaning)	*Aktiengesellschaft* (company incorporated in Austria, Germany, or Switzerland, limited by share ownership, the shares of which are tradeable on a stock market)
Ag (2nd meaning)	Agriculture
AGOA	2000 *African Growth and Opportunity Act*
AGOA II	included in 2002 *Trade Act*
AGOA III	2004 *African Growth and Opportunity Acceleration Act*
Agriculture Agreement (*Ag Agreement*)	WTO *Agreement on Agriculture*
AI (1st meaning)	Artificial Intelligence
AI (2nd meaning)	Avian Influenza
AID	U.S. Agency for International Development
AIG	American Insurance Group
AIIS	American Institute for International Steel
AIKSCC	All India *Kisan Sangharsh* Coordination Committee
AIM	Aluminum Import Monitoring system (U.S. DOC)
AIO	Aerospace Industries Organization (Iran)
AIOC	Anglo Iranian Oil Company
AIPAC	American Israel Public Affairs Committee
AIS	Automatic Identification System (ship location transponder)
AIT	American Institute in Taiwan
ALADI	Latin American Integration Association (Spanish acronym)
ALBA	Bolivarian Alliance for the Peoples of our America

ALD	atomic layer deposition (production tools)
ALJ	Administrative Law Judge
ALOP	Appropriate Level Of Protection
ALT	Alternate (alternate proposed text)
AMA	American Medical Association
AmCham	American Chamber of Commerce
AMEC	Advanced Micro-Fabrication Equipment Inc. (China)
AMI Credit	Advanced Manufacturing Investment Credit (U.S. 2022 *CHIPS Act*)
AMIS	Agricultural Market Information System
AMPS	Acrylamido tertiary butyl sulfonic acid
AMS (1st meaning)	Aggregate Measure of Support
AMS (2nd meaning)	Agriculture Marketing Services (USDA)
ANAD	National Association of Democratic Lawyers (Mexico)
ANZCERTA	*Australia-New Zealand Closer Economic Relations Trade Agreement* (*CER*)
ANZUS (*ANZUS Treaty*)	1951 *Australia, New Zealand, United States Security Treaty*
AoA	WTO *Agreement on Agriculture*
AOG	All Other Goods
AOR	All Others Rate
APA	1946 *Administrative Procedure Act* (U.S.)
APEC	Asia Pacific Economic Cooperation (forum)
APEP	Assistant to the President for Economic Policy (U.S.)
API	active pharmaceutical ingredient
APMC	Agricultural Produce Marketing Committee (India)
APNSA	Assistant to the President for National Security Affairs (U.S.)
APOC	Anglo Persian Oil Company
APTA	*Asia-Pacific Trade Agreement*
APV	Annual Purchase Value
AR	Administrative Review
ARI	Additional (United States) Rules of Interpretation

ARP Act of 2000	2000 *Agricultural Risk Protection Act*
ARRA	2009 *American Recovery and Reinvestment Act*
ARS	Advance Ruling System
ASA (1st meaning)	American Securities Association
ASA (2nd meaning)	American Sugar Alliance
ASCM	WTO *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*)
ASEAN	*Association of Southeast Asian Nations*
ASL (*AFSL*)	*Anti-Foreign Sanctions Law* (June 2021 PRC *Law* blocking compliance with sanctions against China)
ASM	artisanal small mine
ASML (ASML Holding N.V.)	Advanced Semiconductor Materials Lithography (Netherlands)
ASP	American Selling Price
ASPI	Australian Strategic Policy Institute
ATAP	1996 *Agreement Concerning Certain Aspects of Trade in Agricultural Products* (1985 *U.S.-Israel FTA*)
ATC	WTO *Agreement on Textiles and Clothing*
ATISA	*ASEAN Trade In Services Agreement*
ATPA	1991 *Andean Trade Preferences Act*
ATPDEA	2002 *Andean Trade Promotion and Drug Eradication Act*
ATT	2014 U.N. *Arms Trade Treaty*
AU$	Australian Dollar
AUD	Australian Dollar
AUKUS	September 2021 *Australia – United Kingdom – United States Security Partnership* (Trilateral Security Agreement concerning nuclear submarines and their deployment in Indo-Pacific region)
AUMF	2001 *Authorization for Use of Military Force*
AUMF (*Iraq Resolution*)	2002 *Authorization for Use of Military Force Against Iraq Resolution*
Automotive Appendix	Appendix, *Provisions Related to the Product-Specific Rules of Origin for Automotive Goods*, to Annex 4-B of *USMCA* Chapter 4
AUV	Average Unit Value
AV	Audio-Visual
AVE	*Ad Valorem* Equivalent

AVIC	Aviation Industry Corporation of China
B&H	Brokerage and handling (costs)
B&O	Washington State Business and Occupation Tax Rate Reduction
BA	Bankers Acceptance
BAE	British Aerospace Systems Plc
BAMS-D	Broad Area Maritime Surveillance-Drone (U.S. Navy)
BBC	British Broadcasting Corporation
BBS	Bangladesh Bureau of Statistics
B.C.	British Columbia
BCA	Border Carbon Adjustment (Carbon BTA)
BCI	Business Confidential Information
bcm	billion cubic meters
BCR	Blue Corner Rebate (Thailand)
BDC	Beneficiary Developing Country
BDS	Boycott, Divestment, and Sanctions
BECA	October 2020 *Basic Exchange and Cooperation Agreement* (U.S.-India)
beIN	beIN Media Group LLC (Qatar)
beoutQ	be out Qatar (Saudi Arabia)
BEPS	tax Base Erosion and Profit Sharing
Berne Convention	1886 (1971) *Berne Convention for the Protection of Literary and Artistic Works*
BFA	*Banana Framework Agreement*
Bhd (BHD)	Berhad (publicly limited company, Malaysia)
BIA	Best Information Available (Pre-Uruguay Round U.S. term for Facts Available)
BILA (ILAB)	Bureau of International Labor Affairs (U.S. DOL OTLA)
BIMSTEC	Bangladesh, Bhutan, India, Myanmar, Nepal, Sri Lanka, and Thailand (*SAARC* minus Afghanistan and Pakistan, plus Myanmar (Burma) and Thailand)
BIS (1st meaning)	Bank for International Settlements

BIS (2nd meaning)	Bureau of Industry and Security (U.S. DOC)
bis (3rd meaning)	second version (of a text), again, repeat
B.I.S.D.	Basic Instruments and Selected Documents
BIT	*Bilateral Investment Treaty*
BJP	*Bharatiya Janata Party* (India)
bn (bln)	billion
BNA	Bureau of National Affairs (International Trade Reporter and International Trade Daily)
BNO	British National (Overseas) passport (Hong Kong)
BOJ	Bank of Japan
BOK	Bank of Korea
Bolero	Bills of Lading for Europe
BOP	Balance Of Payments
BOT	Balance Of Trade
BP	British Petroleum
bpd (b/d)	barrels per day
Brexit	British exit, *i.e.*, withdrawal of the U.K. from EU, effective 31 January 2020, with transition period ended 31 December 2021, following 23 June 2016 U.K.-wide referendum
BRI	Belt and Road Initiative (China)
BRICS	Brazil, Russia, India, China, and South Africa
BRS (*BRS Conventions*)	*Basel*, *Rotterdam*, and *Stockholm Conventions* (Three *MEAs*: 1989 *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes*; 1998 *Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*; and 2001 *Stockholm Convention on Persistent Organic Pollutants*.)
BSE (1st meaning)	Bombay Stock Exchange
BSE (2nd meaning)	Bovine Spongiform Encephalopathy (Mad Cow Disease)
BSSAC	Beneficiary Sub-Saharan African Country
BSSP	Burmese Socialist Program Party

BTA (1st meaning)	*Bilateral Trade Agreement*
BTA (2nd meaning)	2002 *Bio-Terrorism Act* (*Public Health Security and Bioterrorism Preparedness and Response Act of 2000*)
BTA (3rd meaning)	Border Tax Adjustment
BTD	May 2007 *Bipartisan Trade Deal*
C-4	Cotton Four Countries (Benin, Burkina Faso, Mali, and Chad)
C&F	cost and freight
CAA	1979 *Clean Air Act*
CA$	Canadian Dollar
CAATSA	2017 *Countering America's Adversaries Through Sanctions Act*
CAC	Cyberspace Administration of China
CAD	Canadian Dollar
CAFC	United States Court of Appeals for the Federal Circuit
CAFTA-DR	*Central American Free Trade Agreement – Dominican Republic*
CAI	January 2021 EU-China *Comprehensive Agreement on Investment*
CAIR	Council on American-Islamic Relations
CAN	Community of Andean Nations
CANACAR	*Camara Nacional del Autotransporte de Carga*
CAOI	Civil Aviation Organization of Iran
CAP (1st meaning)	Common Agricultural Policy (EU)
CAP (2nd meaning)	Carolina Academic Press
CAPES	*Centre d'Analyse des Politiques, Economiques et Sociales* (Burkina Faso)
CASA	*Construcciones Aeronáuticas SA* (Spain)
CB	citizens band (radio)
CBA	collective bargaining agreement
CBAM	Carbon Border Adjustment Mechanism
CBC	Canadian Broadcasting Corporation
CBD	U.N. *Convention on Biological Diversity*
CBE	Commander of the Most Excellent Order of the British Empire
CBERA	1983 *Caribbean Basin Economic Recovery Act*

CBI (1st meaning)	*Caribbean Basin Initiative*
CBI (2nd meaning)	Central Bank of Iran
CBO	Congressional Budget Office
CBOT	Chicago Board Of Trade
CBP	U.S. Customs and Border Protection ("U.S. Customs Service" until 1 March 2003)
CBSA	Canadian Border Services Agency
CBTPA	*Caribbean Basin Trade Partnership Agreement*
CC	Cooperative Country (Argentina)
CCB	U.S. Conference of Catholic Bishops
CCC (1st meaning)	U.S. Commodity Credit Corporation (USDA)
CCC (2nd meaning)	Customs Cooperation Council (renamed WCO in 1994)
CCC (3rd meaning)	Commerce Country Chart
CCFRS	Certain cold flat-rolled steel
CCHT	Center for Countering Human Trafficking (U.S. DHS)
CCI (1st meaning)	Competition Commission of India
CCI (2nd meaning)	Countervailing Currency Intervention
CCL	Commerce Control List
CCMC	Communist Chinese Military Company
CCP	Chinese Communist Party (or CPC, Communist Party of China)
CCPA	U.S. Court of Customs and Patent Appeals (abolished 1982; transfer to Federal Circuit)
CCS	Carbon Capture and Storage
CDC (1st meaning)	U.S. Centers for Disease Control and Prevention
CDC (2nd meaning)	Canadian Dairy Commission
CDC (3rd meaning)	Chilean Distortions Commission
CDM	Clean Development Mechanism
CDS	credit default swap
CDSOA	2000 *Continued Dumping and Subsidy Offset Act*

	(*Byrd Amendment*)
CE	*Conformité Européenne* (EU)
CEA	Council of Economic Advisors (U.S.)
CEC	Commission for Environmental Cooperation (*NAFTA*)
CEMAC	*Communauté Économique et Monétaire de l'Afrique Centrale*
CEMS	Continuous Emission Measurement System (EU CBAM)
CENTCOM	United States Central Command
CEO	Chief Executive Officer
CEP	Constructed Export Price
CEPA (1st meaning)	India-UAE *Comprehensive Economic Partnership Agreement*
CEPA (2nd meaning)	Japan-U.K. *Comprehensive Economic Partnership Agreement*
CEPR	Center for Economic and Policy Research
CER	*Australia-New Zealand Closer Economic Relations Trade Agreement* (*ANZCERTA*)
CET	Common External Tariff
CETA	*Comprehensive Economic and Trade Agreement*
CFC	Controlled Foreign Corporation
CFCRL	Federal Conciliation and Labor Registry Center (Spanish acronym, Mexico)
CFE	*Comisión Federal de Electricidad* (Mexico)
CFIUS	Committee on Foreign Investment in the United States
CFO	Chief Financial Officer
C.F.R. (1st meaning)	Code of Federal Regulations
CFR (2nd meaning)	Council on Foreign Relations
CGE	Computable General Equilibrium
CGLO	Central Government Liaison Office (China)
CGTN	China Global Television Network
CH	Order of the Companions of Honor
CHF	Swiss Francs
CHIP 4 (CHIP 4 Alliance)	U.S., Japan, Korea, and Taiwan (forum concerning semiconductor chips)

CHIPS	Clearing House Interbank Payment System
CHIPS Act (*CHIPS for America Act*)	2022 *Creating Helpful Incentives to Produce Semiconductors Act*
CIA	U.S. Central Intelligence Agency
CIC	Citizenship and Immigration Service for Canada
CIDE	Contribution of Intervention in the Economic Domain (Brazil)
CIF (c.i.f)	Cost, Insurance, and Freight
CII	Confederation of Indian Industry
CIP	Chhattisgarh Industrial Program (India)
CISADA	2010 *Comprehensive Iran Sanctions, Accountability, and Divestment Act*
CISG	Convention on Contracts for the International Sale of Goods (U.N.)
CIT	U.S. Court of International Trade (New York, N.Y.)
CITA	U.S. Committee for Implementation of Textile Agreements
CITES	1973 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*
CITT	Canadian International Trade Tribunal
CJ	Commodity Jurisdiction
CKD	Complete knock down
cm	centimeter
CMAA	*Customs Mutual Assistance Agreement*
CME	Chicago Mercantile Exchange
CMI	*Comité Maritime International* (IMO)
CMIC	Chinese Military Industrial Complex Company
CMM	Conservation Management Measures
CMO	Common Market Organization (EU)
CNCE	*Commission Nacional de Comercio Exterior* (Argentina)
CNL	Competitive Need Limitation
CNOOC	China National Offshore Oil Corporation
CNPC	China National Petroleum Corporation
CNY	Chinese *Yuan*
CO_2	Carbon Dioxide

CO_2e	Carbon Dioxide equivalent
CoA	WTO Committee on Agriculture
CoA-SS	Special Session of WTO Committee on Agriculture
COBRA	*Consolidated Omnibus Budget and Reconciliation Act* (multiple years)
COCOM	Coordinating Committee on Multilateral Export Controls
COFINS	Civil Service Asset Formation Program Contribution (Brazil)
COFINS-Importation	*Contribution to Social Security Financing Applicable to Imports of Goods or Services* (Brazil)
COGS	Cost of Goods Sold
COMAC	Commercial Aircraft Corporation of China Ltd.
COMESA	Common Market for Eastern and Southern Africa
CONNUM	Control Number
COO (1st meaning)	Certificate of Origin
COO (2nd meaning)	Country of Origin
COO (3rd meaning)	Chief Operating Officer
COOL	Country of Origin Label
COP (1st meaning)	Conference of the Parties
COP (2nd meaning)	Cost of Production
CORE	corrosion-resistant steel
COS	Circumstances of Sale (dumping margin calculation adjustment)
COSCO	Chinese Ocean Shipping Company
COVAX	COVID-19 Vaccines Global Access
COVID-19	Corona Virus Disease (coronavirus)
CPA (1st meaning)	Certified Public Accountant
CPA (2nd meaning)	Coalition Provisional Authority (Iraq-U.S.)
CPC (1st meaning)	Caspian Pipeline Consortium
CPC (2nd meaning)	U.N. Central Product Classification list
CPC	Communist Party of China

(3rd meaning)	(or CCP, Chinese Communist Party)
CPEC	China-Pakistan Economic Corridor
CPSC	U.S. Consumer Product Safety Commission
CPTPP	*Comprehensive and Progressive Agreement for Trans Pacific Partnership* (entered into force 30 December 2018, informally called *TPP* 11)
CPV	Communist Party of Vietnam (or VCP, Vietnamese Communist Party)
CQE	Certificate of Quota Eligibility
CRO	WTO Committee on Rules of Origin
CROC	Revolutionary Confederation of Laborers and Farmworkers (Mexico, Spanish acronym)
Crop Year 2001 Act	*Crop Year 2001 Agricultural Economic Assistance Act*
CRPF	Central Reserve Police Force (India)
CRRC	China Railway Rolling Stock Corporation
CRS	Congressional Research Service
CRTC	Canadian Radio-Television and Telecommunications Commission
CSA	*Comprehensive Safeguards Agreement* (associated with *NPT*)
CSCL	China Shipping Container Lines
CSI	Container Security Initiative
CSIS	Center for Strategic and International Studies (Washington, D.C.)
CSMS	Cargo Systems Messaging Service (CBP)
CSP (1st meaning)	Conferences of States Parties
CSP (2nd meaning)	Certificate of Supplementary Protection (CETA)
CSPV	Crystalline Silicon Photovoltaic cells, modules, laminates, and panels (solar panels)
CSRC	China Securities Regulatory Commission
CTA	Central Tibetan Administration
CTC	Change in Tariff Classification
CTCSC	Customs Tariff Commission of the State Council (China)
CTD	WTO Committee on Trade and Development
CTESS	WTO Committee on Trade and Environment in Special

	Session
CTF	Customs and Trade Facilitation
CTH	Change in Tariff Heading
CTHA	WTO *Chemical Tariff Harmonization Agreement*
CTIL	Center for Trade and Investment Law (India)
CTPA	*United States – Colombia Trade Promotion Agreement*
C-TPAT (*CTPAT*)	*Customs – Trade Partnership Against Terrorism*
CTSH	Change in Tariff Sub-Heading
CU	Customs Union
Customs Valuation Agreement	WTO *Agreement on Customs Valuation* (*Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994*)
CUFTA (*CUSFTA*)	*Canada – United States FTA*
CUSMA	*Canada – United States – Mexico Agreement* (revised FTA based on August 2017-September 2018 renegotiations, called *CUSMA* in Canada, *USMCA* in America, called *CUSMA* in Canada, *USMCA* in America, and informally called *NAFTA* 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)
CV	Constructed Value
CVA	Canadian Value Added
CVD (1st meaning)	Countervailing Duty
CVD (2nd meaning)	Chronic Venous Disorder
CVI	Chronic Venous Insufficiency
CVID	Complete, Verifiable, Irreversible Disarmament
CWP (1st meaning)	Circular Welded carbon quality steel Pipe
CWP (2nd meaning)	Cooperative Work Program (*IPEF*)
CY	Calendar Year
DAHD	Department of Animal Husbandry, Dairying, and Fisheries (India)
DARPA	U.S. Defense Advanced Research Projects Agency
DBT	U.K. Department for Business and Trade (established February 2023 via merger of DIT with certain other government functions)

DCIV	Double Cab In Van
DCR	Domestic Content Requirement
DCS	Destination Control Statement
DDA	Doha Development Agenda
DDTC	U.S. Directorate of Defense Trade Controls (Department of State)
DEA	*Digital Economy Agreement*
DeitY	Department of Electronics and Information Technology (MCIT, India)
DEPA (1st meaning)	*Digital Economic Partnership Agreement* (generally)
DEPA (2nd meaning)	June 2020 *Digital Economic Partnership Agreement* (Chile, New Zealand, Singapore)
DFFT	Data Free Flow with Trust
DFQF	Duty Free, Quota Free
DG	Director General (Director-General)
DGCFMC	WTO Director General's Consultative Framework Mechanism on the development aspects of Cotton
DGFT	Director General of Foreign Trade (part of Ministry of Commerce, India)
DHS	U.S. Department of Homeland Security
DIPAM	Department of Investment and Public Asset Management (India)
DJAI	*Declaración Jurada Anticipada de Importación* (Argentina, Advance Sworn Import Declaration)
DIEM	*Derechos de Importación Específicos Mínimos* (Argentina, Minimum Specific Import Duties)
DIFMER	Difference in Merchandise (dumping margin calculation adjustment)
DIT	Department for International Trade (U.K.)
DIY	Do It Yourself
DM (1st meaning)	Dumping Margin
DM (2nd meaning)	*Deutsche Marks*
DMA (1st meaning)	2022 EU *Digital Markets Act*
DMA (2nd meaning)	Domestic Marketing Assessment
DMZ	De-Militarized Zone

DNA	deoxyribonucleic acid
DNI	Director of National Intelligence (U.S.)
DNR	Donetsk People's Republic
DOC	U.S. Department of Commerce
DOD	U.S. Department of Defense
DOE	U.S. Department of Energy
DOJ	U.S. Department of Justice
DOL	U.S. Department of Labor
DOP	13 September 1993 Israeli-PLO *Declaration of Principles on Interim Self-Government Arrangements* (*Oslo I Accord, Oslo I*)
DOS	U.S. Department of State
DOT	U.S. Department of Transportation
DP (DPW)	Dubai Ports Dubai Ports World
DPA (1st meaning)	1950 *Defense Production Act* (U.S.)
DPA (2nd meaning)	Deferred Prosecution Agreement
DPA (3rd meaning)	Data Protection Authority (India)
DPCIA	1990 *Dolphin Protection Consumer Information Act*
DPP	*Dialogue on Plastic Pollution and Environmentally Sustainable Plastics Trade* (WTO)
DPRK	Democratic People's Republic of Korea (North Korea)
DRAM	Dynamic Random-Access Memory
DSM	Dispute Resolution Mechanism (*JCPOA*)
DRAMS	Dynamic Random-Access Memory Semiconductor
DRC	Democratic Republic of the Congo
DSB	WTO Dispute Settlement Body
DSM	Dispute Settlement Mechanism
DST	Digital Sales Tax, Digital Services Tax
DSU	WTO *Dispute Settlement Understanding* (*Understanding on Rules and Procedures Governing the Settlement of Disputes*)
DTA	*Digital Trade Agreement*
DUP	Democratic Unionist Party

	(Northern Ireland)
DUV	deep ultraviolet lithography (systems)
DVD	Digital Video Recording
E3	Britain, France, and Germany
EA	Environmental Assessment
EAA	1979 *Export Administration Act*
EAC (1st meaning)	East African Community
EAC (2nd meaning)	East Asian Community
EAC (3rd meaning)	Environmental Affairs Council (*CAFTA-DR, KORUS*)
EADS	European Aeronautic Defense and Space Company NV
EaEU (EAEU)	Eurasian Economic Union
EAF	Electric Arc Furnace
EAGLE Act	2021 *Ensuring American Global Leadership and Engagement Act*
EAPA	2015 *Enforce and Protect Act* (U.S.)
EAR	*Export Administration Regulations*
EBA	*Everything But Arms*
EBOR	Electronic On Board Recorder
EBRD	European Bank for Reconstruction and Development
EC (1st meaning)	European Commission
EC (2nd meaning)	European Communities
ECA (1st meaning)	*Economic Cooperation Agreement*
ECA (2nd meaning)	*Agreement between the Government of the United States of America and the Government of the Republic of Korea on Environmental Cooperation* (*KORUS*)
ECA (3rd meaning)	*Export Controls Act of 2018* (part of 2018 *NDAA*)
ECAT	Emergency Committee for Foreign Trade
ECB	European Central Bank
ECC (1st meaning)	Environmental Cooperation Commission (*CAFTA-DR*)
ECC (2nd meaning)	Extraordinary Challenge Committee (*NAFTA*)

ECCAS	Economic Community of Central African States
ECCN	Export Control Classification Number
ECE	Evaluation Committee of Experts (*NAFTA*)
ECFA	*Economic Cooperation Framework Agreement*
ECG	electrocardiogram
ECHR	European Court of Human Rights
ECJ	European Court of Justice
ECLAC	Economic Commission for Latin America and the Caribbean
E-Commerce	Electronic Commerce
ECOSOC	U.N. Economic and Social Council
ECOWAS	Economic Community of West African States
ECRA	*Export Control Reform Act of 2018* (part of *John S. McCain National Defense Authorization Act for Fiscal Year 2019*, *i.e.*, 20199 *NDAA*)
ECU	European Currency Unit
ED	Economic Development Administration (of DOC)
EDBI	Export Development Bank of Iran
EDC	Export Development Corporation (Canada)
EDI	Electronic Data Interchange
EEC	European Economic Community
EEU	Eurasian Economic Union
EEZ	Exclusive Economic Zone
EFSA	European Food Safety Authority
EFTA	*European Free Trade Association*
EGA	WTO *Environmental Goods Agreement*
EHC	export health certificate (U.K.)
EIB	European Investment Bank
EIF	Enhanced Integrated Framework (formerly "IF," or "Integrated Framework")
EIG	*équipement d'intérêt general* (France)
ELLIE	Electronic Licensing Entry System
ELS	Extra Long Staple (cotton)
EN	Explanatory Note
ENAM	Electronic National Agricultural Market system (India)
ENFORCE Act	2015 *Trade Facilitation and Trade Enforcement Act*

(*TFTEA, TEA*)	
EO (*E.O.*)	*Executive Order* (U.S.)
EOBR	Electronic On Board Recorder
EP	Export Price
EPA (1st meaning)	*Economic Partnership Agreement*
EPA (2nd meaning)	U.S. Environmental Protection Agency
EPI	Economic Policy Institute
EPZ	Export Processing Zone
ERC	End-Use Review Committee (U.S. DOC BIS, set forth under *EAR*)
ERP	Effective Rate of Protection
E-SIGN Act	2000 *Electronic Signatures in Global and National Commerce Act*
ESCS	European Steel and Coal Community
ESG	Environmental, Social, and Governance
ESL	English as a Second Language
ESP	Exporter's Sales Price (Pre-Uruguay Round U.S. term for Constructed Export Price)
ESPO	Eastern Siberia Pacific Ocean
ET (EST)	Eastern Time (Eastern Standard Time)
ETA	Employment and Training Administration (DOL)
ETF	exchange traded fund
ETI Act	2000 *Extraterritorial Income Exclusion Act*
ETIM	East Turkistan Islamic Movement
ETP	Eastern Tropical Pacific (Ocean)
ETS	Emission(s) Trading Scheme (System)
EU	European Union
EUR	e*uro*
EUSFTA	*European Union-Singapore Free Trade Agreement*
EUC	End-User Review Committee (U.S.)
EUV	extreme ultraviolet lithography
Eurojust	EU agency for judicial cooperation in criminal matters
Europol	European Union Agency for Law Enforcement Cooperation
EV	Electric Vehicle
Ex-Im Bank	U.S. Export-Import Bank

FACT Act of 1990 (1990 *Farm Bill*)	1990 *Food, Agriculture, Conservation and Trade Act*
FAIR Act of 1996 (1996 Farm Bill)	1996 *Federal Agricultural Improvement and Reform Act*
FAIR Transition and Competition Act	2021 *Fair, Affordable, Innovative, and Resilient Transition and Competition Act* (proposed BCA legislation)
FAO	Food and Agricultural Organization
FAQ	Frequently Asked Question
FAR	Federal Acquisition Regulation (U.S.)
FAS	Foreign Agricultural Service (of USDA)
FAST	Free And Secure Trade
FATA	Federally Administered Tribal Areas (Pakistan)
FATF	Financial Action Task Force
FBI	U.S. Federal Bureau of Investigation
FCC	Federal Communications Commission (U.S.)
FCF	Fong Chun Formosa Fishery (Taiwan)
FCIC	U.S. Federal Crop Insurance Corporation (USDA)
FCLRC	Federal Conciliation and Labor Registration Center (Mexico)
FCPA	1977 *Foreign Corrupt Practices Act*
FCSC	Foreign Claims Settlement Commission (U.S.)
FDA	Food and Drug Administration (U.S.)
FDI	Foreign Direct Investment
FDP Rule	Foreign Direct Product Rule (U.S.)
Federal Circuit	U.S. Court of Appeals for the Federal Circuit (Washington, D.C.)
Fed. Reg.	Federal Register
FEMA	Federal Emergency Management Agency (U.S. DHS)
FEP	Fuel Enrichment Plant (*e.g.*, for UF_6 at Natanz, Iran)
FERC	U.S. Federal Energy Regulatory Commission
FF	*French Francs*

FFI	foreign financial institution
FFPO	Fines, Penalties and Forfeitures Office(r) (U.S. Ports of Entry)
FFTJ	Fittings, flanges, and tool joints
FGUP	State Research Center of the Russian Federation
FICCI	Federation of Indian Chambers of Commerce and Industry
FIFA	*Fédération Internationale de Football Association*
Fimea	Finnish Medicines Agency
FinCEN	U.S. Financial Crimes Enforcement Network (Department of the Treasury)
fintech	financial technology
FIRRMA	*Foreign Investment Risk Review Modernization Act of 2018* (part of 2018 *NDAA*)
FIT	Feed-in tariff
FLETF	Forced Labor Enforcement Task Force (DHS)
FMCSA	Federal Motor Carrier Safety Administration
FMSA	2011 *Food Safety Modernization Act*
FMV (1st meaning)	Foreign Market Value (Pre-Uruguay Round U.S. term for Normal Value)
FMV (2nd meaning)	Fair Market Value
FMVSS	Federal Motor Vehicle Safety Standards
FN4 Entity	Footnote 4 Entity (entity to which Footnote 4 is added to its entry on Entity List)
FOA	Facts Otherwise Available
FOB (f.o.b.)	Free On Board
FOP	Factors of Production
FOREX	Foreign Exchange
FPA	Foreign Partnership Agreement
FPC	U.S. Federal Power Commission (predecessor of DOE)
FPGA	field programmable gate array integrated circuit
FRAND	Fair, Reasonable, and Non-Discriminatory (terms)
FRCP	U.S. *Federal Rules of Civil Procedure*
FRCrimP	U.S. *Federal Rules of Criminal Procedure*
FRE	U.S. Federal Rules of Evidence
FRS	Fellowship of the Royal Society
FRSA	Fellowship of the Royal Society for the Encouragement of Arts, Manufactures, and Commerce

FSA (1st meaning)	U.S. Farm Services Agency
FSA (2nd meaning)	Food Safety Agency (EU)
FSB	Federal Security Service (Russia)
FSC	Foreign Sales Corporation
FSIA	*Foreign Sovereign Immunities Act of 1976*
FSRI Act of 2002 (2002 *Farm Bill*)	2002 *Farm Security and Rural Investment Act*
FTA	Free Trade Agreement
FTAA	*Free Trade Area of the Americas*
FTAAP	*Free Trade Agreement of the Asia Pacific Region*
FTC (1st meaning)	Free Trade Commission (*NAFTA*)
FTC (2nd meaning)	Federal Trade Commission (U.S.)
FTO	Foreign Terrorist Organization
FTSE	Financial Times Stock Exchange Group ("Footsie," London)
FTZ (1st meaning)	Foreign Trade Zone
FTZ (2nd meaning)	Free Trade Zone
FY	Fiscal Year
FX	Foreign Exchange
G7 (G-7)	Group of Seven Industrialized Nations
G8 (G-8)	Group of Eight Industrialized Nations
G20 (G-20)	Group of Twenty Developed Nations
G33 (G-33)	Group of 33 Developing Countries
G&A	General and Administrative expenses
GAAP	Generally Accepted Accounting Principles
GAFA	Google, Apple, Facebook, and Amazon
GAIN	USDA FAS Global Agricultural Information Network
GAO	U.S. Government Accountability Office
GATB	*General Agreement on Trade in Bananas* (15 December 2009)
GATS	*General Agreement on Trade in Services*
GATT	General Agreement on Tariffs and Trade (GATT 1947 and/or GATT 1994)
GATT 1947	General Agreement on Tariffs and Trade 1947 and all pertinent legal instruments (Protocols, Certifications,

	Accession Protocols, and Decisions) entered into under it before entry into force of the *WTO Agreement* (1 January 1995)
GATT 1994	GATT 1947 plus all pertinent legal instruments (1994 Uruguay Round Understandings and Marrakesh Protocol) effective with the WTO Agreement (1 January 1995)
GAVI	Global for Vaccines and Immunizations
GB	Great Britain
GCAM	General Commission for Audiovisual Media (Saudi Arabia)
GCC (1st meaning)	Global Climate Coalition
GCC (2nd meaning)	Gulf Cooperation Council
GDP	Gross Domestic Product
GDPR	*General Data Protection Regulation* (EU 2016/679)
GE	General Electric
Genocide Convention	1948 U.N. *Convention on the Prevention and Punishment of the Crime of Genocide*
GFCI	Global Financial Centers Index
GI	Geographical Indication
GILTI	Global Intangible Low-Taxed Income
GISAID	Global Initiative on Sharing Avian Influenza Data
GL	General License
GloMag	2016 *Global Magnitsky Human Rights Accountability Act*
GM	Genetically Modified, Genetic Modification
GMO	Genetically Modified Organism
GMT	Greenwich Mean Time
GNH	Gross National Happiness
GNI	Gross National Income
GNP	Gross National Product
GOI	Government of India
GPA	*Government Procurement Agreement* (WTO *Agreement on Government Procurement*)
GPO (1st meaning)	Government Pharmaceutical Organization (Thailand)
GPO (2nd meaning)	Group Purchasing Organization (U.S.)
GPS	Global Positioning System
GPT	General Preferential Tariff

GRI	General Rules of Interpretation (of the HS)
GRP	Good Regulatory Practice
GSM	General Sales Manager
GSP	*Generalized System of Preferences* (U.S.)
GSP+	*Generalized System of Preferences Plus* (EU)
GTA	Global Trade Atlas
GVWR	Gross Vehicle Weight Rating
GW	gigawatt
H5N1	Avian Flu (virus)
H&M	Hennes & Mauritz AB (Swedish MNC)
HALE	High-Altitude, Long, Endurance unmanned aircraft system (drone) (U.S. Navy)
HALEU	high-assay, low-enriched Uranium
HCTC	Health Care Tax Credit
HDC	Holder in Due Course
HDI	U.N. Human Development Index
HDPE	high-density polyethylene
Helms-Burton Act	1996 *Cuban Liberty and Democracy Solidarity (Libertad) Act*
HFCAA	2020 *Holding Foreign Companies Accountable Act*
HFCS	High Fructose Corn Syrup
HHS	U.S. Department of Health and Human Services
HIPC	Highly Indebted Poor Country
HK$	Hong Kong dollar
HKIAC	Hong Kong International Arbitration Center
HKMA	Hong Kong Monetary Authority
HKSAR	Hong Kong Special Administrative Region
HKSE	Hong Kong Stock Exchange
HKU	Hong Kong University (University of Hong Kong)
HLED	High Level Economic Dialogue (*e.g.*, U.S.-Mexico)
HM	Her (His) Majesty
HMG	Her (His) Majesty's Government
HMT	Her (His) Majesty's Treasury (U.K.)
HNW	High Net Worth
HOEP	Hourly Ontario Energy Price

Homeland Security Act	2002 *Homeland Security Act*
HPAE	High Performing Asian Economy
HPAI	High Pathogenic Avian Influenza
HPC	High Performance Computer
HPNAI	High Pathogenic Notifiable Avian Influenza
HQ	Headquarters
HRL	Headquarters Ruling Letter (U.S. Customs Service, CBP)
HS	Harmonized System
HSBC	Hong Kong Shanghai Banking Corporation
HSBI	Highly Sensitive Business Information
HSC	Harmonized System Committee (WCO)
HSI	Homeland Security Investigation (U.S. DHS)
HTS	Harmonized Tariff Schedule
HTSUS	Harmonized Tariff Schedule of the U.S.
HVAC	Heating, Ventilation, and Air Conditioning
IA (1st meaning)	Import Administration (U.S. DOC)
IA (2nd meaning)	Information Available
IA (3rd meaning)	Internal Advice
IAC	Iran Alumina Company (IMIDRO subsidiary)
IADB	Inter-American Development Bank
IAEA	International Atomic Energy Agency
IAR	Internal Advice Response (CBP)
IBRD	International Bank for Reconstruction and Development (The World Bank)
IBT (1st meaning)	International Brotherhood of Teamsters
IBT (2nd meaning)	International Business Transactions
IC (1st meaning)	Indifference Curve
IC (2nd meaning)	integrated circuit
ICs	Indigenous Communities

	(Inuit and other indigenous communities)
ICAC	International Cotton Advisory Committee
ICAO	International Civil Aviation Organization (U.N.)
ICBM	Intercontinental Ballistic Missile
ICC (1st meaning)	International Chamber of Commerce
ICC (2nd meaning)	International Criminal Court
ICE	U.S. Immigration and Customs Enforcement
ICFTU	International Confederation of Free Trade Unions
ICIT	Intergovernmental Commission on International Trade (Ukraine)
ICJ	International Court of Justice
ICOR	Incremental Capital Output Ratio
ICS	Investment Court System
ICSID	International Center for the Settlement of Investment Disputes
ICT	Information and Communications Technology
ICTS	Information and Communications Technology Services
ICTSD	International Center for Trade and Sustainable Development
IDB	Integrated Database
IDF	Israeli Defense Forces
IDP	WTO Informal Dialogue on Plastics Pollution and Environmentally Sustainable Plastics Trade
IE	Information Exchange (MTCR)
IEA	International Energy Agency
IEC (1st meaning)	International Electrotechnical Commission
IEC (2nd meaning)	Importer-Exporter Code (India)
IEEPA	1977 *International Emergency Economic Powers Act*
IFD	WTO *Agreement on Investment Facilitation for Development*
IFPMA	International Federation of Pharmaceutical Manufacturers and Associations
IFPRI	International Food Policy Research Institute
IFSA	2006 *Iran Freedom Support Act*
IFTA	1985 *United States-Israel Free Trade Implementation Act*
IGBA	1970 *Illegal Gambling Business Act*
IGG	*itinéraire à grand gabarit* (France)

IHR	International Health Regulations (WHO)
IIA	*International Investment Agreement*
IIF	Institute of International Finance
IIPA	International Intellectual Property Alliance
IIT	Indian Institute of Technology
ILAB (BILA)	Bureau of International Labor Affairs (U.S. DOL OTLA)
ILC	International Law Commission
ILO	International Labor Organization
ILRF	International Labor Rights Forum
ILSA	1996 *Iran and Libya Sanctions Act* (called *ISA* after *IFSA*)
IMC	Industrial Metal and Commodities
IMF	International Monetary Fund
IMF *Articles*	*Articles of Agreement of the International Monetary Fund*
IMIDRO	Iranian Mines and Mining Industries Development and Renovation Organization
IMO	International Maritime Organization (CMI)
IMTDC	iron mechanical transfer drive component
INARA	2015 *Iran Nuclear Agreement Review Act*
INBAR	International Bamboo and Rattan Organization
Inc.	incorporated (U.S.)
INC	Inter-governmental Negotiation Committee
Incoterms	International Commercial Terms (ICC)
INN	International Non-proprietary Names (WHO)
INOVAR-AUTO	Incentive to the Technological Innovation and Densification of the Automotive Supply Chain (Brazil)
INR (1st meaning)	Initial Negotiating Right
INR (2nd meaning)	Indian *Rupee*
INS	U.S. Immigration and Naturalization Service (reorganized partly into ICE in March 2003)
IO	International Organization
IOR	Importer of Record
IP	Intellectual Property

IPBES	Intergovernmental Science-Policy Platform on Biodiversity and Ecosystem Studies
IPCC	U.N. Intergovernmental Panel on Climate Change
IPEF	*Indo-Pacific Economic Framework*
IPI Tax	Tax on Industrialized Products (Brazil)
IPIC Treaty (*Washington Treaty*)	1989 *Treaty on Intellectual Property in Respect of Integrated Circuits*
IPO	initial public offering
IPOA	International Plan Of Action
IPOA-IUU	International Plan Of Action to Prevent, Deter, and Eliminate Illegal, Unreported, and Unregulated Fishing (FAO)
IPPC	1952 *International Plant Protection Convention*
IPPR	Institute for Public Policy Research
IPR (1st meaning)	Intellectual Property Right
IPR (2nd meaning)	International Priority Right
IPTV	Internet Protocol Television
IRA (1st meaning)	*U.S. Inflation Reduction Act of 2022*
IRA (2nd meaning)	Irish Republican Army (Provisional Irish Republican Army)
IRC	U.S. Internal Revenue Code
IRENA	International Renewable Energy Agency
IRG (IRGC)	Iranian Revolutionary Guard Corps (Islamic Revolutionary Guard Corps)
IRGCN	Islamic Revolutionary Guards Corps Navy (Iran)
IRGC-QF	Islamic Revolutionary Guards Corp *Quds* Forces (Iran)
IRISL	Islamic Republic of Iran Shipping Lines
IRNA	Islamic Republic News Agency (Iran)
IRQ	Individual Reference Quantity
IRS	U.S. Internal Revenue Service
ISA	*Iran Sanctions Act of 1996*, as amended, *i.e., Iran Sanctions Act of 2012* (formerly *ILSA*)
ISDS	Investor-State Dispute Settlement
ISEAS	Institute of Southeast Asian Studies

	(ISEAS-Yusof Ishak Institute, Singapore)
ISI	Inter-Services Intelligence (Pakistan)
ISIL	Islamic State in the Levant (ISIS)
ISIS	Islamic State in Shams (ISIL)
ISO	International Organization for Standardization
ISTC	International Sugar Trade Coalition
IT	Information Technology
ITA (1st meaning)	1996 WTO *Information Technology Agreement*
ITA (2nd meaning)	U.S. International Trade Administration (DOC)
ITA II (*ITA – Exp*)	2015 *Information Technology Agreement* (Expansion of the *Information Technology Agreement*)
ITAR	*International Traffic in Arms Regulations*
ITC (1st meaning)	International Trade Center (joint WTO-U.N. agency)
ITC (U.S.ITC) (2nd meaning)	U.S. International Trade Commission
ITDS	International Trade Data System (electronic single window for import-export data)
ITO	International Trade Organization
ITO *Charter* (*Havana Charter*)	*Charter for an International Trade Organization*
ITRD	International Trade Reporter Decisions
ITSR	Iranian Transactions and Sanctions Regulations (31 C.F.R. Part 560)
ITT	ITT Corporation
ITT NV	ITT Night Vision
ITU	International Telecommunications Union
IUD	intra-uterine device
IUSCT	Iran – U.S. Claims Tribunal
IUU	illegal, unreported, and unregulated
IWC	International Whaling Commission
JADE Act	2008 *Tom Lantos Block Burmese JADE (Junta's Anti-Democratic Efforts) Act*
J&K	Jammu and Kashmir (Indian-Administered Kashmir)
JCPOA	July 2015 *Joint Comprehensive Plan of Action*

	(*Iran Nuclear Deal*)
JeM	*Jaish-e-Mohammed* ("The Army of Muhammad," Pakistan-based terrorist organization)
JFTC	Japan Fair Trade Commission
JIA	Japanese Investigative Authority
JNPT	Jawaharlal Nehru Port Terminals (Mumbai, India)
JPC	Joint Planning Committee (India)
JSC	Joint Stock Company (Russia)
JSI	*Joint Statement Initiative*
JV	Joint Venture
KAF	Khalid Al Falih (former Saudi Minister of Oil)
KCBT	Kansas City Board of Trade
KDB	Korea Development Bank
KEXIM	Export-Import Bank of Korea
KFC	Kentucky Fried Chicken
KfW	*Kreditanstalt für Wiederaufbau* (Germany, Credit Agency for Reconstruction)
kg	kilogram
KGB	*Komitet Gosudarstvennoy Bezopasnosti* ("Committee for State Security," Soviet Union)
KH	*Kata'ib Hezbollah* (*Hezbollah* Brigades, Iraq)
km	kilometer
KMA	Kubota Manufacturing of America
KMT	*Kuomintang*
KORUS	*Korea – United States Free Trade Agreement*
KPPI	*Komite Pengamanan Perdagangan Indonesia* (competent international trade authority)
KSA	Kingdom of Saudi Arabia
KU	University of Kansas
kW	kilowatt
kWh	kilowatt hour
L/C	Letter of Credit
LAC	Line of Actual Control (Ladakh-Aksai Chin)

LAN	Local Area Network
LAP	Labor Action Plan (Colombia TPA)
LCA	Large Civil Aircraft
LCD	Liquid Crystal Display
LDBDC	Least Developed Beneficiary Developing Country
LDC (1st meaning)	Least Developed Country
LDC (2nd meaning)	Less Developed Country (includes developing and least developed countries)
LDC (3rd meaning)	Local distribution company
LED	light-emitting diode
LEEM	Licensing and Enforcement Experts Meeting (MTCR)
LegCo	Legislative Council of the Hong Kong Special Administrative Region
LGBTQ+	Lesbian, Gay, Bisexual, Transgender, Queer (or Questioning), and others
LLDC	Landlocked Developing Country
LNG	Liquefied Natural Gas
LNPP	Large Newspaper Printing Press
LNR	Luhansk People's Republic
LOC	Line of Control (Kashmir)
LOT	Level of Trade (dumping margin calculation adjustment)
LPAI	Low Pathogenic Avian Influenza
LPF	level playing field
LPG	Liquefied Petroleum Gas
LPMO	Livestock Products Marketing Organization (Korea)
LPNAI	Low Pathogenic Notifiable Avian Influenza
LPR (1st meaning)	Labor Force Participation Rate
LPR (2nd meaning)	Loan Prime Rate (PBOC)
LRW	Large Residential Washer
LTFV	Less Than Fair Value
LVC	Labor Value Content
LVMH	Louis Vuitton Moët Hennessey

LWR	Light-Walled Rectangular pipe and tube
LWS	Laminated Woven Sacks
M&A	mergers and acquisitions
MAD	Mutually Assured Destruction
MAFF	Ministry of Agriculture, Forestry, and Fisheries (Korea)
MAI	Multilateral Agreement on Investment
MAP	Monitoring and Action Plan
Marrakesh Protocol	*Marrakesh Protocol* to GATT 1994
Maastricht Treaty	1992 Treaty on European Union
MAS	Monetary Authority of Singapore
MBB	*Messerschmitt-Bölkow-Blohm GmbH* (Germany)
MBS	Mohammed Bin Salman (Crown Prince, Saudi Arabia)
MC (MCX)	WTO Ministerial Conference (MC11 means 11th Ministerial Conference, MC12 means 12th Ministerial Conference, MC13 means 13th Ministerial Conference, and so on)
MCF	military-civil fusion (doctrine) (China)
MCIT	Ministry of Communications and Information Technology (India)
MCL	Munitions Control List
MCTL	Military Critical Technologies List
MDG	Millennium Development Goal
MDL	Military Demarcation Line (DMZ)
MEA	*Multilateral Environmental Agreement*
MEC	Myanmar Economic Corporation
MEDT	Ministry of Economic Development and Trade (Ukraine)
MEFTA	*Middle East Free Trade Agreement*
MEHL	Myanmar Economic Holdings Limited
MEK (*PMOI*)	*Mojahedin-e Khalq* (*People's Mojahedin Organization of Iran*, *PMOI*, exiled Iranian opposition group)
MENA	Middle East North Africa
MEP	Member of the European Parliament
METI	Ministry of Economy, Trade, and Industry (Japan, formerly MITI)
MEU	military end user

MFA	*Multi-Fiber Arrangemen*t (1974-2004)
MFN	Most Favored Nation
MGE	Myanmar Gems Enterprise
MHI	Mitsubishi Heavy Industries, Ltd.
MHT	*Matra Hautes Technologies* (France)
MI5	Military Intelligence, Section 5 (U.K. domestic counter-intelligence and security agency)
MI6	Military Intelligence, Section 6 (U.K. foreign intelligence service)
MIIT	Ministry of Industry and Information Technology (China)
MITI	Ministry of International Trade and Industry (Japan)
MLA	Member of the Legislative Assembly (Stormont, Northern Ireland)
mm	millimeter
MMA	Minimum Market Access (quota)
MMBtu	Million British Thermal Unit
MMPA	1972 *Marine Mammal Protection Act*
MMT	million metric tons
mn	million
MNC	Multinational Corporation
MNE	Multinational Enterprise
MOCI	Ministry of Commerce and Industry (India, Saudi Arabia)
MOCIE	Ministry of Commerce, Industry, and Energy (Korea)
MOFAT	Ministry of Foreign Affairs and Trade (Korea)
MOFCOM	Ministry of Commerce (China)
MOGE	Myanma Oil and Gas Enterprise (sometimes referred to as Myanmar Oil and Gas Enterprise)
MOI (MOI Test)	Market Oriented Industry
MOTIE	Ministry of Trade, Industry, and Energy (Korea)
MOU	Memorandum of Understanding
MP	Member of Parliament
MPC	Marginal Propensity to Consume
MPF	Merchandise Processing Fee

MPIA	WTO *Multi-Party Interim Appeal Arbitration Arrangement*
MPS	Marginal Propensity to Save
MRA	*Mutual Recognition Agreement*
MRE	Meals Ready to Eat
MRI	magnetic resonance imaging
MRL	Maximum Residue Level
MRM	Marine Resource Management
mRNA	messenger ribonucleic acid
MRS	Marginal Rate of Substitution
MRT	Marginal Rate of Transformation
MSCI	Morgan Stanley Capital International
MSF	*Médecins Sans Frontières*
MSME	Micro, Small, and Medium Sized Enterprise
MSP (1st meaning)	Minimum Support Price
MSP (2nd meaning)	Ministry of Social Protection (Colombia)
MSS	Ministry of State Security (China)
MST	Minimum Standard of Treatment
MSY	maximum sustainable yield
mt	metric ton
MTA (1st meaning)	Managed Trade Agreement
MTA (2nd meaning)	Metropolitan Transit Authority (New York City)
MTA (3rd meaning)	Multilateral Trade Agreement
MTB	Miscellaneous Trade Bill (multiple years)
MTCR	Missile Technology Control Regime
MTN	Multilateral Trade Negotiation
MTO	Multilateral Trade Organization
MTOP	Millions of Theoretical Operations per Second
MUFG	Mitsubishi UFJ Financial Group Bank, Ltd. (Japan)
MVTO	Motor Vehicles Tariff Order (Canada)
MWh	Mega Watt hour
MY	Marketing Year
NAD Bank	North American Development Bank

	(*NAFTA*)
NAAEC	*North American Agreement on Environmental Cooperation* (*NAFTA Environmental Side Agreement*)
NAALC	*North American Agreement on Labor Cooperation* (*NAFTA Labor Side Agreement*)
NAFTA	*North American Free Trade Agreement* (*NAFTA* 1.0 and/or *NAFTA* 2.0)
NAFTA 1.0	*North American Free Trade Agreement* (original FTA that entered into force 1 January 1994)
NAFTA 2.0	*North American Free Trade Agreement* (revised FTA based on August 2017-September 2018 renegotiations, called *CUSMA* in Canada, *USMCA* in America, and informally called *NAFTA* 2.0, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)
NAI	Notifiable Avian Influenza
NAM (1st meaning)	U.S. National Association of Manufacturers
NAM (2nd meaning)	Non-Aligned Movement
NAMA	Non-Agricultural Market Access
NAND	Not AND flash memory chip technology
NAO	National Administrative Office (*NAFTA*)
NATO	North Atlantic Treaty Organization
NASA	U.S. National Aeronautics and Space Administration
NASDAQ	National Association of Securities Dealers Automated Quotations exchange (U.S.)
NBA	National Basketball Association
NBP	National Bank of Pakistan
NC	Net Cost
NCC (1st meaning)	National Chicken Council
NCC (2nd meaning)	Non-Cooperative Country (Argentina)
NCCDA	*National Critical Capabilities Defense Act* (part of *ACA*)
NCM	Non-Conforming Measure
N.C.M.	*Nomenclatura Común MERCOSUR* (*MERCOSUR* Common Nomenclature)
NCSC	National Counterintelligence and Security Center

(1st meaning)	(U.S.)
NCSC (2nd meaning)	National Cyber Security Center (U.K.)
NCTO	National Council of Textile Organizations
NDA	National Democratic Alliance (India)
NDAA	U.S. *National Defense Authorization Act* (annual policy bill for DOD and national security since 1962)
NDC	North Drilling Company (Iran)
NdFeB	neodymium-iron-boron permanent magnets (also called neodymium magnets, neo magnets, or rare earth magnets)
NDRC	National Development and Reform Commission (China)
NEA	1976 *National Emergencies Act*
NEI	National Export Initiative
NEP	New Economic Policy (Malaysia)
nes	not elsewhere specified
NFIDC	Net Food Importing Developing Country
NFTC	National Foreign Trade Council
NG	Natural Gas
NGR	Negotiating Group on Rules (WTO Doha Round)
NHI	National Health Insurance (Korea)
NHS	National Health Service (U.K.)
NHT	National Hand Tools Corporation
NI	Northern Ireland
NIC	Newly Industrialized Country
NICO	Naftiran Intertrade Company
NIDC	National Iranian Drilling Company (NIOC subsidiary)
NIEO	New International Economic Order
NIOC	National Iranian Oil Company
NIST	U.S. National Institute of Standards and Technology
NITC	National Iranian Tanker Company
NJPA	National Juice Products Association
NLC	National Labor Committee (U.S.)

NLCF	National Livestock Cooperatives Federation
NLD	National League for Democracy (Burma)
NLR	No Licence Required (U.S. DOC BIS)
NLRB	National Labor Relations Board (U.S.)
nm	nanometer
NMDC	National Minerals Development Corporation (India)
NME	Non-Market Economy
NMFS	U.S. National Marine Fisheries Service (DOC)
NNSA	U.S. National Nuclear Security Administration (DOE)
NOAA	U.S. National Oceanic and Atmospheric Administration (DOC)
NO_x	Nitrogen oxides
NPA	Non-Prosecution Agreement
NPC (1st meaning)	National People's Congress (China's legislature)
NPC (2nd meaning)	National Petrochemical Company (Iran)
NPCSC	National People's Congress Standing Committee (NPC's top-decision making body)
NPF	Non-Privileged Foreign status
NPL	Non-Performing Loan
NPT	1968 *Nuclear Non-Proliferation Treaty*
NRA	National Rifle Association
NRC	U.S. Nuclear Regulatory Commission
NRI	Non-Resident Indian
NRL	Nuclear Referral List
NSA	U.S. National Security Agency
NSC	National Securities Commission (Argentina)
NS-CMIC List	Non-SDN Chinese Military Industrial Complex Companies List
NSF	U.S. National Science Foundation
NSG	Nuclear Suppliers Group
NSIBR	*National Security Industrial Base Regulations*
NSL	*National Security Law* (2020 *Law of the PRC on Safeguarding National Security in*

	the Hong Kong Special Administrative Region)
NSM	Jawaharlal Nehru National Solar Mission (India)
NSPK	National Payment Card System Joint Stock Company (Russia)
NSPD	National Security Presidential Directive
NSS	WTO SPS National Notification System
NTA	National Textile Association (U.S.)
NTB	Non-Tariff Barrier
NTC	National Trade Council (United States)
NTE (1st meaning)	*National Trade Estimate Report on Foreign Trade Barriers* (USTR)
NTE (NTE sector) (2nd meaning)	Non-Traditional Export (sector)
NTM	Non-Tariff Measure
NTR	Normal Trade Relations
NTSB	National Transportation Safety Board (U.S.)
NV (*N.V.*) (1st meaning)	*Naamloze Vennootschap* (Dutch), a publicly limited liability company, with legal personality, which sells capital that is divided into shares to the public to obtain income.
NV (2nd meaning)	Normal Value
NVOCC	Non-Vessel Operating Common Carrier
NWFP	North West Frontier Province (Pakistan) (Khyber Pakhtunkhwa)
N.Y. Fed (FRBNY)	Federal Reserve Bank of New York
NYSE	New York Stock Exchange
NYU	New York University
NZ$	New Zealand Dollar
NZD	New Zealand Dollar
OAS	Organization of American States
OBE	Officer of the Most Excellent Order of the British Empire
OBRA	*Omnibus Budget and Reconciliation Act* (multiple years)
OCD	Ordinary Customs Duties
OCR	Out of Cycle Review
OCTG	Oil Country Tubular Goods

ODA	Official Development Assistance
ODC	Other Duties and Charges
OECD	Organization for Economic Cooperation and Development
OED	*Oxford English Dictionary*
OEE	U.S. Office of Export Enforcement (BIS)
OEM	Original Equipment Manufacturer
OFA	Other Forms of Assistance
OFAC	U.S. Office of Foreign Assets Control (Department of the Treasury)
OIC	Organization of Islamic Conference
OIE	World Organization for Animal Health (*Office International des Epizooties*)
OLI	Ownership, Location, and Internalization (Theory)
OMA	Orderly Marketing Arrangement
OMB	Office of Management and Budget (U.S.)
OMO	Open Market Operation
OOIDA	Owner-Operator Independent Drivers Association
OPA	Ontario Power Authority (Canada)
OPEC	Organization of Petroleum Exporting Countries
OPIC	U.S. Overseas Private Investment Association (U.S. International Development Finance Corporation)
OPZ	Outward Processing Zone (*KORUS*)
OSINFOR	*Organismo de Supervisión de los Recursos Forestales y de Fauna Silvestre* (Forestry regulator, Peru)
Oslo I Accord (*Oslo I*)	13 September 1993 *Israeli-PLO Declaration of Principles on Interim Self-Government Arrangements* (DOP)
OTC	Over the Counter
OTCA (*1988 Act*)	*Omnibus Trade and Competitiveness Act of 1988*
OTCG	Oil Country Tubular Good
OTDS	Overall Trade distorting Domestic Support
OTEXA	Office of Textiles and Apparel (U.S. DOC)
OTLA	Office of Trade and Labor Affairs (in DOL)
OTR	Off-The-Road

P5+1	China, France, Russia, U.K., and U.S. (five permanent U.N. Security Council members), plus Germany
P&I	protection and indemnity (maritime insurance)
PACOM (USINDOPACOM)	United States Indo-Pacific Command
PADIS	Program of Incentives for the Semiconductors Sector (Brazil)
PAP	People's Action Party (Singapore)
PAPS	Pre-Arrival Processing System
Paris Agreement	December 2015 *Paris Climate Accord*, or *Paris Climate Agreement*, under *UNFCCC*
Paris Convention	1883 Paris Convention for the Protection of Industrial Property
PASA	Pre-Authorization Safety Audit
PATVD	Program of Support for the Technological Development of the Industry of Digital TV Equipment (Brazil)
PBC (PBOC)	People's Bank of China
PBS	Price Band System
PBUH	Peace Be Upon Him
Pub. L. No.	Public Law Number (United States)
PC	Personal Computer
PCA (1st meaning)	Post-Clearance Audit
PCA (2nd meaning)	Permanent Court of Arbitration (The Hague)
PCAOB	Public Company Accounting Oversight Board (United States)
PCAST	President's Council of Advisors on Science and Technology (United States)
PCB	printed circuit board
PCBA	printed circuit board assembly
PCG (PCG fibers)	polyvinyl alcohol (PVA), cellulose, and glass fibers
PDB	President's Daily Brief
PDR	People's Democratic Republic (Lao PDR)
PDV	Present Discounted Value
PDVSA	*Petróleos de Venezuela, S.A.*

	(Venezuelan state-owned oil and natural gas company)
PEESA	*Protecting Europe's Energy Security Act of 2019*, as amended
Pemex	*Petróleos Mexicanos* (Mexico)
PEO	Permanent Exclusion Order
PETA	People for the Ethical Treatment of Animals
PF	Privileged Foreign status
PFC	Priority Foreign Country
Pharma Agreement	WTO *Agreement on Pharmaceutical Products* (Uruguay Round plurilateral sectoral agreement)
PhRMA	Pharmaceutical Manufacturers of America
PI	preliminary injunction
PIS/PASEP	*Social Integration Program/Civil Service Asset Formation Program Contribution* (Brazil)
PIS/PASEP-Importation	*Social Integration and Civil Service Asset Formation Programs Contribution Applicable to Imports of Foreign Goods or Services* (Brazil)
PJSC	Public Joint Stock Company (Russia)
PLA	People's Liberation Army (China)
Plc	public limited company (U.K.)
PLI	Production-Linked Incentive
PLO	Palestine Liberation Organization
PM	Prime Minister
PMC	Popular Mobilization Committee (Iraq)
PME	Pingtan Marine Enterprise (China)
PNTR	Permanent Normal Trade Relations
PNW	Pine wood nematode
POA	Power of Attorney
POC	Point of Contact (MTCR)
POI	Period of Investigation
POR	Period of Review
POW-MIA	Prisoner of War – Missing in Action
PP	Purchase Price (Pre-Uruguay Round U.S. term for Export Price)

PPA	Power Purchase Agreement
PPB	Basic Productive Process (Brazil)
PPE	personal protective equipment
PPF	Production Possibilities Frontier
PPM (1st meaning)	parts per million
PPM (2nd meaning)	process and production method
PPP	Purchasing Power Parity
PPS	Probability-Proportional to Size
PR	public relations
PRC	People's Republic of China
PROEX	*Programa de Financiamento às Exportações* (Brazil)
PRO-IP Act	2008 *Prioritizing Resources and Organization for Intellectual Property Act*
PRS	Price Range System
PSA (1st meaning)	Port of Singapore Authority
PSA (2nd meaning)	production sharing agreement
PSC	Post-Summary Correction (U.S. CBP)
PSH	Public Stock Holding
PSI	Pre-Shipment Inspection
PSI Agreement	WTO *Agreement on Pre-Shipment Inspection*
PSRO	Product Specific Rule of Origin
PSU	Public Sector Unit (India)
PTA (1st meaning)	Preferential Trade Agreement, or Preferential Trading Arrangement
PTA (2nd meaning)	Payable through account
PTO	U.S. Patent and Trademark Office
PUBG	PlayerUnknown's Battlegrounds (Chinese app)
PV	Photovoltaic
PVA (PVA fibers)	Polyvinyl alcohol fibers
PVC	Polyvinyl chloride
PVLT	passenger vehicle and light truck

PwC	PricewaterhouseCoopers
QAI	Quds Aviation Industries (Iran)
QC	Queen's Counsel
QE	Quantitative Easing
QIZ	Qualified Industrial Zone
QR	Quantitative Restriction
Quad	Quadrilateral Security Dialogue (Australia, India, Japan, and U.S.)
R&D	Research and Development
R&TD	Research and Technological Development measures
RAM	Recently Acceded Member (of WTO)
RAN	Radio Access Network
RBI	Reserve Bank of India
RCC	United States – Canada Regulatory Cooperation Council
RCEP	Regional Comprehensive Economic Partnership
RCMC	Registration-cum-Membership Certificate (India)
RDIF	Russian Direct Investment Fund
rDNA	recombinant deoxyribonucleic acid
REACH	Registration, Evaluation, and Authorization of Chemicals (EU)
REC	Regional Economic Community
REER	Real Effective Exchange Rate
Rep.	Representative
RESTRICT Act	U.S. *Restricting the Emergence of Security Threats that Risk Information and Communications Technology (RESTRICT) Act*
RFMO	Regional Fisheries Management Organization
RFMO/A	Regional Fisheries Management Organization or Arrangement
RMA (1st meaning)	Risk Management Association (U.S.)
RMA (2nd meaning)	Risk Management Authorization
RMB	*Ren min bi* ("people's money," the Chinese currency)
RMG	Ready Made Garment
RMI (DRM)	Rights Management Information (Digital Rights Management)
RNG	WTO Negotiating Group on Rules

	(Rules Negotiating Group)
RNRC	Russian National Reinsurance Company
ROA	Return on Assets
ROC (R.O.C.)	Republic of China (Taiwan)
Rome Convention	1964 *Rome Convention for the Protection of Performer, Producers of Phonograms and Broadcasting Organizations*
ROO	Rule Of Origin
ROW	Rest Of World
ROZ	Reconstruction Opportunity Zone
RPC	*RCEP* Participating Country
RPG	Rocket-propelled grenade
RPL	Relative Price Line
RPOC	Reinforced Point Of Contact (MTCR)
RPT	Reasonable Period of Time
RRM	*USMCA* Rapid Response Mechanism
Rs.	*Rupee*
RSS	*Rashtriya Swayamsevak Sangh* (India)
RTA	Regional Trade Agreement
RTAA	Re-employment Trade Adjustment Assistance
Rusi	Royal United Services Institute (U.K.)
RV	Recreational Vehicle
RVC	Regional Value Content
S&D	Special and Differential
S&ED	Strategic and Economic Dialogue (U.S.-China)
S.A.	*Société Anonyme* (French company designation), *Sociedad Anónima* (Spanish company designation), *Sociedade Anónima* (Portuguese company designation)
S.A. de C.V.	*Sociedad Anónima de Capital Variable* (Mexican company designation)
SAA	Statement of Administrative Action
SAARC	*South Asia Association for Regional Cooperation*
SABIC	Saudi Arabian Basic Industry Corporation (Saudi Arabian Basic Industries Corporation)
SAC	State Administration Council (Burma)
SACU	*Southern African Customs Union*

SADC	*Southern African Development Community*
SAF	sustainable aviation fuel (*IPEF*)
SAFE	State Administration of Foreign Exchange (China)
SAFE Port Act	2006 *Security and Accountability for Every Port Act*
SAFTA	*South Asia Free Trade Agreement*
SAGIA	Saudi Arabian General Investment Authority
SAIC	Shanghai Automotive Industry Corporation Motor Corporation Limited (China)
SAM	surface-to-air (missile)
SAMA	Saudi Arabian Monetary Authority
SAP	Structural Adjustment Program
SAPTA	*South Asia Preferential Trading Arrangement*
SAR (1st meaning)	Suspicious Activity Report (FinCEN)
SAR (2nd meaning)	Special Administrative Region (China)
SAR (3rd meaning)	Saudi Arabian *Riyal*
SARS	Sudden Acute Respiratory Syndrome
SASAC	State-owned Assets Supervision and Administration Commission of the State Council (China)
SBV	State Bank of Vietnam
SCC	standard contractual clause
Scexit	Exit of Scotland from the U.K.
SCGP	Supplier Credit Guarantee Program
SCI	*Secretaría de Comercio Interior* (Argentina, Secretary of Domestic Trade)
SCM	Subsidies and Countervailing Measures
SCM Agreement	WTO *Agreement on Subsidies and Countervailing Measures* (*ASCM*)
SCP	Sugar Containing Product
SDF	Steel Development Fund (India)
SDG	United Nations Sustainable Development Goal
SDIC	State Development & Investment Corp. (China)
SDLP	Social Democratic and Labor Party (Northern Ireland)

SDN (SDN List)	Specially Designated Nationals and Blocked Persons (List)
Sdn Bhd (SDN BHD)	Sendirian Berhad (privately limited company, Malaysia)
SDR (1st meaning)	services domestic regulation
SDR (2nd meaning)	IMF Special Drawing Right
SE	*Secretaría de Economía* (Secretariat of Economy, Mexico, formerly *SECOFI*)
SEBI	Securities and Exchange Bureau of India
SEC	U.S. Securities and Exchange Commission
SECOFI	Secretary of Commerce and Industrial Development (*Secretario de Comercio y Fomento Industrial*), *i.e.*, Ministry of Commerce and Industrial Development (Mexico, renamed SE in December 2000)
SED	Strategic Economic Dialogue (U.S.-China)
SEI	Strategic Emerging Industry (SEI Catalogue – China)
SEIU	Service Employees International Union
Sen.	Senator
SENTRI	Secure Electronic Network for Travelers Rapid Inspection
SEP	Standard Essential Patent
SEZ	Special Economic Zone
SFA	Singapore Food Agency
SFO	Serious Fraud Office
SG&A	Selling, General, and Administrative expenses
SG$	Singapore Dollar
SGD	Singapore Dollar
SHIG	Shahid Hemmat Industries Group (Iran)
SIDS	Small Island Developing States
SJM	*Swadeshi Jagaran Manch* (India)
SIE	State Invested Enterprise
SIFI	Systemically Important Financial Institution
SIFMA	Securities Industry and Financial Markets Association
SII	Serum Institute of India
SIL	Special Import License (India)
SIM	*Sistema Informático MARIA*

	(Argentina, AFIP electronic portal information system)
SIMA	*Special Import Measures Act* (Canada)
SKD	Semi-knock down
SKM	*Samyukta Kisan Morcha* (India, umbrella group of approximately 40 farmers unions)
SMART	Secondary Materials and Recycled Textiles Association
SMBC	Sumitomo Mitsui Banking Corporation (Japan)
SME (1st meaning)	Small and Medium Sized Enterprise
SME (2nd meaning)	Square Meter Equivalent
SMIC	Semiconductor Manufacturing International Corp. (China)
SMS	Supply Management System (Canada)
SNAP	Supplemental Nutritional Assistance Program
SNAP-R	Simplified Network Application Process - Redesign
SNB	Swiss National Bank
SNITIS	*Sindicato Nacional Independiente de Trabajadores de Industrias y de Servicios Movimiento 20/32* (independent Mexican labor union)
SNP	Scottish National Party
S.O.	Statutory Order (India)
SOCB	State Owned Commercial Bank (China)
SocGen	*Société Générale* (France)
SOE	State Owned Enterprise
SOF	Special Operations Forces
SOGI	Sexual Orientation and Gender Identity
SPD	Solar Power Developer
SPI (1st meaning)	Seven Pillars Institute for Global Finance and Ethics
SPI (2nd meaning)	Special Program Indicator
SPND	*Sazman-e Pazhouheshhaye Novin-e Defa'i* (Organization of Defensive Innovation and Research, Iran)
SPS (1st meaning)	Sanitary and Phytosanitary

SPS (2nd meaning)	Single Payment Scheme
SPS Agreement	WTO *Agreement on Sanitary and Phytosanitary Measures*
SPV	Special Purpose Vehicle
SRAM	Static Random Access Memory (chip)
SRO	Special Remission Order (Canada)
SS	Special Session(s)
SSA	Sub-Saharan Africa
SSAC	Sub-Saharan African Country
SSF Guidelines	Voluntary Guidelines for Securing Sustainable Small-Scale Fisheries in the Context of Food Security and Poverty Eradication (FAO)
SSG	Special Safeguard
SSM	Special Safeguard Mechanism
SSN	Resolutions of the National Insurance Supervisory Authority (Argentina)
SST	State Sponsor of Terrorism
Stat.	United States Statutes at Large
Stat. Suf.	Statistical Suffix
STB	set-top box
STDF	WTO Standards and Trade Development Facility
STE	State Trading Enterprise
STIP	*U.S.-Kenya Strategic Trade and Investment Partnership*
STO	Special Trade Obligation
SUV	Sport utility vehicle
SVE	Small, Vulnerable Economy
SVP	surge voltage protector
SWAT	Strategic Worker Assistance and Training Initiative
SWIFT	Society for Worldwide Interbank Financial Telecommunications
T&A	Textiles and Apparel
TAA (1st meaning)	Trade Adjustment Assistance
TAA (2nd meaning)	*Trade Agreements Act of 1974*, as amended
TAAEA	2011 *Trade Adjustment Assistance Extension Act*
TAARA	*Trade Adjustment Assistance Reauthorization Act of 2015*
TAA Reform Act	2002 *Trade Adjustment Assistance Reform Act*
TABC	Trans-Atlantic Business Council

(TBC)	(also abbreviated TBC)
TABD	Trans-Atlantic Business Dialogue
TAC	Total Allowable Catch
TACB	technical assistance and capacity building (*IPEF*)
TAIPEI Act	2019 *Taiwan Allies and International Protection and Enhancement Initiative Act*
TB	tuberculosis
TBEA	Tebian Electric Apparatus Co., Ltd. (China)
TBI	traumatic brain injury
TBT	Technical Barriers to Trade
TBT Agreement	WTO *Agreement on Technical Barriers to Trade*
TCA	*U.K.-EU Trade and Cooperation Agreement* (*EU-U.K. Trade and Cooperation Agreement*, *i.e.*, Christmas Eve 2020 *Brexit Deal*, effective 1 January 2020)
TCOM	Total Cost of Manufacturing
TCP (1st meaning)	Third Country Price
TCP (2nd meaning)	*El Tratado de Comercio entre los Pueblos*, ("Trade Treaty for the Peoples")
TCS	Tata Consulting Services
TD	Treasury Decision (U.S.)
TDA	2000 *Trade and Development Act*
TDDS	trade-distorting domestic support
TDEA	1983 *Trade and Development Enhancement Act*
TDI	Trade Defense Instrument
TDIC	Tourism Development and Investment Company (Abu Dhabi, UAE)
TEA (1st meaning)	*Trade Expansion Act of 1962*, as amended
TEA (2nd meaning) (*TFTEA*)	*Trade Enforcement Act of 2015*, as amended (same as *TFTEA*, *Trade Facilitation and Trade Enforcement Act*)
TECRO	Taipei Economic and Cultural Representative Office
TED	Turtle Excluder Device
TEM	Technical Experts Meeting (MTCR)
TEO	Temporary Exclusion Order
ter	third version (of a text)

TESSD	Trade and Environmental Sustainability Structured Discussions (WTO)
TEU	Twenty Foot Equivalent Unit
TFA	WTO *Agreement on Trade Facilitation* (Trade Facilitation Agreement)
TFAF	Trade Facilitation Agreement Facility
TFP	Total Factor Productivity
TFR	Total Fertility Rate
TGAAA	2009 *Trade and Globalization Adjustment Assistance Act*
TGL	Temporary General License
THAAD	Terminal High Altitude Area Defense system
TIEA	*Tax Information Exchange Agreement*
TIES	Threat and Imposition of Economic Sanctions database (University of North Carolina)
TIFA	*Trade and Investment Framework Agreement*
TIPA	*Taiwan Invasion Prevention Act*
TIPI	*Trade and Investment Partnership Initiative*
TISA (*TiSA, TSA*)	WTO *Trade in Services Agreement*
TKB	*Transkapitalbank* (Russia)
TMT	thousand metric tons
TN (1st meaning)	*NAFTA* business visa
tn (second meaning)	trillion
TNC	WTO Trade Negotiations Committee
TOT	Terms of Trade
TPA (1st meaning)	Trade Promotion Agreement
TPA (2nd meaning)	Trade Promotion Authority (Fast Track)
TPBI	Thai Plastic Bags Industries
TPC	Technology Partnerships Canada
TPEA	2015 *Trade Preferences Extension Act*
TPF	United States – India Trade Policy Forum
TPL	Tariff Preference Level
TPM (1st meaning)	Trigger Price Mechanism
TPM	Technological Protection Measure

(2nd meaning)	
TPP (1st meaning)	*Trans Pacific Partnership*
TPP (2nd meaning)	Tobacco Plain Packaging For example, Australia's (1) *Tobacco Plain Packaging Act 2011*, (2) *Tobacco Plain Packaging Regulations 2011*, as amended by the *Tobacco Plain Packaging Amendment Regulation 2012* (Number 1), and (3) *Trade Marks Amendment (Tobacco Plain Packaging) Act 2011*.
TPP 11	*CPTPP* (entered into force 30 December 2018)
TPRB	WTO Trade Policy Review Body
TPRM	WTO Trade Policy Review Mechanism
TPSC	Trade Policy Staff Committee (U.S., interagency led by USTR)
TRA (1st meaning)	1979 *Taiwan Relations Act*
TRA (2nd meaning)	Trade Readjustment Allowance
TRB	Tapered roller bearing
TRIA	*Terrorism Risk Insurance Act of 2002*
TRIMs	Trade Related Investment Measures
TRIMs Agreement	WTO *Agreement on Trade Related Investment Measures*
TRIPs	Trade Related Aspects of Intellectual Property Rights
TRIPs Agreement	WTO *Agreement on Trade Related Aspects of Intellectual Property Rights*
TRO	Temporary Restraining Order
TRQ	Tariff Rate Quota
TSA	U.S. Transportation Security Administration
TSMC	Taiwan Semiconductor Manufacturing Co.
TSUS	Tariff Schedule of the United States (predecessor to HTSUS)
TTC	U.S.-EU Trade and Technology Council
TTF	Dutch Title Transfer Facility
T-TIP	*Trans-Atlantic Trade and Investment Partnership*
TV (1st meaning)	Television
TV (2nd meaning)	Transaction Value
TVE	Town and Village Enterprise
TVPA	2000 *Trafficking Victims Protection Act*
TWEA	1917 *Trading With the Enemy Act*

TWN	Third World Network
UAV	Unmanned Aerial Vehicle (drone)
UAW	United Auto Workers
UBC	University of British Columbia
UBS *AG*	Swiss bank resulting from 1998 merger of Union Bank of Switzerland and Swiss Bank Corporation (founded in 1872 and 1862, respectively)
UCC (1st meaning)	Uniform Civil Code (India)
U.C.C. (2nd meaning)	Uniform Commercial Code (U.S.)
UCLA	University of California at Los Angeles
UCP (1st meaning)	Uniform Customs and Practices
UCP (2nd meaning)	Unified Cargo Processing
UE	United Electrical, Radio and Machine Workers of America
UEFA	Union of European Football Associations
UES	United Engineering Steel (U.K.)
UETA	1999 *Uniform Electronic Transactions Act*
UF	Ultra-filtered (milk)
UF_6	Uranium Hexafluoride
UFLPA	2021 *Uyghur Forced Labor Prevention Act*
UHRP	Uyghur Human Rights Project
UI	Unemployment Insurance
UIEGA	2006 *Unlawful Internet Gambling Enforcement Act*
U.K.	United Kingdom
U.K.CA (UKCA)	United Kingdom Conformity Assessed
U.K.CGC	U.K. Carbon & Graphite Company
U.K.SFTA (*UKSFTA*)	*United Kingdom-Singapore Free Trade Agreement*
UMR	Usual Marketing Requirement (FAO)
UMTS	Universal Mobile Telecommunications System
UN	United Nations
UNCAC	*United Nations Convention Against Corruption*
UNCC	United Nations Compensation Commission
UNCDP	United Nations Committee for Development Policy

UNCITRAL	United Nations Commission on International Trade Law
UNCLOS	*United Nations Conference on the Law of the Sea Treaty*
UNCTAD	United Nations Commission on Trade and Development
UNEP	United Nations Environmental Program
UNESCO	United Nations Educational, Cultural, and Scientific Organization
UNFCCC	*United Nations Framework Convention on Climate Change*
UNICA	Brazilian Sugarcane Industry Association
UNITA	National Union for the Total Independence of Angola
UNOCHA	United Nations Office for the Coordination of Humanitarian Affairs
UNODA	United Nations Office of Disarmament Affairs
UNOHCHR (OHCHR)	United Nations Office of the High Commissioner for Human Rights
UPA	United Progressive Alliance (India)
UPOV	*International Union for the Protection of New Varieties of Plants*, referring to 1961 *International Convention for the Protection of New Varieties of Plants* (revised 1972, 1978, 1991)
UPS (1st meaning)	uninterrupted power supply
UPS (2nd meaning)	United Parcel Service
UPU	Universal Postal Union
URAA	1994 *Uruguay Round Agreements Act*
U.S.	United States
USAPEEC	USA Poultry and Egg Export Council
USC	United Shipbuilding Corporation (Russia)
U.S.C.	United States Code
USCBC	U.S.-China Business Council
USCCAN	United States Code Congressional and Administrative News
USCCB	United States Conference of Catholic Bishops
USD (1st meaning)	Union Solidarity and Development Party (Burma)
USD (2nd meaning)	United States Dollar
USDS	United States Data Security (division)
USICA	*U.S. Innovation and Competition Act of 2021* (Senate bill)
USJDTA	*United States – Japan Digital Trade Agreement* (signed 7 October 2019)

USJTA	*United States – Japan Trade Agreement* (signed 7 October 2019, entered into force 1 January 2020)
USMCA	*United States-Mexico-Canada Agreement* (revised FTA based on August 2017-September 2018 renegotiations, called *CUSMA* in Canada, *USMCA* in America, and informally called *NAFTA* 2.0, signed 30 November 2018, signed again after further renegotiations 10 December 2019, and entered into force 1 July 2020)
USML	United States Munitions List
USP	United States Price (Pre-Uruguay Round U.S. term encompassing both Purchase Price and Exporter's Sales Price)
U.S.S.	United States Ship (U.S. Navy)
U.S.S.R.	Union of Soviet Socialist Republics
USTR	U.S. Trade Representative
USVSST	United States Victims of State Sponsored Terrorism Fund
USW (1st meaning)	United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union
USW (2nd meaning)	United Steel Workers of America
UVL	Unverified List
VAT	Value Added Tax
VC	Venture Capital
VCP	Vietnamese Communist Party (or CPV, Communist Party of Vietnam)
VCR	Video Cassette Recorder
VEO	Violent Extremist Organization
VER	Voluntary Export Restraint
VEU	Validated End User
Vienna Convention	1969 *Vienna Convention on the Law of Treaties*
VLCC	Very Large Crude Carrier
VND	Vietnamese *dong*
VNM (VNOM)	Value of Non-Originating Materials
VOC	volatile organic compound
VOD	video on demand
VOM	Value of Originating Materials
VPN	virtual private network
VRA	Voluntary Restraint Agreement
VSD	voluntary self-disclosure

VW	Volkswagen AG
W120	WTO services classification list (based on CPC)
WA	1995 *Wassenaar Arrangement*
WAML	Wassenaar Arrangement Munitions List
WCF	World Cocoa Foundation
WCO	World Customs Organization (formerly CCC until 1994)
WFOE	Wholly Foreign-Owned Enterprise (China)
WFP	World Food Program
WHO	World Health Organization
WIPO	World Intellectual Property Organization
WIV	Wuhan Institute of Virology
WMD	Weapon of Mass Destruction
WMO	World Meteorological Association
WRO	Withhold Release Order
WTO	World Trade Organization
WTO Agreement	*Agreement Establishing the World Trade Organization* (including all 4 Annexes)
WWF	World Wildlife Fund
XITIC	Xiamen International Trade and Industrial Company
XPCC	Xinjiang Production and Construction Corps. (China)
XUAR	Xinjiang Uyghur Autonomous Region (China)
YMTC	Yangtze Memory Technologies Co. (China)
YoY	Year on Year
ZAC	*zone d'aménagemement concertée* (France)
ZTE	Zhongxing Telecommunications Corp.
1916 Act	*Antidumping Act of 1916,* as amended (repealed)
1930 Act	*Tariff Act of 1930,* as amended
1934 Act	*Reciprocal Trade Agreements Act of 1934*
1934 FTZ Act	*Foreign Trade Zones Act of 1934,* as amended
1945 UNPA	*United Nations Participation Act of 1945*
1974 Act	*Trade Act of 1974,* as amended
1978 Act	*Customs Procedural Reform and Implementation Act*
1979 Act	*Trade Agreements Act of 1979*

1984 Act	*International Trade and Investment Act of 1984* (*Trade and Tariff Act of 1984*)
1988 Act (1st meaning, *OTCA*)	*Omnibus Trade and Competitiveness Act of 1988*
1988 Act (2nd meaning)	*United States – Canada Free Trade Implementation Act*
1990 Act	*Customs and Trade Act of 1990*
1993 Mod Act	*Customs Modernization Act of 1993*
1993 NAFTA Implementation Act	*North American Free Trade Implementation Act of 1993*
2002 Act	*Trade Act of 2002*
2003 Act	*Burmese Freedom and Democracy Act of 2003*
2007 Act	*Implementing Recommendations of the 9/11 Commission Act of 2007*
2010 Act	*Omnibus Trade Act of 2010*
3D	Three dimensional
3PLs	Third Party Logistics Providers
3Ts (3T Issues)	Taiwan, Tiananmen, and Tibet
4Ts (4T Issues)	Taiwan, Tiananmen, Tibet, and The Party (CCP)

Part One

GATT-WTO ARCHITECTURE

Chapter 1

STRUCTURE OF GATT-WTO REGIME[2]

I. Three Legs of WTO

- **Leg One: Negotiation and Consensus Rule**

The WTO is akin to a three-legged stool supporting the multilateral trading system.[3] Leg One is its negotiating function. Members seek deals on trade liberalization. Unless they expressly agree to an isolated accord, or to a plurilateral deal, Members follow the traditional GATT practice of negotiating a package of accords contemporaneously, and adopting them as a "single undertaking." That is, nothing is agreed to until everything is agreed to, and everyone must agree to everything.

Given the increasing size and diversity of the WTO Membership, both a far cry from the 23 original GATT contracting parties, operating on a single undertaking basis is challenging. WTO Members are developed, developing, and least developed countries. They include traditional hegemons, like the U.S. and EU, regional powers like Australia and Brazil, and emerging giants, namely, China and India. It is sometimes said that since the birth of the WTO on 1 January 1995, and for 19 years thereafter, its Members failed to reach even one new multilateral agreement. While technically correct, it is misleading.

The criticism discounts important plurilateral arrangements reached by a subset of WTO Members in the years immediately following its birth. In 1997, the WTO reached consensus on trade liberalization in financial services and telecommunications, both under the auspices of the Uruguay Round *GATS*. They also reached an agreement on duty-free treatment for roughly 180 high-tech products, the 1996 *ITA*. At the December 2015 Nairobi Ministerial Conference, 54 of the then 82 signatories to the *ITA* expanded the deal by a further 201 products.[4]

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[2] Documents References:
(1) GATT Articles XXVI, XXXI- XXXIII, XXXV
(2) *Ministerial Declaration* on the Uruguay Round (Punta del Este, 20 September 1986)
(3) *WTO Agreement*
For a collection of papers (most of which are authored by economists) on the challenges and opportunities that confronted the WTO just three years after the birth of this IO, including (1) institutional capacity and resources available to the WTO Secretariat to fulfill its tasks, (2) constraints imposed by national-level policies of Members, (3) policy coherence with IMF and World Bank, (4) services trade, (5) dispute settlement, (6) labor and environmental standards, and (7) relationship of the WTO to developing countries, see Anne O. Krueger ed., *The WTO as an International Organization* (Chicago, Illinois: The University of Chicago Press, 1998).

[3] *See* Shawn Donnan, *Up In the Air*, FINANCIAL TIMES, 3 December 2013 (reporting the description of Professor Jagdish Bhagwati).

[4] Those products included amplifiers (*e.g.*, loudspeakers), car radios, certain printer ink cartridges, checking and measuring instruments, digital flight data recorders, flat panel displays, lasers, machines used in the manufacture of semiconductors, medical devices, microphones, optical elements and media, radio remote controls, semiconductors, solid state hard drives, touch pads. The duty-free treatment was not

Notably, like its predecessor, this so-called "*ITA II*" is an open plurilateral deal. So, it gives MFN treatment to all Members, even if they are not signatories to the deal. Small wonder, then, why India reaffirmed in January 2016 its refusal to sign *ITA II*. The Department of Electronics and Information Technology (DeitY) within the Ministry of Communications and Information Technology (MCIT) said the Indian hardware industry was wiped out by duty-free hardware imports under the original *ITA*. So, why not free ride on *ITA II*, enjoy the benefits of duty-free access for exports, without the reciprocal burden of such access for imports? Manifestly, this logic championed domestic producers of like products vis-à-vis such imports over domestic consumers of those items.

Twice since the end of the Uruguay Round, during the Doha Round, WTO Members struck multilateral accords. At their December 2005 December Ministerial Conference, the Members agreed to amend rules in the Uruguay Round *TRIPs Agreement* on compulsory licensing to deal with manufacturing and importation of generic pharmaceutical medicines. In November 2014, Members adopted their December 2013 Bali Ministerial text, specifically, the *Trade Facilitation Agreement*. The WTO Director General, Roberto Azevêdo, admitted "[w]e need to find an easier way of doing this [negotiating and reaching agreement on multilateral accords]. But, he intoned: "The consensus rule is never going to disappear."[5]

- **Leg Two: Adjudication**

WTO Members bring and defend cases, as complainants and respondents, and participate in them as third parties, under the *Dispute Settlement Understanding*, more formally, the *Understanding on Rules and Procedures Governing Settlement of Disputes*. Cases adjudicated by Panels and the Appellate Body have produced jurisprudence useful not only in resolving disputes, but also in illuminating Members about the legality or illegality of their conduct under GATT-WTO rules. *DSU* proceedings also have helped many poor countries build legal capacity for arguing international trade cases.

Over 500 cases have been brought under the *DSU*. They include many highly controversial, hard fought disputes, on topics ranging from developing country preferences to sanitary barriers to food imports. Many of the disputes are highly technical. AD, CVD, and safeguard cases are among them.

Overall, compliance by losing Members has been significant. Perfect enforcement is a test no legal system can pass. In no legal system is compliance 100%. In the GATT-WTO regime, Members understand they are repeat players, and if they expect compliance

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immediate on all 201 products, but rather on 65% of them as of 1 July 2016. For the remainder, the cuts started no later than 1 July 2016, and occurred in four annual reductions in the subsequent three years, ending on 1 July 2019. Moreover, for a list of sensitive IT products, tariffs were not cut until 1 July 2019, with a phase out of four additional years, *i.e.*, between 2019 and 2022. Still, the *ITA* expansion was the first significant tariff-cutting deal under WTO auspices since Uruguay Round negotiations finished on 15 December 1993.

[5] *Quoted in* Bryce Baschuk, *WTO Chief Urges Greater Efficiency During Process of Trade Negotiation*, 31 International Trade Law (BNA) 2092 (4 December 2014).

when they win a case, then they must endeavor to comply when they lose one. In other words, the sanction of reputational integrity, as well as express trade retaliation under the *DSU*, has produced a strong record of compliance in WTO cases. It is in highly politicized cases, where the losing party faces difficult domestic political or economic circumstances, that compliance is difficult, or at least delayed.

- **Leg Three: Monitoring**

Knowing whether and the extent to which WTO Members adhere to their obligations under the many GATT-WTO texts serves two purposes. First, it helps assure the rules of the multilateral trading system are practiced, not just words in treaties. Second, it spots issues before they become legal controversies under the *DSU*. These purposes are served by the monitoring function of the WTO. By extension, they also are served by the research, statistics, and analyses published by the WTO. That is because such publications help identify what exactly it is that Members are doing in their trade laws and policies with respect to other Members, and thus whether adherence to obligations is "trending up" or "trending down."

So, along with GATT Article X, most WTO texts demand transparency among Members in respect of their trade measures. Moreover, the texts create mechanisms to monitor execution by Members of the rules in those texts. Thanks to the Uruguay Round *TPRM*, each WTO Member undergoes a periodic review of its panoply of trade measures. Initially, the cycle for the four largest WTO Members (China, EU, Japan, and U.S.) was every two years, every four years for most other Members, and about every six years for LDCs.

Alas, institutional resource constraints meant the WTO could not keep pace with those cycles. So, in July 2017, the General Council approved new cycles: (1) every three years for the big four Members; (2) every five years for the next 16 largest Members (*e.g.*, Argentina, Australia, Brazil, Canada, India, Indonesia, South Korea, Mexico, Russia, Saudi Arabia, Switzerland, and Turkey); (3) every seven years for all other, non-LDC WTO Members; and (4) longer than every seven years for LDCs. The cycle modifications were only the second change to a Uruguay Round text, following the December 2015 amendment to Article 31 of the *TRIPs Agreement*.

II. WTO Institutional Structure

Excerpted below is one of President Bill Clinton's *Statements of Administrative Action* on the Uruguay Round agreements. These *Statements* were submitted to Congress with the 1994 *Uruguay Round Agreements Act.* (This *Act* is codified at 19 U.S.C. Sections 3501-3624. It also amends several other provisions in Title 19)) There is one *Statement* for each of the agreements.

Generally, the *Statements* are worthy of perusal. First, they provide clear expositions of the underlying trade agreement (in the instance below, the *WTO Agreement*). Second, Section 102(d) of the 1994 *Act* (19 U.S.C. § 3512(d)) imparts to them an exalted

status: they are the "authoritative expression" by the U.S. of the underlying agreement and its implementation. In any U.S. judicial proceeding, they are the definitive legislative histories. The *Statement* on the *WTO Agreement* is of particular note, and thus is set out below. It lays out the structure of the WTO. Observe, too, it opens with remarks about American sovereignty.

URUGUAY ROUND TRADE AGREEMENT, *STATEMENT OF ADMINISTRATIVE ACTION, AGREEMENT ESTABLISHING THE WORLD TRADE ORGANIZATION*, H.R. DOC. NO. 316, 103d CONG., 2d SESS., VOL. 1, 659-667 (27 September 1994)

The *Agreement Establishing the World Trade Organization* (*WTO Agreement*) creates a permanent forum for Member governments to address issues affecting their multilateral trade relations as well as to supervise the implementation of the trade agreements negotiated in the Uruguay Round. The new World Trade Organization (WTO) will operate in much the same manner as the General Agreement on Tariffs and Trade, which it will replace, while overseeing a wider variety of trade agreements and benefiting from a number of improved decision making procedures.

1. U.S. SOVEREIGNTY

U.S. sovereignty is fully protected under the *WTO Agreement*. The WTO will continue the longstanding GATT practice of making decisions by consensus. The last policy decision made by vote under the GATT – other than approving a waiver or a country's accession to the GATT – was in 1959. However, should a vote be taken on a matter in the WTO, the improved procedures written into the *WTO Agreement* will ensure that there can be no change in U.S. substantive rights and obligations without the agreement of the United States.

The WTO will have no power to change U.S. law. If there is a conflict between U.S. law and any of the Uruguay Round agreements, Section 102(a) of the implementing bill [the *1994 Act*, 19 U.S.C. § 3512(a)] makes clear that U.S. law will take precedence: No provision of any of the Uruguay Round Agreements, nor the application of any such provision to any person or circumstance, that is inconsistent with any law of the United States shall have effect.

Moreover, ... WTO dispute settlement panels will not have any power to change U.S. law or order such a change. Only Congress and the Administration can decide whether to implement a WTO panel recommendation and, if so, how to implement it.

2. OBJECTIVES AND PRINCIPLES

The *Preamble* sets forth the objectives of the *WTO Agreement* and the principles that should guide its member governments. The first paragraph of the *Preamble* recognizes the need to achieve the goals of expanding trade and economic development in a manner that allows for the optimal use of the world's resources in accordance with the objective of

sustainable development as well as in a manner that seeks to protect and preserve the environment. The *Preamble* also recognizes that agreements to reduce tariffs and other barriers to trade and to eliminate discriminatory treatment can contribute to attaining these objectives.

3. ESTABLISHMENT OF THE WTO

Articles I and II establish the WTO and specify the various trade agreements that will apply to Member governments. Article II provides that by accepting membership in the WTO, each government will automatically become a party to 18 agreements and legal instruments, referred to as "multilateral trade agreements" (MTAs). They are set out in Annexes 1, 2, and 3. One of these – the *Trade Policy Review Mechanism* (*TPRM*) – is the continuation of a procedural mechanism that has been in operation since 1989. [The *TPRM* was established in 1989 under the GATT.] This mechanism enhances transparency and supplies information regarding the operation of member governments' trade policy.

Certain WTO agreements, referred to as "plurilateral trade agreements" ("PTAs") and included in Annex 4, will apply only between WTO members that accept them. [The most significant PTA is the *Agreement on Government Procurement*.] ...

Paragraph 4 of Article II establishes the relationship between the current General Agreement on Tariffs and Trade (GATT 1947) and the General Agreement on Tariffs and Trade that is contained in Annex 1A of the WTO Agreement (GATT 1994). GATT 1947 and GATT 1994 are legally distinct and contain different provisions. [However, the text of the 39 Articles in GATT is *verbatim* the same.] Furthermore, GATT 1994 is not considered to be a successor agreement to GATT 1947. Thus, if a government withdraws from GATT 1947 and joins the WTO, it will have no GATT obligations to countries that have not also joined the WTO.

4. WTO FUNCTIONS AND STRUCTURE

Article III provides that the WTO will oversee the application of the various WTO agreements and serve as the framework for member governments to conduct their trade relations under those agreements. Article III anticipates future negotiations among WTO members both on matters covered by existing WTO agreements as well as other subjects. Although any negotiations regarding amendments or additions to existing agreements would take place under WTO auspices, the *WTO Agreement* does not preclude negotiations in other fora on subjects related to those agreements, such as shipbuilding subsidies.

In addition, the WTO will administer the *TPRM* and the *Understanding on Rules and Procedures Governing the Settlement of Disputes* (*DSU*), and will cooperate with the International Monetary Fund and the World Bank. [Later Chapters discuss the *DSU*.]

Under Article IV, the "Ministerial Conference," consisting of representatives of all WTO governments will convene at least every other year to carry out WTO functions, including decisions on matters that WTO Members may raise concerning a MTA. The

Ministerial Conference will establish a Committee on Trade and Development, a Committee on Balance of Payments, a Committee on Budget, Finance and Administration (Budget Committee), and a Committee on Trade and the Environment.

When the Ministerial Conference is not in session, its functions will be carried out by a General Council, also comprising representatives of WTO Member governments. (Because it carries out the functions of the Ministerial Conference, references below to the Ministerial Conference should be read to apply to the Council as well.)

When it applies the *DSU*, the Council will convene as the Dispute Settlement Body (DSB). The Council will convene as the Trade Policy Review Body to carry out the functions of the *TPRM*.

Three subsidiary councils will oversee the functioning of the MTAs. The Council for Trade in Goods will be responsible for the agreements included in Annex 1(A). The Council for Trade in Services will oversee the *General Agreement on Trade in Services* (*GATS*) and the Council for Trade-Related Aspects of Intellectual Property … will have responsibility for the *TRIPs Agreement*. Each of these Councils may elect to establish subsidiary bodies.

In addition, the various PTAs may establish their own supervisory bodies. Those bodies will be required to keep the General Council informed of their activities.

Article V requires the General Council to make appropriate cooperative arrangements with other intergovernmental organizations that have responsibilities related to those of the WTO. The Council may also consult and cooperate with non-governmental organizations with an interest in WTO matters.

5. THE SECRETARIAT

Article VI provides for a WTO Secretariat, whose Director-General will be selected by the Ministerial Conference. Secretariat personnel will perform their duties pursuant to regulations issued by the Conference. Like other multilateral organizations, the staff of the Secretariat is required to be impartial and Member governments may not seek to influence staff actions.

6. BUDGETARY MATTERS

Article VII establishes a three step annual budgetary process for the WTO. First, the WTO Director-General will present a budget estimate to the Budget Committee. Next, that committee will issue a budget recommendation to the General Council. Finally, the General Council will adopt the annual budget estimate.

The Budget Committee will issue regulations concerning how Member contributions are to be apportioned and how to deal with members in arrears. Those regulations are to be based, as far as practicable, on the GATT 1947 regulations and

practices.

7. LEGAL STATUS

Under Article VIII, each WTO Member is required to accord the WTO sufficient legal status for it to exercise its functions. Each Member is also required to accord the WTO, its officials, and representatives from member governments requisite "privileges and immunities," similar to those stipulated in the 1947 U.N. *Convention on the Privileges and Immunities of the Specialized Agencies*.

8. PROCEDURES FOR MAKING DECISIONS

The procedures and rules for decision making on WTO matters are set forth in Articles IX and X of the Agreement. In each area, WTO provisions either strengthen the safeguards against action with which the United States disagrees or maintains current GATT practice.

Article IX establishes rules for issuing waivers and definitive interpretations of the MTAs. The WTO will continue the longstanding GATT practice of attempting to reach such decisions by "consensus" – that is, without formal objection by any member country. However, as has been the rule under the GATT, a matter may be decided by vote in the absence of a consensus. Although GATT 1947 provides for the possibility of resolving matters through voting, there has not been a vote on a policy matter (other than a decision on grant of a waiver or the terms of accession for a new contracting party) since 1959. If there is a vote, the matter will be decided by majority of the votes cast, unless the WTO Agreement or the relevant MTA or PTA provides otherwise.

As has been the case under the GATT 1947, each WTO Member will have one vote. There is a special rule for the EU (which will be a WTO Member in addition to its member countries) that ensures that the EU casts only as many votes as it has member countries who are members of the WTO.

The Ministerial Conference and the General Council are the sole WTO bodies empowered to issue authoritative, binding interpretations of the *WTO Agreement* and MTAs. The Conference and Council may not, however, use their authority to issue interpretations that would undermine the amendment provisions set out in Article X.

Interpretations may be adopted by a vote of three-quarters of WTO Members, and must be based on a recommendation from the Council charged with overseeing the relevant agreement. For example, the General Council may issue an interpretation of the Agreement on Safeguards only on the basis of a recommendation from the Council on Trade in Goods.

A Member government requesting a waiver of a MTA provision must first submit the request to the Council in charge of the agreement in question. The Council has up to 90 days to consider the request and submit a report to the General Council.

If a Member country seeks the waiver of an obligation that is subject to a transition period, such as most of the obligations in the *TRIPs Agreement*, or is subject to staged implementation, such as certain tariff cuts, there must be a consensus to grant the waiver. Waivers for other types of obligations must be agreed to by three-quarters of the Members if a consensus is not reached within 90 days after the request is received.

A decision granting a waiver must include: (1) a statement of the "exceptional circumstances" justifying the decision; (2) the terms and conditions governing the application of the waiver; and (3) the termination date of the waiver. If a waiver is granted for more than one year, the General Council will conduct an annual review to determine whether the exceptional circumstances continue to apply and whether the country granted the waiver has met any terms and conditions the General Council attached to the waiver. On the basis of this review, the General Council may extend, modify, or terminate the waiver.

The WTO waiver provisions significantly improve upon the current GATT requirements for grant of a waiver, enhance transparency in the operation of the waiver, and provide greater certainty regarding the duration and scope of the waiver. The consensus provision greatly increases the likelihood that important, but politically difficult, obligations such as those in the *TRIPs Agreement*, will be implemented. Furthermore, the three-quarters majority vote requirement increases the number of Members that must agree to the grant of any waiver.

Procedures for interpretations and waivers of the PTAs will be governed by the rules of the relevant agreement.

9. AMENDMENTS

Under Article X, any member may propose that the Ministerial Conference consider amending the *WTO Agreement* or an MTA. In addition, each of the three subordinate Councils (for trade in goods, services, and *TRIPs*) may submit proposals to amend the MTA it oversees.

During the first 90 days that the Ministerial Conference considers a proposed amendment, or any extended period the Conference may establish, it may submit the proposal to the Members for domestic ratification only if there is a consensus to do so. If the Conference cannot reach a consensus during this period, two-thirds of the Members may vote to submit the proposed amendment to the members for possible ratification.

Article X sets out rules concerning the manner in which certain types of amendments may enter into force and which members will be bound by those amendments. For example, certain provisions of the MTAs may not be amended unless all WTO members agree, and such amendments do not enter into force for any Member until all members have agreed to the amendment. These are Articles IX (decision making) and X (amendments) of the *WTO Agreement*; Articles I (MFN) and II (tariff bindings) of GATT 1994; Article II:1 (MFN) of the *GATS*; and Article IV (MFN) of the *Agreement on TRIPs*.

Two general rules apply in other cases. First, amendments affecting Member rights and obligations (by far the largest category of likely amendments) become effective on ratification by two-thirds of WTO Members, but only for those governments agreeing to the amendment. For example, if the United States does not accept a substantive amendment to the *Agreement on Agriculture,* that amendment does not apply to the United States.

However, a three-fourths majority of the Ministerial Conference may decide that an amendment of this type is so important that Members which refuse to accept it may need to withdraw from the WTO. This rule is based on a longstanding GATT provision of this nature. The GATT rule has never been invoked, despite the fact that a GATT contracting party can be requested to withdraw based on only a two-thirds majority vote.

Second, if the Conference decides by a three-quarters vote that a proposed amendment will not affect Member rights and obligations, the amendment will become effective for all Members when ratified by two-thirds of WTO governments.

Article X sets out special rules for amending the *DSU* and the *TPRM*. Any Member may propose that the Ministerial Conference consider such an amendment. Conference decisions to approve amendments to the *DSU* may only be made by consensus. The Conference may amend the *TPRM* under the normal decision-making rules of Article IX:1, that is, either by consensus or, failing a consensus, by majority vote. It should be noted, however, the *TPRM* is simply a procedural mechanism. A decision to amend the *DSU* or *TPRM* is effective for all WTO Members.

Procedures for amending the various PTAs are set out in those agreements. The Conference may add new PTAs to Annex 4 of the *WTO Agreement* only by consensus of all WTO members. On the other hand, if all members of a PTA request that the agreement be dropped from Annex 4, the General Council may decide to do so by consensus or majority vote.

10. ORIGINAL MEMBERSHIP

Article XI sets three requirements in order for a government to become an original Member of the WTO. First, a government must be a party to the GATT at the time the *WTO Agreement* enters into force. Second, the government must have accepted the *WTO Agreement* and the MTAs. Finally, the government must have submitted a "Schedule of Concessions and Commitments" for both the GATT 1994 and the *GATS*.

11. ACCESSION AND NON-APPLICATION

Governments that do not qualify as original WTO Members may accede to the *WTO Agreement* and the MTAs, as provided in Article XII. The terms of any such accession will be negotiated between the applicant government and the WTO General Council, which may approve an accession by a two-thirds vote.

Article XIII permits WTO Members not to apply the *WTO Agreement*, the MTAs, and the *DSU* to other members, subject to a number of conditions. First, a government that decides not to apply those provisions to another government may do so only at the time the government invoking non-application or the other government becomes a WTO Member. Second, the right of current GATT Contracting Parties to "non-apply" the WTO agreements to other GATT Contracting Parties will be limited to those cases where the governments concerned do not apply the GATT to each other at the time the WTO Agreement enters into force for them. In addition, governments that accede to the WTO must notify the Ministerial Conference before the Conference takes action on the accession request if they intend to "non-apply" the agreement to any WTO Member upon accession.

Non-application under the PTAs is governed by specific provisions on that subject in each such agreement.

The *WTO Agreement* provisions regarding non-application significantly improve upon the current GATT, which prohibits a GATT contracting party from engaging in tariff negotiations if it intends to invoke non-application at the time the new entrant accedes. Under Article XIII of the *WTO Agreement*, a WTO Member can engage in such negotiations, ensuring that the acceding government will apply desirable tariff rates to the member government if, at some later date, the member chooses to apply the Agreement to the acceding country.

12. ENTRY INTO FORCE

[The *WTO Agreement* entered into force on 1 January 1995.] ...

13. WITHDRAWAL

Pursuant to Article XV, a government may withdraw from the *WTO Agreement* – and thus from the MTAs – six months after the government submits written notice to the WTO Director-General. Procedures for withdrawal from the PTAs are set out in those agreements.

14. MISCELLANEOUS PROVISIONS

Article XVI makes certain provisions regarding the transition from the GATT to the WTO. For example, decisions, procedures, and customary practices established by the GATT "CONTRACTING PARTIES" will apply under the WTO. Furthermore, the GATT Secretariat is to become the Secretariat of the WTO "to the extent practicable."

Article XVI also provides that if there is a conflict between a provision of the WTO Agreement and a provision of an MTA, the *WTO Agreement* provision will take precedence to the extent of the conflict.

Paragraph four of Article XVI requires each WTO Member to ensure that its governmental measures conform with its obligations under the MTAs. This provision is

simply a restatement of the long accepted principle of public international law that countries will abide by their commitments. Paragraph four does not create obligations beyond those imposed by the MTAs.

WTO Members are not permitted to file "reservations" (*i.e.*, declare that they will not be bound by certain provisions) under the *WTO Agreement*. Governments may record reservations under the MTAs only to the extent allowed by the relevant MTA. The use of reservations under the PTAs is governed by each PTA.

15. NOTES AND ANNEXES

The annexes to the *WTO Agreement* incorporate each of the various MTAs and PTAs. Annex 1A, for example, includes each of the various "trade-in-goods" agreements that form part of the overall WTO Agreement. Among the agreements that figure in Annex 1A is the GATT 1994, which is defined to mean the 1947 text of the GATT plus:

- various legal instruments, such as waivers and accession protocols, adopted by the GATT CONTRACTING PARTIES;
- six Understandings concerning various GATT articles;
- a protocol adopted in Marrakesh when the WTO Agreement was signed;
- changes in certain GATT terms (*e.g.*, changing "contracting party" to read "Member") to make them applicable to the WTO; and
- an exception to Part II of the GATT for the *Jones Act*.

An interpretative note to Annex 1A provides that any conflict between the GATT 1994 and a provision of the other trade-in-goods agreements in the Annex will be resolved in favor of the latter.

Annex 1B of the *WTO Agreement* incorporates the *GATS*. Annex 1C sets out the *Agreement on TRIPs*. Annex 2 contains the *DSU* and Annex 3 sets out the Trade Policy Review Mechanism. The PTAs are set out in Annex 4.

III. Structural Flaws

One point the above-excerpted *Statement of Administrative Action* fails to make is how Euro-centric the WTO Secretariat is. The Secretariat staff numbers over 600. Yet, as Brazil, China, Cuba, Ecuador, India, Pakistan, and South Africa noted in a joint proposal they issued on 4 November 2009, nationals of developing and least developed countries account for only one-fifth of the employees. Roughly 80% of WTO Members are poor countries, hence the incongruity. Stunningly, nationals from five of the world's six most populous countries – China, India, Indonesia, Brazil, and Pakistan – fill just 25 Secretariat staff positions.

By contrast, nearly 70% of the Secretariat staff comes from eight developed countries: Canada, France, Germany, Spain, Switzerland, U.K., and U.S. The top five of them are France (181 nationals), U.K. (72), Spain (46), Switzerland (44), U.S. (30), and

Canada (23). To be sure, a number of European (particularly French) employees are administrators, translators, and secretaries, and there is a relative dearth of meritorious trade capacity available from developing countries. However, is the startling lack of diversity at the Secretariat entirely coincidental, or is there an overhang of traditionalist culture from the GATT era?

Another point the *Statement* does not make, which it could not have because it pre-dates experience with the WTO, is how flawed an institution the WTO is. In April 2012, WTO Director General Pascal Lamy (1947-) appointed a panel to study challenges to the global trading system in the 21st century. In January 2013, a panelist, Talal Abu Ghazaleh, Chairman and Founder of the management consulting group TAGOCorp, which is based in Jordan, issued a separate report. His report recommended the WTO:

(1) Use voting, instead of consensus, to make decisions in order to move forward more efficiently and efficiently.
(2) Hold Ministerial Conferences annually, rather than biennially.
(3) Facilitate the development of plurilateral agreements, so that a subset of Members eager to pursue trade liberalization in a particular area can do so without being hamstrung waiting for a consensus of the entire Membership.
(4) Negotiate an Internet Economy Agreement.
(5) Integrate poor countries into international services trade.
(6) Establish two permanent advisory committees, one with officials from NGOs, and the other with private sector businesspersons.

Regrettably, but not surprisingly, nothing changed.

The *Abu Ghazeleh Report* preceded the April 2013 deadline for the panel to issue its study, but followed a 2005 Report from an Advisory Panel that Peter Sutherland (1946-2018), former GATT Director General chaired. The earlier *Report* also called for annual Ministerial meetings, plus a head-of-state summit every five years. The *Sutherland Report* suggested that consensus-based decision making should be amended by a rule barring blockage by one or a small group of Members unless it can show a "vital national interest" that would be compromised if the consensus decision were adopted. It also called for a stronger Director General office. There was no follow up on any of its recommendations, either.

IV. Content of *WTO Agreement* and Four Annexes

● Overall

Overall, in the context of this Grand Bargain, the Uruguay Round produced an array of agreements. What is the relationship between GATT and the WTO?

The technical answer is GATT is one of the 13 MTAs covering goods listed in Annex 1A to the *WTO Agreement*. As a text annexed to the *WTO Agreement*, GATT is

incorporated by reference into the web of multilateral trade rules found in that *Agreement*, and throughout other texts listed in the Annexes.

There are four such annexes, with Annexes 1, 2, and 3 containing "Multilateral Trade Agreements" that were part of the single undertaking in the Uruguay Round, and Annex 4 containing "Plurilateral Agreements" that WTO Members could opt into (or not). Table 1-1 lists these Annexes to the *WTO Agreement*, and the specific "covered" agreements contained in the Annexes.

This Table should be memorized. It a fundamentally important Table. That is because this Table answers the questions "where is GATT-WTO law?" and "of what does GATT-WTO law consist?" Note that to say GATT is an "annexed" agreement and thereby incorporated by reference is to understate its contemporary importance. It remains the central substantive legal document, even the "constitution," of international trade.

- **Open versus Closed Plurilateral Agreements**

As for the Plurilateral Agreements, they include not only the most notable such Uruguay Round accord, namely, on government procurement (in Annex 4), but also post-Uruguay Round deals, such as the 1996 *ITA* and 1997 *Agreement on Financial Services* and *Agreement on Telecommunications* pursuant to the *Annexes* to *GATS*. Observe there are two species of Plurilateral Agreements: open versus closed.

With an "open" deal, all of the benefits created by the deal extend immediately and unconditionally to every WTO Member, regardless of whether the Member is a signatory to the deal and assumes its obligations. Such benefits include market access, so with an open arrangement, a non-signatory gets the benefit of the liberalized market access provided by the deal, even though that non-signatory makes no market access concessions of its own. In effect, an open deal applies the obligation of immediate, unconditional MFN treatment to all Members.

In that sense, an open plurilateral accord is not radically different from a multilateral agreement. In the first instance, by definition, a subset of Members negotiates the deal. The benefits of the deal extend to all Members, once the trade value of volume represented by the parties to the deal crosses a quantitative benchmark. In the second instance, as a practical matter, a subset of Member is engaged actively in talks. All Members get the benefit of this deal, but with no delay associated with a benchmark.

However, with an "open" deal, "immediate" may have a peculiar meaning. The unconditional extension of benefits may be conditional on a critical mass of countries joining the deal. The countries agree on a quantitative threshold – such as that the number of signatories to the deal represent 80% of the value or volume of trade in the sector in which the deal covers. This quantitative threshold triggers application of the deal to all other countries (*i.e.*, non-signatories). The *ITA* is an example. Its benefits extended to all WTO Members, whether they were a party to this plurilateral bargain or not, but only after Members representing 90% of world trade in IT products agreed to join the *ITA*.

Table 1-1
Annexes and *Agreements* Therein to *WTO Agreement*

Annex 1 **Multilateral Trade Agreements (MTAs)**
Annex 1A ***MTAs on Goods***
(1) GATT 1994, which incorporates by reference the entire 1947 GATT text. (2) *Agreement on Agriculture* (3) *Agreement on the Application of Sanitary and Phytosanitary Measures* (*SPS Agreement*) (4) *Agreement on Textiles and Clothing* (*ATC Agreement*) (5) *Agreement on Technical Barriers to Trade* (*TBT Agreement*) (6) *Agreement on Trade-Related Investment Measures* (*TRIMs Agreement*) (7) *Agreement on Implementation of Article VI of GATT 1994* (*Antidumping Agreement* or *AD Agreement*) (8) *Agreement on Implementation of Article VII of GATT 1994* (*Customs Valuation Agreement*) (9) *Agreement on Pre-shipment Inspection* (*PSI Agreement*) (10) *Agreement on Rules of Origin* (11) *Agreement on Import Licensing Procedures* (12) *Agreement on Subsidies and Countervailing Measures* (*SCM Agreement*) (13) *Agreement on Safeguards* (14) *Agreement on Trade Facilitation* (*TFA Agreement*) (added following consensus reached at 9th Ministerial Conference in Bali in December 2013 pursuant to Doha Round negotiations)
Annex 1B ***MTA on Services***
General Agreement on Trade in Services (*GATS*)
Annex 1C ***Intellectual Property***
Agreement on Trade Related Aspects of Intellectual Property Rights (*TRIPs Agreement*)
Annex 2
Understanding on Rules and Procedures Governing the Settlement of Disputes (*Dispute Settlement Understanding* or *DSU*)
Annex 3
Trade Policy Review Mechanism (*TPRM*)
Annex 4 **Plurilateral Agreements**
(1) *Agreement on Government Procurement* (*GPA*) (2) *Agreement on Trade in Civil Aircraft* Notes:

1st:
The *International Dairy Arrangement* and *Arrangement Regarding Bovine Meat*, both plurilateral accords, have expired.

2nd:
The *GPA* does not allow for free riders; its benefits extend only to WTO Members that are parties to the *GPA* and have made concessions thereunder.

3rd
The *Civil Aircraft Agreement* entered into force on 1 January 1980. It is distinct from bilateral accords between certain Members (such as the 1992 EU-U.S. arrangement allowing each side certain domestic aircraft subsidies, but from which the U.S. withdrew in 2004, which in turn led to the 2011 *Airbus* and 2012 *Boeing* Appellate Body cases that are discussed in separate Chapters). There are 33 WTO Members that are parties to this *Agreement* (as of October 2022). "The main feature of the *Agreement* is … it obliges signatories to eliminate import duties on all aircraft, other than military aircraft, as well as on all other products covered by the *Agreement*."[6] Such products "include civil aircraft engines and their parts and components, all components and sub-assemblies of civil aircraft, and flight simulators and their parts and components."[7]

The *Agreement on Trade in Civil Aircraft* entered into force on 1 January 1980.

With a "closed" deal, only participants (that is, signatories) to the deal are entitled to its benefits. Unless a Member signs the deal and makes market opening concessions of its own, it cannot make use of any market access provisions of the deal. Thus, a closed Plurilateral Agreement forbids free ridership. It adheres to the MFN obligation in an immediate, but conditional way: the condition is that only a Member that is a party to the accord gets its benefits.

Both species are found among WTO texts: the *GPA* is closed, as is the 1979 *Agreement on Trade in Civil Aircraft* (and both are in Annex 4 to the *WTO Agreement*), while (as indicated) the *ITA* is open under a "critical mass" approach. As for the 1997 *Agreement on Financial Services* and 1997 *Agreement on Telecommunications*, both of which are post-Uruguay Round deals negotiated under the auspices of the *GATS*, they fit the open pattern. Under these 1997 *Agreements*, MFN treatment is extended immediately and unconditionally to all Members, unless a specific exemption is invoked under *GATS* rules. *GATS* Article II:1 calls for immediate, unconditional MFN treatment, though Article II:2 allows a Member to derogate from that obligation by scheduling exemptions (in yet another appendix, the *Annex on Article II (MFN) Exemptions*). The *Annex on Financial Services* (specifically, Paragraph 1 of the *Second Annex*) also respects the *GATS* MFN rule of Article II, but allows for derogations from MFN treatment, and the *Annex on Telecommunications* (in Footnote 15) refers to the general *GATS* MFN rule.

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[6] World Trade Organization, *Brazil Seeks to Join Agreement on Trade in Civil Aircraft* (10 October 2022), www.wto.org/english/news_e/news22_e/air_10oct22_e.htm. [Hereinafter, *Brazil Seeks to Join*.]

[7] *Brazil Seeks to Join*.

V. Post-Uruguay Round Deals

● 1996 *ITA* and 2015 *ITA* Expansion

By no means did the Uruguay Round lead to freer, much less free, trade in all product markets. Duties remained on many agricultural and industrial products, and impediments to services traded still abounded. These matters had to be addressed in future multilateral negotiations.

However, in the aftermath of the Uruguay Round, various WTO Members sought plurilateral bargains to liberalize trade in specific sectors. The *ITA* is a case in point. Signed in 1996 by 66 WTO Members, the *ITA* removes tariffs on knowledge-based, high-technology exports. The *ITA* provides DFQF treatment to many computer-related goods. Thereafter, Members added an additional 201 products for this treatment, yielding a so-called "*ITA II*" accord that phased out tariffs across three ears (1 July of 2017, 2018, and 2019). Unlike the *GPA*, the *ITA* does permit Members to free ride. As the WTO states:

> The *GPA* aims to open up government procurement markets to foreign competition in a reciprocal manner and to the extent agreed between *GPA* parties. It also aims to make government procurement more transparent and to promote good governance. Reciprocal market opening assists *GPA* parties in purchasing goods and services that offer the best value for their money. The *Agreement* provides legal guarantees of non-discrimination for the goods, services and suppliers of *GPA* parties in covered procurement activities, which are worth [as of May 2020] an estimated USD 1.7 trillion annually.[8]

There are (as of October 2023) 49 WTO Members that are party to the WTO, but that tally includes the 27 EU states.[9] In contrast, under the *ITA*, covered goods exported from any Member can enjoy duty-free treatment from an importing Member that is a party to the *ITA*. That is true regardless of whether the merchandise originates in a Member that has made concessions under the *ITA* and become a party to it. What explains the prohibition on free ridership in the *GPA*, but not the *ITA*?

Some WTO Members also appreciated there were products not invented at the time of the *ITA* and *ITA II*, such as multi-chip integrated circuits (MCPs). An MCP enhances the functions and quality of communication devices (*e.g.*, Blackberry devices, cell phones, and digital cameras) by allowing memory and processing chips to be put in the same package. America imposed a 2.6% tariff on MCPs, the EU a 4% tariff, and Korea an 8% tariff. (Japan did not impose a tariff on MCPs.) However, in November 2005, the U.S., EU,

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[8] *See* World Trade Organization, *North Macedonia Set to Become New Party to Government Procurement Pact* (7 June 2023), www.wto.org/english/news_e/news23_e/gpro_07jun23_e.htm; World Trade Organization, *Brazil Submits Application to Join Government Procurement Pact*, (18 May 2020), www.wto.org/english/news_e/news20_e/gpro_19may20_e.htm.

[9] *See* World Trade Organization, *Agreement on Government Procurement – Parties, Observers, and Accessions*, www.wto.org/english/tratop_e/gproc_e/memobs_e.htm. Switzerland and the U.K. (post-Brexit) joined on their own right effective 1 January 2021.

Japan, Korea, and Taiwan agreed to provide duty-free treatment to MCPs (as of 1 January 2006). This post-Uruguay Round deal is plurilateral. But, the five founding Members account for 70% of world MCP production. (Major manufacturers include Intel, Micron, and Texas Instruments.) Once Members accounting for 90% of production sign, the deal is considered a multilateral WTO compact.

In July 2015, 54 of the then 81 WTO Members that joined the *ITA* agreed to a further expansion of the *ITA* – a new plurilateral accord within the foundational one – and finalized the accord at the December 2015 Ministerial Conference in Nairobi. They added 201 IT products to the duty-free list, phasing out tariffs on them across three years starting in July 2016. The items included GPS navigation systems, medical products that have magnetic resonance imaging machines, machine tools for manufacturing printed circuits, new-generation semi-conductors, telecommunications satellites, and touch screens.

- **December 2013 Bali Package and Interests of Poor**

Following the ninth WTO Ministerial Conference held in December 2013 in Bali, Indonesia, is it right to cast doubt on the first of the three legs of the WTO, the negotiating function? Is it an obscure international discussion forum? "Yes," given the results (or lack thereof) from the Doha Round. As an Ambassador to the WTO said in November 2013, when it appeared no agreements would be reached for the December 2013 Bali Ministerial Conference: "WTO, R.I.P."[10] "No," because Members agreed to a "Bali Package." With their consensus, the Director General, Roberto Azevêdo declared with relief: "We have put the 'World' back into the 'World Trade Organization.'"[11]

But, had rich country interests dominated the WTO agenda, with the poor yet to see significant, tangible results? Query whether in reality what occurred in Bali was that "W," as in "Wal Mart," remained as a "W" in "WTO." The giddiest reaction to what the *Financial Times* described as "a relatively modest package to help businesses get their products through borders more easily" came from Wal Mart and other American MNCs, such as Caterpillar and UPS.[12] Likewise, Euro-Commerce, the association for European retailers and wholesalers, embraced the Bali Package. To be sure, few if any trade agreements gain traction among politicians without the support of the business community. The question is of balance given the relatively smaller voice of the poor.

The key Package elements were a *Decision on an Agreement on Trade Facilitation*, and a *Decision on Public Stockholding for Food Security Purposes*.[13] Each *Decision* was replete with meaningless text. Instead of impose hard law obligations, each relied on

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[10] *Quoted in* Daniel Pruzin, *WTO Chief Admits Defeat in Efforts To Secure Bali Package of Trade Deals*, 30 International Trade Reporter (BNA) 1870 (5 December 2013).

[11] *Quoted in* World Trade Organization, Ninth WTO Ministerial Conference, *Days 3, 4, and 5: Round-the-Clock Consultations Produce "Bali Package – The Concluding Remarks,"* 5-7 December 2013, *posted at* www.wto.org.

[12] Shawn Donnan, *WTO Comes Back to Life with Signing of Trade Deal*, FINANCIAL TIMES, 9 December 2013, at 2.

[13] *See* WT/MIN(13)/W/8 (6 December 2013), www.wto.org, and WT/MIN(13)/W/10 (6 December 2013), www.wto.org, respectively.

aspirational language and future work programs. To be fair, in Bali, Members expressed their desire to complete a revised *GPA*, which they did in March 2014, and which took effect in April. The revision entailed new (1) market access commitments for goods and services scheduled by governmental ministries and agencies not previously open to foreign bidding, (2) standards on the use of electronic tools for procurement, and (3) anti-corruption measures, plus (4) promotion of appropriate technical specifications in procurement to conserve natural resources and protect the environment.

Still, after 12 years, the Round had not achieved its original purposes: boosting trade to alleviate poverty and, in turn, fight Islamist extremism. Members failed to agree on binding cuts to tariffs on agricultural or industrial goods, farm subsidies, or services trade barriers, and to limits on trade remedies. These failures cast doubt on the utility of the WTO as a negotiation venue.

What could the Director General do to avoid such failures? Under the *WTO Agreement*, the Director General has little authority, other than moral, to persuade Members to adopt an agreement. The Members drive this IO, so it is as effective and efficient a negotiating forum as they allow it to be.

VI. June 2022 MC12 Geneva Package and WTO Future Credibility

WTO Members needed to extend by two days MC12 so as to secure a set of 10 instruments they hyped as "unprecedented" and said "confirm[ed] the historical importance of the multilateral trading system and underlines the important role of the WTO in addressing the world's most pressing issues, especially at a time when global solutions are critical."[14]

> The World Trade Organization agreed on the first change to global trading rules in years … [the *Fisheries Subsidies Agreement*, noted below and discussed in a separate Chapter,] as well as a deal to boost the supply of COVID-19 vaccines [also discussed in a separate Chapter] in a series of pledges that were heavy on compromise. [Technically, the *Fisheries Agreement* was the third change to GATT-WTO treaties since the 1986-1994 Uruguay Round: the first was the *TRIPs Agreement* Article 31 compulsory license amendments, and the second was the *TFA*; the Fisheries Agreement and TFA represent the only post-Uruguay Round multilateral agreements. Both are discussed in a separate Chapter.]
>
> The [MC12] deals were forged in the early hours of the sixth day of a [Ministerial] Conference of more than 100 Trade Ministers that was seen as a test of the ability of nations to strike multilateral trade deals amid geopolitical tensions heightened by the Ukraine war.
>
> …
>
> Director General Ngozi Okonjo-Iweala told them: "The package of

[14] World Trade Organization, *WTO Members Secure Unprecedented Package of Trade Outcomes at MC12*, 17 June 2022, www.wto.org/english/news_e/news22_e/mc12_17jun22_e.htm.

> agreements you have reached will make a difference to the lives of people around the world. The outcomes demonstrate that the WTO is in fact capable of responding to emergencies of our time."
>
> Earlier she had appealed to WTO Members to consider the "delicate balance" required after nearly round-the-clock talks that have at times been charged with anger and accusations.
>
> …
>
> "It was not an easy process. There were a lot of bumps, just like I predicted. It was like a roller coaster, but in the end we got there," an exhausted but elated Okonjo-Iweala told a final news conference. [15]

Was Dr. Okonjo-Iwela correct? Has the WTO Members passed the test amidst not only the conflict in Ukraine, but also the Sino-American Trade War (discussed in a separate Chapter)? Or, was Prabhash Ranjan, Vice Dean and Professor, Jindal Global Law School (India), closer to the mark with his assessment:

> 164 countries, in a desperate act, have pulled the World Trade Organization *back from the brink of worthlessness* by managing to cobble together a deal at the recently concluded 12th Ministerial Conference at Geneva. Another failure of a high-profile WTO Ministerial meeting would have been an unmitigated disaster for the *already moribund Organization*. The deal – a package of agreements … – provides a *semblance of hope for trade multilateralism* that, of late, has been battered and bruised by rising protectionism and countries entering into plurilateral trade agreements.
>
> …
>
> The Geneva Ministerial has achieved the *bare minimum to give a much-needed face-saver to the WTO as a multilateral trade institution and thus keep it alive and kicking. The road ahead is long and arduous.*[16]

He certainly is correct in stating "one has to *read the fine print* to separate the grain from the chaff to discover the good, the bad, and the ugly of the Geneva Ministerial [Conference]."[17]

So, ultimately, the WTO Members agreed on the so-called "Geneva Package" during their 12-17 June 2022 after "more than five gruelling days of negotiations."[18] That Package consisted of:

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[15] Emma Farge & Philip Blenkinsop, *WTO Strikes Global Trade Deals After "Roller Coaster" Talks*, REUTERS, 17 June 2022, www.reuters.com/markets/commodities/wto-chief-urges-countries-accept-unprecedented-package-trade-agreements-2022-06-17/.

[16] Prabhash Ranjan, *WTO Ministerial Meeting: The Good, The Bad, And The Ugly*, BQ PRIME (Mumbai), 20 June 2022, www.bqprime.com/opinion/wto-ministerial-meeting-the-good-the-bad-and-the-ugly. (Emphasis added.) [Hereinafter, *WTO Ministerial Meeting: The Good*.]

[17] *WTO Ministerial Meeting: The Good*.

[18] *Fact Box: What Has the WTO Ministerial Conference Achieved?*, REUTERS, 17 June 2022, www.reuters.com/world/what-has-wto-ministerial-conference-achieved-2022-06-17/. [Hereinafter, *Fact Box: What Has the WTO Ministerial.*]

(1) The *MC12 Outcome Document*.[19]

(2) Four documents on the WTO's response to emergencies, namely:

(a) *Ministerial Declaration on the Emergency Response to Food Insecurity* [discussed in a separate Chapter].[20]

(b) *Ministerial Decision on World Food Program (WFP) Food Purchases Exemptions from Export Prohibitions or Restrictions*.[21]

(c) *Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics* [excerpted below].[22]

(d) *Ministerial Decision on the Agreement on Trade-Related Aspects of Intellectual Property Rights* [excerpted below].[23]

(3) *Decision on the E-Commerce Moratorium and Work Program* [discussed in a separate Chapter].[24]

(4) *Agreement on Fisheries Subsidies* [discussed in a separate Chapter].[25]

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[19] *See* World Trade Organization, *MC12 Outcome Document – Draft*, WT/MIN(22)/W/16/Rev.1 (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 16 June 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W16R1.pdf&Open=True.

[20] *See* World Trade Organization, *Draft Ministerial on the Emergency Response to Food Insecurity*, WT/MIN(22)/W/17/Rev.1 (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 16 June 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W17R1.pdf&Open=True.

[21] *See* World Trade Organization, *Draft Ministerial Decision on World Food Program Food Purchases Exemption from Export Prohibitions or Restrictions*, WT/MIN(22)/W/18 (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 10 June 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W18.pdf&Open=True

[22] *See* World Trade Organization, *Draft Ministerial Declaration on the WTO Response to the COVID-19 Pandemic and Preparedness for Future Pandemics*, WT/MIN(22)/W/13 (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 10 June 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W13.pdf&Open=True.

[23] *See* World Trade Organization, *Draft Ministerial Declaration on the TRIPs Agreement – Revision*, WT/MIN(22)/W/15/Rev.2 (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 17 June 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W15R2.pdf&Open=True.

[24] *See* World Trade Organization, *Work Program on Electronic Commerce, Draft Ministerial Decision of 16 June 2022*, WT/MIN(22)/W/23 (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 16 June 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W23.pdf&Open=True.

[25] *See* World Trade Organization, *Agreement on Fisheries Subsidies – Draft Ministerial Decision of 17 June 2022*, WT/MIN(22)/W/22 (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 17 June 2022), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W22.pdf&Open=True

(5) *Decision on the Work Program on Small Economies*.[26]

(6) *Decision on the TRIPS Non-violation and Situation Complaints* [discussed in a separate Chapter].[27]

(7) *Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges*.[28]

(As indicated, each of these instruments is discussed, as appropriate, below or in a separate Chapter.)

The WTO's self-characterization of its accomplishments was over-blown. Only instruments 2(d) and four were of significant substantive importance. Instrument (1) (excerpted below) was largely a summation document about well-known structural headaches. The most important passages of this document concerned S&D treatment for poor countries and the Appellate Body candidate blockage that had hobbled the *DSU* since December 2019 (both discussed in separate Chapters):

> All WTO Members say the Organization's rule book needs updating, although they disagree on what changes are required.
>
> Most pressingly, its dispute appeals court has been paralyzed for nearly two years since then-U.S. President Donald Trump blocked new adjudicator appointments, which has curbed the WTO's ability to resolve trade disputes.
>
> Members committed to work towards necessary reforms of the WTO to improve its functions. This work should be transparent and address the interests of all Members, including developing countries, which are afforded special treatment.
>
> The WTO committed to conduct discussions so as to have a fully functioning dispute settlement system by 2024.
>
> The *Declaration* highlighted the growing importance of services trade and the need to increase the participation of developing countries.

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[26] *See* World Trade Organization, *Work Program on Small Economies – Draft Ministerial Decision*, WT/MIN(21)/W/3 (Ministerial Conference, Twelfth Session, Geneva, 30 November-3 December 2021, 23 November 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/W3.pdf&Open=True.

[27] *See* World Trade Organization, *TRIPs Non-Violation and Situation Complaints*, *Draft Ministerial Decision*, WT/MIN(21)/W/4 (Ministerial Conference, Twelfth Session, Geneva, 30 November-3 December 2021, 23 November 2021), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN21/W4.pdf&Open=True.

[28] *See* World Trade Organization, *Sanitary and Phytosanitary Declaration for the Twelfth WTO Ministerial Conference: Responding to Modern SPS Challenges* (Ministerial Conference, Twelfth Session, Geneva, 12-15 June 2022, 16 June 2022, General Council, Committee on Sanitary and Phytosanitary Measures), WT/MIN(22)/W/3/Rev.3, WT/GC/W/835/Rev.6, G/SPS/GEN/1758/Rev.15, https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W3R3.pdf&Open=True.

> The Members also recognized global environmental challenges including climate change and related natural disasters, loss of biodiversity and pollution. Some experts believe issues about the environment have the potential to give the body a new vitality and purpose.[29]

Instrument 2(a) contained no new substantive ideas, and plainly failed to discipline agricultural subsidies or set rules for PSH for food security purposes. Paragraph 5 was its most impressive provision:

> 5. We resolve to ensure that any emergency measures introduced to address food security concerns shall minimize trade distortions as far as possible; be temporary, targeted, and transparent; and be notified and implemented in accordance with WTO rules. Members imposing such measures should take into account their possible impact on other Members, including developing countries, and particularly least-developed and net food-importing developing countries.

Likewise, instrument 2(b) contained no new substantive ideas, nor did it presage an expansion of resources to assist the WFP in its mission to "fight hunger in places hit by conflicts, disasters and climate change."[30] This document articulated the "do no harm" principle, hence it stated:

> 1. Members shall not impose export prohibitions or restrictions on foodstuffs purchased for non-commercial humanitarian purposes by the World Food Program.
> 2. This *Decision* shall not be construed to prevent the adoption by any Member of measures to ensure its domestic food security in accordance with the relevant provisions of the WTO agreements.

Instrument (3) was the extension of an existing agenda and moratorium, stating:

> We shall intensify discussions on the moratorium and instruct the General Council to hold periodic reviews based on the reports that may be submitted by relevant WTO bodies, including on scope, definition, and impact of the moratorium on customs duties on electronic transmissions.
>
> We agree to maintain the current practice of not imposing customs duties on electronic transmissions until MC13, which should ordinarily be held by 31 December 2023. Should MC13 be delayed beyond 31 March 2024, the moratorium will expire on that date unless Ministers or the General Council take a decision to extend.

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29 *Fact Box: What Has the WTO Ministerial.*

30 *Fact Box: What Has the WTO Ministerial.*

That is:

> WTO Members … extended a moratorium on placing customs duties on electronic transmissions, from streaming services to financial transactions and corporate data flows, worth hundreds of billions of dollars a year.
>
> The moratorium has been in place since 1998. South Africa and India had initially opposed an extension, saying they should not be missing out on customs revenues.
>
> The extension runs to the next ministerial conference, which would normally be held by the end of 2023, but in any case will expire on March 31, 2024.[31]

Likewise, instrument (5), the text of which had been set in November 2021, did nothing more than reaffirm an existing work agenda extant since 2018. Instrument (6) was the same as (5) – a text dating from November 2021, which did nothing more than extend of an existing *Decision*. Since when are such extensions "unprecedented" in the sense of ushering in a noteworthy final deal? As for instrument (7), it was a set of anodyne acknowledgements about SPS implications associated with the international trade in food, animals, and plants, and the establishment of a work program on them. What better way to safeguard institutional existence than create yet another such program, wilfully blind to the reality the institution failed to complete its other agendas it set years, even decades, ago?

Instrument 2(c) was notable, though predictable, in that it discussed the WTO's "response to COVID-19 and preparedness for future pandemics, [and] stress[ed] the needs of least developed countries," "recognized that any emergency trade measures should be proportionate and temporary and not cause unnecessary disruptions to supply chains," and exhorted Members to "exercise restraint in imposing export restrictions on essential medical goods."[32] So, of the 10 instruments comprising the MC12 Geneva Package, only instruments 2(d) and 4 were of significant substantive importance.

In examining instrument (1) below, note the breadth and depth of WTO activities. Which are traditional trade items, and which represent an expansion of the WTO's agenda? Is the WTO at risk of succumbing to mission creep? Or, is trade inherently such a wide field that it is proper for the Organization to foster a changing agenda?

WORLD TRADE ORGANIZATION, *MC12 OUTCOME DOCUMENT – DRAFT* REVISION*, WT/MIN(22)/W/16/REV.1 (MINISTERIAL CONFERENCE, TWELFTH SESSION, GENEVA, 12-15 JUNE 2022, 16 JUNE 2022)[33]

We, the Ministers, have met in Geneva from 12 to 16 June 2022 for our Twelfth Session.

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31 *Fact Box: What Has the WTO Ministerial.*

32 *Fact Box: What Has the WTO Ministerial.*

33 https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN22/W16R1.pdf&Open=True.

1. We resolve to strengthen the rules-based, non-discriminatory, open, fair, inclusive, equitable and transparent multilateral trading system with the WTO at its core. In this regard, we reaffirm the principles and objectives set out in the *Marrakesh Agreement Establishing the World Trade Organization* and underscore the relevance and critical role of international trade and the WTO in global economic recovery, growth, prosperity, alleviation of poverty, welfare of all people, sustainable development and to facilitate cooperation in relation to the protection and preservation of the environment in a manner consistent with respective needs and concerns at different levels of economic development.

2. We reaffirm the provisions of special and differential treatment for developing country Members and LDCs as an integral part of the WTO and its agreements. Special and differential treatment in WTO agreements should be precise, effective and operational. In addition, we recall that trade is to be conducted with a view to raising standards of living, ensuring full employment, pursuing sustainable development of Members, and enhancing the means for doing so in a manner consistent with Members' respective needs and concerns at different levels of economic development. We instruct officials to continue to work on improving the application of special and differential treatment in the CTD SS and other relevant venues in the WTO, as agreed and report on progress to the General Council before MC13.

3. We acknowledge the need to take advantage of available opportunities, address the challenges that the WTO is facing, and ensure the WTO's proper functioning. We commit to work towards necessary reform of the WTO. While reaffirming the foundational principles of the WTO, we envision reforms to improve all its functions. The work shall be Member-driven, open, transparent, inclusive, and must address the interests of all Members, including development issues. The General Council and its subsidiary bodies will conduct the work, review progress, and consider decisions, as appropriate, to be submitted to the next Ministerial Conference.[1]

4. We acknowledge the challenges and concerns with respect to the dispute settlement system including those related to the Appellate Body, recognize the importance and urgency of addressing those challenges and concerns, and commit to conduct discussions with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024.

5. In this difficult context, we note with satisfaction the progress achieved by LDC Members who have met or who are about to meet the graduation criteria set by the United Nations Committee for Development Policy (CDP) and acknowledge the particular challenges that graduation presents, including the loss of trade-related international support measures, as they leave the LDC category. We recognize the role that certain measures in the WTO can play in facilitating smooth and sustainable transition for these Members after graduation from the LDC Category.

6. We underscore the importance of accessions, noting that although no new accession has taken place since July 2016, several applicants have made encouraging progress. In this regard, we remain committed to facilitate the conclusion of ongoing accessions, especially for least-developed countries fully in line with the General Council Guidelines on LDC Accessions, and to provide technical assistance, where appropriate, including in the post-accession phase.

7. We recognize the special situation of the Members acceded in accordance with Article XII of the *Agreement Establishing the World Trade Organization* who have undertaken extensive commitments at the time of accession, including in market access. This situation shall be taken into account in negotiations.

8. We reaffirm our *Decision* at the Tenth Ministerial Conference in Nairobi on *Implementation of Preferential Treatment in Favor of Services and Service Suppliers of Least Developed Countries and Increasing LDC Participation in Services Trade*, and instruct the Council for Trade in Services to review and promote the operationalization of the waiver including to explore improvements in LDC services export data; to review information on LDC services suppliers and consumers of LDC services in preference providing Member markets; and to assess best practices in facilitating the use of the preferences. On this matter, we instruct the General Council to report to our next session on progress.

   We reaffirm our *Decision* at the Ninth Ministerial Conference in Bali on *Duty-Free Quota-Free Market Access for Least-Developed Countries* and instruct the Committee on Trade and Development to re- commence the annual review process on preferential DFQF market access for LDCs. On this matter, we instruct the General Council to report on the progress to our next session.

   We welcome the *Decision* of the Committee on Rules of Origin (CRO) adopted on 14 April 2022 (G/RO/95) on *Preferential Rules of Origin and the Implementation of the Nairobi Ministerial Decision*. We instruct the CRO to report its work to the General Council ahead of the Thirteenth Ministerial Conference.

   We also acknowledge LDCs' commitment and efforts in implementation of the *TFA*. We urge all Members to assist the LDCs in meeting their definitive Category C deadlines.

   We recognize the importance of Aid for Trade initiatives in trade-related capacity building for the LDCs. We recommend that such programs prioritize the objectives identified by the LDCs.

9. We instruct the Trade Facilitation Committee to hold a Dedicated Session on transit issues annually until the next review of the *Trade Facilitation Agreement* is completed. These dedicated sessions will highlight the importance of transit and reserve time for the Committee to discuss best practices, as well as the constraints

and challenges faced by all landlocked WTO Members, including landlocked developing countries and LDCs as outlined in G/TFA/W/53.

10. Services trade is vital to the global economy and has a major role to play in global economic output and employment. The COVID-19 pandemic has highlighted the importance of services and has had a significant impact on services trade and services sectors, particularly for developing Members, including least developed countries (LDCs). We underscore the importance of recovery for services most impacted by the pandemic and of efforts to strengthen such services, taking into account challenges and opportunities encountered by Members. We acknowledge the need to facilitate the increasing participation of developing Members, including LDCs, in global services trade, including by paying particular attention to sectors and modes of supply of export interest to them. We take note of work in the area of trade in services.

11. We take note of the reports from the General Council and its subsidiary bodies. These reports, and the Decisions stemming from them demonstrate Members' continued commitment to the work of the WTO, thereby strengthening its effectiveness and the multilateral trading system as a whole.

12. We recognize the importance of strengthened collaboration and cooperation with other intergovernmental organizations and other relevant stakeholders that have responsibilities related to those of the WTO, in accordance with the rules and principles of the WTO, to restore trust, certainty and predictability in the world economy and effectively address current and future multidimensional challenges.

13. We recognize women's economic empowerment and the contribution of MSMEs to inclusive and sustainable economic growth, acknowledge their different context, challenges and capabilities in countries at different stages of development, and we take note of the WTO, UNCTAD, and ITC's work on these issues.[2]

14. We recognize global environmental challenges including climate change and related natural disasters, loss of biodiversity and pollution. We note the importance of the contribution of the multilateral trading system to promote the U.N. 2030 Agenda and its Sustainable Development Goals in its economic, social, and environmental dimensions, in so far as they relate to WTO mandates and in a manner consistent with the respective needs and concerns of Members at different levels of economic development. In this regard, we reaffirm the importance of providing relevant support to developing country Members, especially LDCs, to achieve sustainable development, including through technological innovations. We note the role of the Committee on Trade and Environment as a standing forum dedicated to dialogue among Members on the relationship between trade measures and environmental measures.

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* This draft text is without prejudice to Members' positions and to any action that

Ministers may decide to take.

1. For greater certainty, in this context, this does not prevent groupings of WTO Members from meeting to discuss relevant matters or making submissions for consideration by the General Council or its subsidiary bodies.

2. These are general messages on cross cutting issues that do not change the rights or obligations of WTO Members (and do not relate to any Joint Statement Initiatives).

Chapter 2

GATT-WTO ACCESSION PROCESS[34]

I. Original GATT Contracting Parties and Accession

GATT Article XXVI contains provisions on entry into force of GATT. As Article XXXII specifies, the "contracting parties" are those countries that are original (*i.e.*, founding) parties to GATT or that subsequently acceded to GATT. Article XXVI is relevant to the original contracting parties, whereas Article XXXIII establishes the process of accession for countries that are not founding members. The 23 original contracting parties are:

Australia
Belgium
Brazil
Burma (Myanmar)
Canada
Ceylon (Sri Lanka)
Chile
China[35]

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[34] Documents References:
(1) GATT Articles XXVI, XXXI-XXXIII, XXXV
(2) *WTO Agreement*

[35] Following China's original contracting party status, its withdrawal is a fascinating historical tale:

> The former Republic of China was an original GATT contracting party, but later internal political upheaval led to its withdrawal. On October 1, 1949, the PRC was founded, and the tattered remains of Chiang Kai-shek's [1887-1975, President of the Republic of China, 1950-1975] Nationalist government [*i.e.*, that of the *Kuomintang*, or *KMT*] fled to Taiwan. On March 6, 1950, the U.N. Secretary General received a communication from officials in Taiwan indicating that "China" was withdrawing from GATT. The withdrawal took effect on May 5, 1950.
>
> The Mainland Communist government did not recognize the Nationalists' action, and contested the validity of this withdrawal. It argued that the withdrawal was null and void because it was attempted when the Communists controlled the mainland, hence Chiang Kai-shek's government did not have the right to represent China. Put in public international law terms, the PRC argued for application of the law of succession - it should be recognized as the legitimate successor government in China. In rebuttal, however, it can be said that the "China" that was an original contracting party and the "China" that withdrew was the Republic of China, headed by Chiang's Nationalists. The Communist government on the mainland represented a different sovereign entity; a China that had never been a part of GATT. In other words, the PRC was not a successor government to the Nationalist one, but an entirely new creature. Plainly, the arguments involve politically charged questions of recognition, and whether there is one China or two. Whatever the merits of the conflicting positions, the fact is that for the twenty years following the withdrawal, the PRC played virtually no role in GATT affairs. Mao Zedong [1893-1976, CCP Chairman, 1943-1976] simply did not much care about them.

Cuba
Czechoslovakia
France
India
Lebanon
Luxembourg
Netherlands
New Zealand
Norway
Pakistan
Southern Rhodesia (Zimbabwe)
Syria
South Africa
United Kingdom
United States

> In January 1965, the CONTRACTING PARTIES granted Taiwan's request to join GATT as a non-voting observer. In 1971 the U.N. General Assembly voted to restore all the rights of China in the U.N. to the PRC. Accordingly, the PRC became a full member of the General Assembly and permanent member of the Security Council. Additionally, the PRC obtained representation in specialized U.N. agencies. While GATT was not such an agency (nor is the WTO), GATT followed U.N. policy decisions. In seating the PRC delegation, the U.N. decided the PRC was the sole legitimate government of China. Hence, GATT revoked Taiwan's observer status. Curiously, the PRC elected not to seek membership in GATT in 1971 – and an otherwise auspicious year for the PRC's international status. The reasons for this decision may lie in the internal upheaval in the PRC associated with the Cultural Revolution of 1966-76, the preoccupation of PRC leaders with President Nixon's [1913-1994, President, 1969-1974] dramatic "opening" to China, or perhaps even Mao's declining health.

Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1469, 1477-1478 (2000).

But, why did China withdraw in 1950? There are no publicly available records of the event. The answer appears to be a mixture of national security and economic reasons. The Nationalist government in control of Taiwan anticipated Mainland China would industrialize rapidly and benefit from foreign market access for its manufactured items thanks to MFN treatment under GATT Article I:1, which in turn would be a basis for CCP power *vis-à-vis* Taiwan. At the time, the economy of the island of Formosa (Taiwan) was relatively agrarian. So, the Nationalists in Taiwan sought to dent the Communists on the Mainland the benefits of GATT. In fact, it was Taiwan that industrialized rapidly after the Chinese Civil War (1927-1950), and the Mainland that, turning inward, failed to do so for several decades. Thus, apparently at the urging of Ministry of Finance officials in Taiwan, the fateful communication of China's withdrawal was sent to the GATT Secretariat. Notably, as of January 2019, the two sides have never signed an armistice or peace treaty. That same month, PRC President Xi Jinping [1953-, President, 2013-] said Taiwan "must and will be" reunited by China, and reserved the right to use military force toward that end; conversely, Taiwanese President Tsai Ing-Wen [1956-, President, 2016-] declared "Taiwan will never accept 'one country, two systems,'" as "[t]he vast majority of Taiwanese public opinion also resolutely opposes 'one country, two systems.'" *Quoted in Xi Jinping Says Taiwan Must and Will Be Reunited with China*, BBC NEWS, 2 January 2018, www.bbc.com/news/world-asia-china-46733174.

Article XXX:1 states that amending GATT requires either a two-thirds or unanimous vote of the CONTRACTING PARTIES, depending on the provision being amended. A two-thirds vote is required to amend Article XXXIII.

GATT Article XXXIII is minimalist in content, and Article XII of the *WTO Agreement* is little more than an echo of the GATT provision. GATT Article XXXIII says a government that is not a party to GATT (or a government acting on behalf of a separate customs territory that possesses full autonomy in its external commercial relations) can accede to GATT. That government must do so on terms agreed to between the government and the CONTRACTING PARTIES. Then, the CONTRACTING PARTIES must approve a decision in favor of accession by a two-thirds majority. (The minority of existing members that do not want to deal with the new party have the option of non-application under Article XXXV of the GATT and Article XIII of the *WTO Agreement*.) Over time, GATT practice developed to fill in details unspoken by Article XXXIII.

II. Two Step Accession Process

Since 1 January 1995, when the WTO was born, dozens of countries have joined as Members – 36 to be exact, bringing the total to 164 (as of August 2016).[36] It took each of those 36 countries an average of 10 years to join. Some took far longer. The Seychelles needed 18 years. A few years later (as of February 2024, with effect in March), the Membership number climbed only by two, to 166 Members, with the terms of accession for Comoros and Timor Leste approved at MC 13 in Abu Dhabi.[37] The Working Party for the Comoros accession had been established in October 2007, and that for Timor Leste in December 2016 – meaning processes of about 17 years and 7 years, respectively. How did such countries become Members, and why did it take so long?

● Negotiating Bilateral Concession Agreements

Conceptually and in practice, accession is a two-step process. First, a government seeking accession – the applicant – must negotiate bilateral concession agreements with each WTO Member individually that asks the government to do so. Collectively, Members requesting bilateral agreements are referred to as an "accession Working Party." The bilateral deals embody promises the applicant makes to individual Members about opening the applicant's market to goods and services from those Members. They should not be confused with previously-negotiated deals the applicant may have made with Members. At issue here are new agreements, or at least, revisions to existing agreements. These new pacts are the price of admission into the GATT-WTO system.

The need for the first step is not apparent from GATT Article XXXIII, which after all speaks of the joint action of the CONTRACTING PARTIES. Still, it has become indispensable. What Members will ask for bilateral concession agreements? Those

[36] Accession commitments of Members that joined following the birth of the WTO on 1 January 1995 are at the Accession Commitments Data Base, http://acdb.wto.org/.

[37] *See* World Trade Organization, *Ministers Approve WTO Membership of Comoros and Timor-Leste at MC13* (26 February 2024), www.wto.org/english/news_e/news24_e/acc_26feb24_e.htm.

members that have a keen export interest in the applicant's market. Therefore, the first step can be a tedious process.

For commercially and politically significant applicants like the PRC and Taiwan, many Members are sure to ask for bilateral deals. Roughly 40 WTO Members asked the PRC for bilateral concession agreements (including Australia, Brazil, Canada, Chile, EU, Hungary, India, Japan, New Zealand, Norway, Switzerland, and the U.S.), and about 26 Members (including Hong Kong and the U.S.) asked Taiwan for such deals. Saudi Arabia and Russia are other examples where many existing Members wanted bilateral agreements. The bilateral agreements need not be identical – indeed, it is unlikely they will be. The Members will have some common, and some different, export interests. For example, in August 1998 Taiwan completed its bilateral agreement with the U.S. Taiwan offered greater market-opening concessions to American agricultural products (specifically, beef and port innards, and chicken) than it had agreed to in its deals with the EU and Japan.

- ***Protocol***

The second step is the negotiation of a *Protocol of Accession* with all WTO Members, *i.e.*, with the WTO as a whole. Technically, the *Protocol* is not the same thing as the decision of the CONTRACTING PARTIES referred to in GATT Article XXXIII. The decision is taken, and a separate protocol is drafted and approved. Thus, it could be said that accession actually involves three steps: bilateral deals; the decision; and the *Protocol*.

Obviously, the *Protocol* will not be agreed to unless the first step is accomplished. Why? Because if the demands of several Members for bilateral concession agreements remain unsatisfied, then why would those Members support accession? (To be sure, if only a few Members remain unsatisfied, then they could invoke the non-application provisions of the GATT and *WTO Agreement*.) At the same time, successful completion of the first step is no guarantee negotiating an *Accession Protocol* will be easy. To make matters even more complicated, the two steps may overlap.

The *Protocol* represents the terms of entry into the WTO. It is, in effect, a contract between the acceding party and the Members in their joint capacity (the CONTRACTING PARTIES, in the language of GATT Article XXXIII). As such, it implies the Members in their joint capacity are a separate legal entity under international law. Many of the arrangements made in the bilateral concession agreements become multilateralized through the *Protocol*. In fact, the bilateral deals are incorporated into a Schedule of Concessions, one for goods, and one for services, which are sent with the *Protocol*, along with a Report from the Working Party, to the WTO General Council for approval.

In addition, the *Protocol* outlines the applicant's current trade laws and policies, and the differences between that regime and the minimum GATT-WTO requirements. The *Protocol* explains how – and when – the applicant intends to correct these differences. Thus, for example, there might be a gap between the applicant's sanitary rules and the *SPS Agreement*, or its copyright laws and the *TRIPs Agreement*. The *Protocol* will identify these problem areas, and set out the agreed plan of action for dealing with them.

Finally, an applicant may want its *Protocol* to indicate its status as a developing, or even least developed, country so as to take advantage of special and differential treatment afforded by many Uruguay Round agreements for such countries. The PRC, for example, argued vociferously – but, ultimately, unsuccessfully – for across-the-board developing country status. Many WTO Members may see such arguments as a ruse to avoid trade obligations for as long as possible. Indeed, aside from the problem of status, the question of "when?" often is crucial. For an admixture of domestic political and economic reasons, an applicant may want to procrastinate cutting or eliminating tariff and NTBs. Extant Members are sure to pursue the opposite goal in the *Protocol* negotiations.

- **Urgency**

Amidst these negotiations may be a sense of urgency, particularly by the applicant. The longer the negotiations drag on, the more likely the terms of entry will become more onerous. Why? Because WTO Members will agree among themselves to new trade liberalizing initiatives.

For example, suppose a new trade negotiating round commences and results in a major market-opening deal on agriculture. A country that acceded before the new round would have had the opportunity to shape the terms of this deal, and in particular, make sure it can live with those terms. A country seeking accession after the round will be stuck with the deal negotiated by others. Moreover, to use a track-and-field metaphor, "the bar will get raised." Many of the pre-round concessions the applicant made in bilateral negotiations during the first step of the accession process may, after the round, be deemed inadequate. After all, if the new round leads to greater liberalization among the Members, then more will be expected of the applicant.

In the PRC case, the sense of urgency spilled over to Taiwan. Taiwan was concerned that if it was not a WTO Member by the time a new multilateral trade round (at the time, billed the "Millennium Round") was supposed to have commenced (early 2000), then the concessions it had made in its bilateral agreements would be deemed inadequate by the WTO Members. Taiwan feared it would have no choice but to liberalize more quickly, and risk the shock that import surges would inflict on its economy that rapid liberalization would entail. Taiwan considered backing away from its "down payment" market access measures made to the U.S. if it did not gain WTO Membership in the near future. Why implement these measures on the assumption of imminent accession if that event was far off? There was the "rub." Politically, Taiwan could not become a WTO Member before the PRC. Thus – somewhat ironically – Taiwan was quite eager to see the PRC accede.

- **Shared Interests**

This irony suggests that despite difficulties and complexities, negotiations on bilateral agreements and the *Protocol* ought not to be analogized to a war, or even a non-violent zero-sum game. As to most if not all applicants, there is a shared interest among

the applicant and WTO Members that the applicant be brought into the "Club." That shared interest may spill over to other applicants in the queue, as in the PRC-Taiwan case. As long as an applicant remains outside the WTO, it bears no multilateral trade obligations whatsoever. The applicant is responsible for performing only those requirements it previously took on via regional or bilateral trade and investment treaties.

Likewise, WTO Members bear no multilateral obligations to the applicant, and are liable only for the obligations they have previously assumed through a direct deal with the applicant. By joining the WTO, trade relations between the applicant and WTO Members become stabilized in a legal sense. Each side takes on clear, predictable multilateral obligations towards the other that are almost certain to be far more rigorous, in terms of demanding trade liberalization, than any previous bilateral arrangements. Moreover, there is a dispute resolution mechanism to adjudicate alleged breaches. In brief, the two steps ought to be thought of as a positive-sum game.

- **Effective Date**

The key documents, namely, *Protocol*, Working Party Report, and Schedules of commitments for both goods and services, are the "accession package." Once the General Council approves them, then the applicant itself must do so under its Constitutional structure. Technically, an applicant becomes a Member of the WTO, and is allowed to take its seat in Geneva, 30 days after it notifies the Secretariat it has ratified its package.

III. False Promises? Human Rights and Religious Freedom

The benefits of this game extend beyond trade relations. An oft-made (and quite plausible) argument was the PRC would be a better neighbor in Asia, and a more responsible world citizen, once it was welcomed into the WTO. President George W. Bush (1946-, President, 2001-2009) clearly put the point:

> Mr. Bush, then the Governor of Texas, perhaps put it best in a speech to Boeing workers on the Presidential campaign trail in May 2000.
>
> "The case for trade," with China, he said, was "*not just* a matter of commerce, but a matter of conviction."
>
> "*Economic freedom creates habits of liberty. And habits of liberty create expectations of democracy.*"
>
> …
>
> WTO membership – which became a reality on President George W Bush's watch – was the crowning glory of a decades-old policy of growing engagement, supported by every President since Richard Nixon.[38]

[38] *Quoted in* John Sudworth, *Can the U.S. Live in Xi Jinping's World?*, BBC NEWS, 3 November 2022, www.bbc.com/news/world-asia-china-63386954. (Emphasis added.) [Hereinafter, *Can the U.S. Live?*]

As suggested, he was not alone:

> In the late 1990s, Mr. Biden, then a member of the U.S. Senate, was a key architect of the efforts to welcome China into the … WTO.
>
> "China is not our enemy," he told reporters on a trip to Shanghai in 2000 – a statement based on the belief that increased trade would lock China into a system of shared norms and universal values, and help its rise as a responsible power.[39]

So, to delay accession unnecessarily would be to isolate the PRC. It would punish the PRC's burgeoning middle class, the people most likely to embrace democracy. Then, the PRC might turn inward, its human rights record might worsen, and its hand in Tibet might be all the heavier. It might also become increasingly hostile to the outside world, more inclined to settle matters – like reunification of Taiwan, problems in Hong Kong, or the dispute over the Spratly Islands with several Asian countries – militarily.

Given the behavior of the CCP toward its own citizens, since China joined the WTO, and since the Arab Spring of 2011, has this promise been borne out? Was the Bush-Biden argument naïve?:

> It's no small irony that it is President Joe Biden [1942-, President, 2021-] who is increasingly treating China as an adversary. And his attempt to cut off its access to advanced semiconductors [under the *CHIPS Act*, discussed in a separate Chapter] is arguably the most significant reversal of the trade and engagement approach [to advancing human rights through commercial intercourse].[40]

Consider the same question with respect to other RAMs, including Saudi Arabia, Russia, Laos, Yemen, and Vietnam. In other words, what effect, if any, does joining the Club have on the human rights of the new Club Member, and on the attitude of that Member to human rights outside its borders? Consider carefully freedom of conscience – is religious freedom enhanced by joining the Club? Should that matter?[41]

IV. GATT Article XXVI:5(c) Sponsorship Accession

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39 *Can the U.S. Live?*

40 *Can the U.S. Live?*

41 By no means are these questions confined to the context of WTO Membership. For example, EU Catholic Bishops and other prominent clergy have urged the EU to incorporate religious freedom provisions into its FTAs and other trading arrangements. *See EU Bishops' Commission Urges Action To Protect Religious Freedom*, CATHOLIC NEWS SERVICE, 20 July 2021, www.catholicnews.com/eu-bishops-commission-urges-action-to-protect-religious-freedom/#noredirect (observing: "Church leaders repeatedly have called on the EU to link protection of religious rights to its aid and trade packages amid reports of worsening violations across the world.").

GATT Article XXVI:5(c) is a curious but historically important provision. It establishes a different procedure for accession for a customs territory that has full autonomy in the conduct of its external commercial relations. That territory can be sponsored for membership by an existing contracting party responsible for the territory. In 1950, Indonesia, sponsored by its former colonial master, the Netherlands, became the first country admitted under this provision. Starting in 1957 and for several years thereafter, several former colonies – Cambodia, Ghana, Laos, Malaysia, and Tunisia, for example – entered into GATT through the sponsorship procedure.

In contrast to Article XXXIII, the Article XXVI:5(c) procedure does not require a series of bilateral concession agreements, decision of the CONTRACTING PARTIES, or accession *Protocol*. Rather, the customs territory/newly independent country obtains membership on the same terms and conditions as those accepted by its former Colonial master on its behalf. So, if the Dutch agreed to bind the tariff on imports of wheat into Indonesia at 12%, then as a new contracting party, Indonesia would have a tariff schedule with a 12% bound rate for wheat. Notably, Indonesia would not inherit a concession on wheat if the Dutch had made none. As another example, if the sponsoring contracting party elected to non-apply GATT obligations to another party, then the sponsored entity would be deemed to have elected non-application to the same entity. (This scenario occurred for former British Colonies sponsored by the U.K. The British avoided application of GATT to Japan when Japan acceded, and thus so also did its Colonies.)

Under GATT Article XXVI:5(c) and procedures adopted during a 1957 GATT meeting, there is a period of *de facto* application of GATT obligations on a reciprocal basis between the contracting parties and the customs territory/newly independent country. During the period, the new country can adjust to the obligations, implement necessary trade policies, and decide for sure whether it desires full GATT membership. Assuming it decides affirmatively, then it is accorded full Membership after that period.

V. July 2012 *Decision* on Accession of LDCs

In July 2012, the WTO General Council adopted a *Decision* concerning accession of LDCs to the WTO.[42] This *Decision* followed a mandate from the December 2011 Geneva Ministerial Conference. In turn, the mandate followed up on request from WTO Ministers to the Sub-Committee on LDCs of the Committee on Trade and Development to make recommendations to improve the general *LDC Accession Guidelines*. These *Guidelines* were adopted in December 2002 as a *Decision* by the General Council pursuant to Article IV:2 and Article XIII:2 of the *WTO Agreement* and Paragraph 42 of the

[42] *See* World Trade Organization, Sub-Committee on Least-Developed Countries, Communication to the General Council, *Recommendations by the Sub-Committee on LDCs to the General Council to Further Strengthen, Streamline, and Operationalize the 2002 LDC Accession Guidelines*, and *Accession of Least-Developed Countries (Draft Decision)*, WT/COMTD/LDC/21, www.wto.org (6 July 2012). [Hereinafter, Recommendations.]

November 2001 Doha *Ministerial Declaration* (though they were not formally part of any Doha Round outcome.)[43]

The July 2012 *Decision* take the form of an *Addendum* to the December 2002 *Guidelines*. According to the WTO, the December 2002 *Guidelines* were too general, hence the need for the July 2012 *Addendum* to them.[44] The WTO argued it is helpful to accelerate the accession negotiations of LDCs if there were specific ways to judge negotiating outcomes. So, the July 2012 *Decision* set 5 such metrics:

(1) *Goods Market Access Benchmark*[45]

An acceding LDC must bind 100% of its agricultural tariff lines at an average MFN duty rate of 50%. On industrial tariff lines, an LDC could choose between 1 of 2 options.

An acceding LDC could bind 95% of those lines at an average MFN rate of 35%. On the remaining 5%, the LDC could leave them unbound, but the specific lines it left unbound would be subject to negotiations. Existing Members could object. Though a footnote to the Decision urged them to consider the sensitivities of the industrial sector of the acceding LDC, its language was not a mandate, and the annals of trade negotiating history, including the Doha Round, are replete with stories of rich countries disregarding the sensitivities of poor ones.

Alternatively, the acceding LDC could seek comprehensive binding coverage, *i.e.*, on 100% of its industrial tariff lines (immediately, or in stages). If it did so, then it would be allowed an average bound MFN rate in excess of 35% on up to 10% of those lines, and a transition period in which to phase in tariff reduction on those lines of 10 years.

(2) *Services Market Access Benchmark*[46]

The trade liberalization commitments for any services sector or sub-sector made by LDCs that already were WTO Members constituted the maximum that could be asked of a newly acceding LDC. As a practical matter, of the 48 LDCs listed by the U.N. (as of July 2012), 32 had become WTO Members, including four that joined after the WTO was established on 1 January 1995. Those five LDCs were Cambodia (2004), Nepal (2004), Cape Verde (2008), Samoa (2012), and Vanuatu (2012, though technically it was not yet a Member as of July 2012, when the WTO General Council adopted

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43 *See* World Trade Organization, *Decision of 17 December 2011, Accession of Least-Developed Countries*, WT/L/846 (19 December 2011), www.wto.org; World Trade Organization, *Decision of 10 December 2002, Accession of Least-Developed Countries*, WT/L/508 (20 January 2003), www.wto.org.

44 *See* World Trade Organization, *Members Streamline Accession for Poorest Countries*, 6 July 2012, www.wto.org. [Hereinafter, *Members Streamline*.]

45 *See Members Streamline*; *Recommendations*, ¶¶ 5-7.

46 *See Members Streamline*; *Recommendations*, ¶¶ 10, 12.

the *Addendum*). Thus, the existing LDC Members, especially these five, set the services market access benchmark. They set it for the likes of Afghanistan, Bhutan, Comoros, Equatorial Guinea, Ethiopia, Laos, São Tomé & Principe, Sudan, and Yemen, all of which (as of July 2012) were LDCs in various stages of accession negotiations, with Yemen officially acceding on 26 June 2014.

Further, in making requests of an acceding Member, existing Members must not require it to make a commitment at variance with its development, finance, or trade needs. Nonetheless, LDCs must identify their "priority sectors and sub-sectors," and make "reasonable offers" to liberalize them.[47]

(3) *Transparency Benchmark*[48]

The WTO Working Party on Accession for a prospective new LDC Member should be used as a forum to review all of the bilateral market access commitments made by that LDC. And, once an accession package was agreed (via completion of negotiations and circulation to the Working Party of consolidated schedules of concessions for goods and services for verification), existing Members would not re-open it.

(4) *Special and Differential Treatment Benchmark*[49]

An acceding LDC would be entitled to all S&D treatment set out in GATT and the WTO agreements as of the day it becomes a Member. It also could ask for additional transition periods, and existing Members should consider such requests favorably on a case-by-case basis, but only if it submits an "Action Plan" for implementing its commitments.[50]

(5) *Technical Assistance Benchmark*[51]

For each LDC applicant, the WTO Secretariat will prepare a technical assistance framework plan. The plan will aim to improve coordination and delivery of such assistance during the accession process.

In brief, surely the poorest countries in the world would be better off in navigating the complexities of WTO accession if there were clear points for them to follow. The WTO said these benchmarks balanced their interests in seeing that trade liberalization and concomitant legal reform would lead to "faster economic growth and poverty alleviation"

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47 *See Recommendations* ¶ 10.
48 *See Members Streamline*; ¶ 14.
49 *See Members Streamline*; *Recommendations* ¶¶ 18-20.
50 *Recommendations*, ¶ 20.
51 *See Members Streamline*; *Recommendations*, ¶¶ 21-24.

against their "limited capacity" to negotiate an accession package.[52] The benchmarks amounted to a "simpler framework for the entry of LDCs into the WTO *family*."[53]

If the WTO is a "family," then like most families, it has its dysfunctions. One of them is that more powerful family members tend to push outcomes on less powerful ones, rationalizing their oppressive behavior as being in the interest of the less powerful, and conceding nothing in return. Arguably, the *Addendum* adopted by the July 2012 *Decision* bears all the marks of this behavioral modality. Consider the 5 benchmarks from a critical perspective.

The Goods Benchmark told LDCs what they must do to join the happy WTO family. Whether they liked it or not, whether it was in their interest or not, they had to cut average MFN agricultural tariffs, on all tariff lines, to 50%. Full binding of farm of tariff lines is a "standard feature in all WTO Members' commitments" pursuant to the WTO *Agreement on Agriculture*.[54] That it would be demanded of LDCs, too, which are often heavily dependent on small-scale agriculture, intimated the WTO "family" indeed was dominated by the "1%" over the "99%" (to use the "Occupy Wall Street" movement metaphor). To ensure such dominance was horizontal across all economic sectors, LDCs also had to slash average MFN duties on industrial goods on 95% of those lines to 35%, and would have to negotiate to keep the remaining 5% of lines unbound (or, they could be seduced into binding 100% of their industrial tariff lines with a higher-than-35% bound rate on 10% of their lines and a decade-long transition period).

The Services Benchmark assured acceding LDCs merely that they would not be asked to make market access commitments beyond those made by LDCs already in the WTO. But, they could be asked to make all such liberalizing commitments, *i.e.*, the Benchmark meant WTO Members could impose prior LDC commitments as a precedent from which acceding LDCs could not derogate with the argument, for example, "Cambodia agreed to these service sector and sub-sector commitments in 2004, so you _____ [fill in the blank of the acceding LDC] must, too." It was small comfort to an acceding LDC that it would not be asked to make a services commitment inconsistent with its development, financial, or trade needs. Existing Members, especially rich ones, could be skillful in arguing that opening various sectors or sub-sectors was precisely what the poor country needed.

As for the Transparency Benchmark, extant WTO Members could abuse it. To say the Working Party should be a forum to review bilateral market access commitments is to invite them to see if any Member that has not yet completed a bilateral deal with the acceding LDC can "do better" than the existing deals. The review process was an opportunity to see what concessions had been extracted from and LDC, and what more might be. And, for the existing Members to commit not to re-open a completed accession package was nothing more than a pledge to behave in a minimally decent manner.

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52 *Members Streamline*.

53 *Members Streamline*. (Emphasis added.)

54 *Members Streamline*.

The S&D Treatment Benchmark adduced the shameless lack of generosity of rich WTO Members. They agreed to give no new treatment. They simply repeated LDCs could use the existing S&D provisions in GATT and the WTO agreements.

Finally, the Technical Assistance Benchmark was empty. The WTO Secretariat promised nothing, and that promise related only to the accession process – not after accession. No money. No non-monetary resources. Nothing, other than the Secretariat would concoct technical assistance framework plans, which might or might not ever come to fruition and make an impact.

In sum, the July 2012 *Guidelines* were a set of non-negotiable points foisted on the poorest of the poor, dressed up in the seductive language of "family." Whatever little room for maneuver LDCs had before the *Addendum*, the first three Benchmarks meant they had even less. The last two Benchmarks gave them nothing in return.

VI. Changing Terms

● Reservations

Is it possible for a new or existing WTO Member to file a "reservation" to the *WTO Agreement* or its Annexes? That is, could a Member simply declare it will not be bound by certain provisions? After all, reservations are contemplated in the *Vienna Convention on the Law of Treaties*. Moreover, when a country accedes to the WTO, typically it negotiates "reservations," in the form of terms and conditions for entry, in its protocol of accession.

Nevertheless, upon entry, and as regards existing Members, the general answer is "no." Article XVI:5 of the *WTO Agreement* prohibits reservations to that *Agreement*, and permits reservations to a provision in a specific multilateral accord only to the extent allowed for by that accord. Joining and participating in the GATT-WTO regime is, indeed, a single undertaking.

● Amendments

Multilateral trade rules must be rigorous, but also afford flexibility. Rigidity in a legal system is likely to lead to ossification of that system, or a revolution against it. Thus, GATT and the WTO Agreement allow for amendment of their rules. However, as a threshold matter, what is the relationship between GATT Articles XXV:5 and XXX? That is, what is the difference between a waiver from a multilateral trade law obligation, and an amendment of that obligation?

To ask the question is to reveal the answer. In theory, a waiver is a request a WTO Member makes to be relieved from a GATT-WTO obligation. The relief applies only to that Member, and typically just for a short term. It is not a generalized, permanent lessening of an obligation, which would require an amendment. That is, an amendment applies to all Members, or a large portion thereof (*e.g.*, LDCs), and represents a permanent, or at least long-term, alteration of the obligation. Also, it might be urged a waiver never involves a

new obligation, only removal of an existing one.

In practice, this distinction may not be so obvious. A Member could request a waiver that is worded in a sufficiently generic manner so as to accommodate other Members, so long as they satisfy the criteria set forth in the waiver. For instance, a waiver for the EU to give preferences to over 70 of its former colonies in the ACP countries arguably is tantamount to an amendment. (Still, the EU obtained waivers periodically for ACP preferences.) Further, what about waiver criteria, *i.e.*, the terms and conditions to be satisfied in order to get relief from the obligation? Suppose they include notice and reporting requirements, consultation procedures, or economic or financial ratio tests. (Criteria in the first two categories have been set forth in waivers.) Might these criteria constitute new obligations, or are they nothing more than requirements tied to the waiver?

Delineating waivers from amendments is important. While the WTO Ministerial Conference is the ultimate decision maker in either instance, the criteria for decision making vary. For example, if there is no consensus on a proposed amendment, then the Ministerial Conference decides by a two-thirds majority whether to submit the amendment to the Members for acceptance. There is no such hurdle on waiver decisions. They are made directly, without need of a prior decision as to whether to submit the waiver request to the Members. As another example, Article X of the *WTO Agreement* contains a number of details unique to the amendment process. More importantly, in some instances proposed amendments require unanimity.

GATT Article XXX:1 mandates that all contracting parties accept a proposed amendment to Part I of GATT before that proposal takes effect. Part I of GATT contains the first two of the pillars, *i.e.*, the MFN and tariff binding obligations in GATT Articles I and II, respectively. All other GATT provisions (including the national treatment obligation of Article III, the transparency provisions of Article X, and rule against quantitative restrictions in Article XI) can be amended upon a two-thirds vote of the contracting parties. Article X:2 of the *WTO Agreement* supplements these thresholds. It indicates unanimity of acceptance is necessary not only for proposed changes to GATT Articles I and II, but also for proposed changes to Article IX of the *WTO Agreement* (concerning WTO decision making, including decisions about waivers), Article II:1 of *GATS* (concerning MFN treatment), and Article 4 of the *TRIPs Agreement* (concerning MFN treatment for IPR protection). Likewise, Article X:8 supplements the thresholds in GATT. It mandates that amendments to the *DSU* require consensus.

A proposed amendment to a GATT provision outside of Part I, or to a WTO accord other than the particular aforementioned provisions, takes effect upon acceptance by 2/3 of WTO Members. (*See* GATT Article XXX:1 and *WTO Agreement* Article X:3.) But, if that amendment affects the substantive rights and obligations of the Members, then it becomes effective only for those Members that accepted the proposal. For the 1/3 or fewer Members that did not, the substantive amendment is inapplicable unless and until they accept it. Why?

No doubt protection of sovereign interests of the non-approving Members in the

face of possible tyranny of the majority is the answer. Every Member should be allowed to decide whether to incur new obligations, and not have them foisted upon itself by a majority. In contrast, procedural amendments take effect for the entire membership upon acceptance by the two-thirds super-majority. Who decides whether an amendment does or does not affect substantive rights and obligations? The Ministerial Conference, by a three-fourths vote.

Conceivably, the Members approving the amendment might find it so fundamentally important that any non-accepting Member must consider withdrawal from the GATT, or remain as a Member only with the consent of the Ministerial Conference. GATT Article XXX:2 and Article X:3 provide for this instance. Withdrawal is provided for in GATT Article XXXI and WTO Agreement Article XV, and takes effect six months after providing notice of that withdrawal. Finally, observe that any WTO Member can propose the Ministerial Conference make an amendment. In addition, each of the Councils of the General Council – the Goods, Services, and TRIPs Council – may submit amendment proposals for the agreements it oversees.

- **Rectifying Tariff Schedules**

Evidently, amending a provision of the GATT-WTO regime is difficult, and rightfully so. However, in at least one instance, it is necessary to "get amendments through" quickly and with ease, namely, technical corrections to tariff schedules. Given the thousands of product lines and corresponding numbers, descriptions, and tariff rates, it is inevitable that mistakes will be made in virtually every Member's schedule. The Ministerial Conference would grind to a halt if the amendment process of GATT Article XXX and *WTO Agreement* Article X had to be used for every such correction. Yet, it could be argued that the formal amendment process was required, because GATT Article II:7 makes tariff schedules "an integral part of Part I" of the GATT, hence unanimity would be required for every amendment no matter how minor.

Fortunately, a certification process developed during the pre-Uruguay Round era and continues in use. A minor technical correction – or, in GATT-speak, "non-substantive rectification" – is accepted automatically by all contracting parties so long as they are given notice and raise no objections. On 19 November 1968, the CONTRACTING PARTIES decided to establish the "Procedures for Modification and Rectification of Schedules." It states a certification not challenged by any contracting party within 60 days' notice of that certification shall take effect. This *Decision* is consistent with customary international law on correction of errors of a purely formal nature in treaties.

VII. Breaking Away

The above discussion is about a country "joining the Club." What happens if, after joining, it breaks apart? What if Scotland left the U.K. (a so-called post-Brexit "Scexit")? What if Quebec seceded from Canada? What if Kashmir gains independent status from India and Pakistan? What if Tibet regains full autonomy? What if Yemen splits back into North and South Yemen?

The U.K., Canada, India, Pakistan, China, and Yemen all are full Members. So, would the newly independent countries from them also be Members? Or, would they need to go through the accession process? What would existing Members prefer – the opportunity for new bilateral commercial negotiations to ensure enhanced market access with the breakaway country, or continuation of that country on the same terms as its former "mother"? What would the breakaway country prefer? Professor David Gantz considers the question in *The Scottish Referendum: Another Major Step Towards Independence?*[55]

The problem of breaking away, and then re-joining, was best exemplified by Brexit, the withdrawal on 29 March 2019 of the U.K. from the EU. Before Brexit, both the U.K. and EU were WTO Members, with the U.K. having the same Schedule of Concessions for goods (under GATT) and services (under *GATS*), *i.e.*, the U.K. had no independent Schedules for goods or services, its Schedules were the EU's Schedules. The U.K. sought to retain the same Schedule post-Brexit, that is, to stay in the WTO on the same tariff terms *vis-à-vis* all other WTO Members as the U.K. had before it left the EU. And, the U.K. and EU hoped they could simply split the other trade terms, namely, TRQs, in their pre-Brexit common Schedule, between them, into two post-Brexit Schedules, one for the U.K., and the other for the EU.

The U.S., along with Argentina, Australia, Brazil, Canada, China, Mexico, New Zealand, Paraguay, Taiwan, Thailand, and Uruguay, objected to this proposal. The crux of the problem (with respect to goods) concerned TRQs. They covered beef, lamb, sugar, and hundreds of other sensitive products. With the U.K. out of the EU, these other Members argued the value of the TRQs was not the same as it was when the U.K. was part of the EU. They saw Brexit has causing a diminution in the value and quality of market access on these products, so simply splitting up the TRQs from the pre-Brexit EU Schedule into the post-Brexit EU and U.K. Schedules damaged their export interests. They demanded appropriate compensation, and threatened to refuse to certify their Schedules, and bring *DSU* proceedings, if necessary.

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55 *See* 21 INTERNATIONAL TRADE LAW AND REGULATION 1-7 (2015).

Chapter 3

WTO ACCESSION CASE STUDIES[56]

I. Enter the Dragon (China)

The WTO Membership approved the terms of accession for the PRC on 11

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[56] Documents References:
(1) GATT Articles XXVI, XXXI-XXXIII, XXXV
(2) *WTO Agreement*
For an engaging collection of papers on WTO accession, especially those concerning China, Laos, Russia, and Yemen, before these countries joined the WTO, as well as one on Iran's application (lodged in 1996) to join, see United Nations Conference on Trade and Development, *WTO Accessions and Development Policies* UNCTAD/DITC/TNCD/11 (New York, New York, United Nations, 2001). The paper by S. Jalal Alavi, Permanent Mission of the Islamic Republic of Iran to the United Nations Office in Geneva, entitled *Iran's Accession to the WTO* observes:

> We [Iran] have not yet … experienced substantive difficulties in our accession, because we have been facing a very anomalous procedural problem, which has cost us five years in our efforts to join the system [namely, America's blockage of formation of a Working Party on Iran's accession]. … The WTO-recognized acceding countries are facing substantive difficulties in their negotiations, while Iran has been halted since the very beginning of the accession process on a purely procedural, and, in our view, unnecessary basis. This situation [is] the result of the unnecessary application of the consensus rule to the procedural part of Article XIII of the *WTO Agreement*.
>
> We do not call into question the usefulness of consensus-based decision-making at the WTO. It has proved its advantages for the whole system. The principle of consensus is a workable mechanism among Member states, not to be used against non-Members who would like to join the system. If this is the case, as it was for us, one Member will be in a position [*e.g.*, the U.S.] to prevent non-Members [*e.g.*, Iran] from accession forever, simply by preventing the General Council from considering the non-Member's application for Membership. How, in that case, can universality be guaranteed?
>
> … In this very rapid and dynamic international trading system, how can acceding countries afford to be left behind for a long time, cooling their heels as they wait to join the Organization? How will they be able to abide by an international trading system which they are not involved in establishing. …
> …
> …[A]cceding countries should not be subjected to onerous demands while negotiating the terms of their accession. … [A] reference is made [in a WTO Secretariat discussion note] to the "standard terms" with minor variations. We do not think that these standard terms are now being applied in a standard manner. Apparently, this will affect only the acceding countries, who should envisage a higher "Membership fee," but it will have its adverse repercussions for the multilateral trading system as well. … [T]he longer the accession process, the higher the price of Membership. The question is what will happen if acceding countries are not able to afford this soaring Membership fee. …

Id., pages 83-85. Did this observation prove prescient? Or, did America's lifting (in 2005, during the Administration of President George W. Bush) of its consensus blockage in 2005 change the accession negotiating dynamics, and put the onus on Iran to prove it would be not only a faithful WTO Member, but also a responsible stakeholder in international relations?

December 2001. Ratification by the Chinese government was swift. The PRC became a Member 30 days after notification to the WTO Secretariat of its approval of the *Protocol of Accession*, which also was 11 December.

For the PRC, the accession process took about 15 years, following its application on 10 July 1986 to join GATT. The critical breakthrough came on 15 November 1999, when the PRC and U.S. reached a bilateral agreement. In that bilateral accord, the commitments made by the PRC, and specifically Premier Zhu Rongji (1928-, Premier, 1998-2003), one of China's great modern reformers, were breathtaking. The sides agreed on a comprehensive package embodied in 250 pages of text (including about 60 pages of tariff schedules), with many hand-written notations that appeared to be last-minute arrangements. The key points of the deal, which later became multilateralized into terms of entry to the WTO, were as follows:

- **Tariffs**

The PRC agreed to reduce overall tariffs from an average of 22.1% to an average of 17%. It promised to slash tariffs on industrial goods from the 1997 average of 24.6% to 9.4% by 2005, with the majority of cuts by 2003, and ultimately to an overall average bound rate of 8.9%. On industrial products considered by the U.S. to be a priority (*i.e.*, in which the U.S. has a keen export interest), the PRC agreed to reduce tariffs to 7.1%. The PRC agreed to bound tariffs on chemicals in the range of 2.5% to 5%. On civil aircraft, it agreed to a lower bound rate of 2%-4%, with the variation depending on aircraft size. The PRC also agreed to participate in the WTO *ITA*, and thereby committed itself to reducing tariffs on computers, computer equipment, semiconductors, and internet-related equipment from 13.3% to zero by 2005.

- **Quotas**

The PRC agreed to eliminate all import quotas on industrial goods by no later than 2005, with most quotas abolished by 2002. For priority American products (*e.g.*, optic fiber cable), the PRC said it would eliminate quotas immediately upon accession. While still in operation, quotas would grow at a 15% annual rate to ensure that market access increases progressively.

- **Agriculture**

The PRC agreed to reduce the overall agricultural tariffs to 17% by January 2004, and eventually to an overall average bound rate of 15%. This reduction was considerable, as the PRC's tariffs on farm goods ranged from 20% to 50%, with an average rate of 31.5%. Further, on agricultural products the U.S. considered to be a priority, the PRC agreed to cut tariffs by January 2004 from an average of 31.5% to an average of 14.5%. These products included beef (with a pre-agreement rate of 45%, and post-agreement rate of 12%), cheese (with a pre-agreement rate of 50%, and post-agreement rate of 12%), poultry (with a pre-agreement rate of 20% and post-agreement rate of 10%), and wine (with a pre-agreement rate of 65% and post-agreement rate of 12%).

The PRC also agreed to liberalize purchases of bulk agricultural commodities by establishing TRQs for barley, corn, cotton, rice, and wheat, and phasing out state trading of soy oil. The quota thresholds in these TRQs is to be high and growing, and the applicable tariff for over-quota shipments is to average between 1%-3%. A share of the TRQs is to be reserved for private traders. (On some items, such as cottonseed oil, peanut oil, soybean oil, and sunflower-seed oil, the PRC agreed to an immediate elimination of TRQs.) More generally, for the first time, the PRC agreed to permit trade in agricultural goods between private parties. Finally, the PRC pledged to eliminate SPS measures not based on scientific evidence.

- **Automobiles**

The PRC agreed to reduce tariffs on vehicles from 80%-100% to 25% by 1 July 2006, and to make the deepest cuts within the first few years following accession. As of the date of accession, the PRC agreed to slash by half its auto tariffs, setting its bound auto duty rate at 51.9%. The PRC pledged to cut tariffs on auto parts by 1 July 2006 to an average of 10%. The U.S. had hoped for a phase-out period that would end by 2005. It agreed to the extra year in exchange for a Chinese pledge to allow foreign non-bank financial institutions to provide automobile financing immediately upon accession. In addition, the PRC agreed to phase out all quotas on auto imports by 2005. Until then, it committed to a base level quota of $6 billion, and to increasing this level by 15% annually until the quotas were eliminated.

- **Trading Rights**

The PRC agreed to grant foreign firms full rights to import and export goods. There was no need to trade through a Chinese middleman. The PRC said it would phase in these rights over three years.

- **Distribution Rights**

The PRC agreed to grant distribution rights to foreign exporters and manufacturers for both agricultural and industrial goods, whether imported or made in the PRC, within three years following accession. The foreign firms could conduct their own distribution networks. In other words, there would be no need for Chinese middlemen. They could maintain wholesale or retail operations, as well as after-sales services (*e.g.*, repair, maintenance, and transport). However, the PRC kept some limitations on distribution rights. For example, in the first three years after accession, foreign oil companies were limited to 30 gas service stations in the country, thus inhibiting the distribution of their product.

- **Services Auxiliary to Distribution**

The PRC agreed to phase out all restrictions on services auxiliary to distribution within three-to-four years following accession. Examples of these services included air

corridor, freight forwarding, packing, rental and leasing, storage and warehousing, and technical testing and analysis. After the phase-out period, the PRC promised foreign firms would be able to establish 100% wholly-owned subsidiaries to provide these services.

- **T&A**

The U.S. agreed to phase out textile quotas by 2005, as the *ATC Agreement* calls for (corresponding to the expiration of the *MFA*), not 2010 as the American textile lobby had hoped. However, the U.S. retained for 12 years (*i.e.*, until 31 December 2008, which is after the *ATC* expired) after the PRC's accession a special safeguard mechanism aimed at preventing textile import surcharges. The remedy was created especially for use against a rapid increase in Chinese textile imports that cause, or threaten to cause, market disruption (namely, material injury) in America.

- **Dumping**

For purposes of monitoring possible dumping of Chinese goods, the U.S. continued to treat the PRC as a NME for 15 years after its accession (through 31 December 2016). So, when calculating Normal Value in the computation of the dumping margin (the difference between Normal Value and Export Price or Constructed Export Price), the Department of Commerce is likely to use a proxy, Constructed Value. To arrive at a value for Constructed Value, the Commerce Department could (and, indeed, did) look to data from a third country (such as India, Indonesia, or Thailand – or even Paraguay, as occurred in the past). Respondents in AD cases argue this calculation – in particular, the choice of a third country from which to gather data for Constructed Value – is arbitrary and skewed toward finding a positive dumping margin. The USTR pointed out the NME statute is self-limiting: if a particular sector in a foreign economy, or an entire foreign economy, demonstrates it has become market-oriented, then the rules are not applied to that sector.

- **Subsidies**

The PRC agreed to eliminate all export subsidies. The elimination of these subsidies on cotton and rice was of particular importance to the U.S. In addition, America reserved the right for the 15 years following the PRC's accession to take into account the special characteristics of the PRC's economy when applying CVD law. In particular, in a case involving a newly privatized company, the U.S. could identify and measure the benefit of a subsidy provided to that firm when it was still a SOE, and thereby fashion an argument that the benefit carried through to the post-privatization entity. Finally, the PRC accepted the ability of foreign governments to apply the Uruguay Round *SCM Agreement* against Chinese SOEs, when appropriate.

- **Product-Specific Safeguard**

In addition to the normal WTO safeguard mechanism pursuant to GATT Article XIX and the Uruguay Round *Agreement on Safeguards*, American firms would be permitted to avail themselves of a new and special safeguard remedy, known as the

Product-Specific Safeguard. This remedy was designed to address imports of Chinese goods that are a significant cause, or threat, of material injury to an industry in the U.S.

The Product-Specific Safeguard remained in force for the first 12 years of the PRC's WTO Membership (through 31 December 2013). This remedy differed from a normal safeguard action in two key respects. First, the U.S. could apply import restraints unilaterally based on criteria that were less stringent than those in the *Safeguards Agreement*. Second, it permitted the PRC to address import surcharges by imposing VRAs (which are otherwise illegal under Article 11:1(b) of the *Agreement*).

- **Telecommunications Services**

The PRC agreed to open, within limits, its telecom market to foreign companies and provide them with national treatment. Through these commitments, the PRC agreed to join the WTO *Basic Telecommunications Agreement*. Consequently, the PRC agreed to implement the pro-competitive regulatory principles set forth in the *Agreement*, like cost-based pricing, inter-connection rights, the establishment of an independent regulatory authority, and technologically-neutral scheduling (*i.e.*, allowing foreign suppliers to choose which technology to use in providing telecom services).

As for the market-opening commitments made by the PRC, they covered two broad areas: FDI in the telecom sector, and geographic restrictions on the provision of telecom services. With respect to FDI, the PRC agreed, effective immediately upon accession, to allow foreign companies to take up to a 49% stake in JVs engaged in certain telecom services. (Foreign investment in telecommunications had been barred entirely.) After two years of membership, they were permitted a 50% stake in JVs providing value-added and paging services. After five years, foreign firms could take up to a 49% stake in JVs providing mobile voice and data services. After six years, they could own up to 49% of a JV providing domestic and international services.[57]

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[57] Long after China's 11 December 2001 WTO accession, the telecom JV requirement – like many other PRC commitments – remained a controversy. During the Sino-American Trade War (discussed in a separate Chapter), which started in March 2018, the U.S. complained China continued to restrict FDI by American telecommunications providers with undue JV requirements. *See* Jennifer A. Dlouhy & Todd Shields, *U.S.-China Feud Gets Nasty With Red Tape as Stealth Weapon*, BLOOMBERG, 28 June 2020, www.bloomberg.com/news/articles/2020-06-28/u-s-china-feud-quietly-gets-nasty-with-red-tape-as-weapon?sref=7sxw9Sxl.

For an argument that in acceding to the WTO:

> China never made any commitments to dismantle the state sector of its economy and is not otherwise legally bound to do so under the WTO. The claim that China agreed to adopt open markets is a myth created by President Bill Clinton due to wishful thinking or political expediency when he sought congressional support for China's accession to the WTO in 2001. Clinton argued that China's WTO entry would lead to the adoption of economic freedoms that in turn would lead to political freedoms and greater protection for human rights. Clinton even dangled the possibility China could shed the shackles of Communism and embrace democracy. In response to Clinton's grandiose vision, China remained cautious and made no extravagant promises. China promised only to adopt a hybrid system in which some free markets would operate within an overall state-led economy. Rather than dismantling its state-led economy after its WTO accession, China has incessantly

Thus, the U.S. dropped its insistence that the PRC allow foreign firms a 51% equity interest within four-to-five years after accession. In return, America accepted immediate 49% stakes, rising to 50% stakes with management control within two years. The USTR pointed out that under Chinese law, contractual management and operational participation was possible with a 50/50 ownership structure.

As regards geographic limitations on the provision of telecom services by foreign firms, the PRC agreed to phase out all such restrictions for paging, value added, and closed user groups in three years, mobile voice, cellular, and data services in five years, and domestic wireline and international services in six years. The PRC agreed to open its most important telecom corridor (the Beijing – Shanghai – Guangzhou region, which represents 75% of all traffic in the PRC), immediately upon accession to all telecom services. The PRC also assured the U.S. it would permit foreign firms to provide telecom services via satellite. Finally, it appeared that PRC authorities accepted the fact that production quotas on mobile phones they had planned would be incongruous with GATT-WTO rules, hence the need to abandon the planned quotas.

- **Internet Services**

Foreign companies were allowed to invest in Chinese internet content providers, subject to a 49% equity limit. Whether existing foreign investments in excess of this limit were "grandfathered" was not clear, though arguably such investments fell within the scope of a clause providing for the continuation of existing JVs in all service sectors.

- **Banking Services**

The PRC agreed that two years after it acceded to the WTO, foreign banks would be allowed to conduct local currency business (*e.g.*, deposit-taking and lending) with Chinese enterprises in specified geographical regions. In other words, two years after accession, foreign banks received qualified national treatment within those regions. Five years after the accession, the customer and geographic restrictions were lifted: foreign banks were able to conduct retail business (principally taking deposits from, and making loans to, Chinese individuals) in local currency, and will be able to establish branches anywhere in the PRC. That is, five years after accession, foreign banks got complete national treatment, because they could handle local currency business of any kind, anywhere.

- **Securities Underwriting Services**

> strengthened it. Tightening the state's grip over the economy serves important goals of the Communist Party, including further entrenching its power, whereas loosening its grip would be tantamount to relinquishing power, a prospect that the Party will never accept. … [T]he United States must finally reject the Clinton myth and accept that China has no intention of dismantling its state-led economy.

see Daniel C.K. Chow, *The Myth of China's Open Market Reforms and the World Trade Organization*, 41 UNIVERSITY OF PENNSYLVANIA JOURNAL OF INTERNATIONAL LAW issue 4, 939-979 (2020).

The PRC agreed to permit foreign brokerage firms to operate in the PRC, subject to fairly tight restrictions. Investment by foreign firms in Chinese securities underwriting companies had to be through a JV, and the foreign stake would be limited to 33%. The JVs would receive national treatment in that they could underwrite domestic equity offerings. In addition, they could underwrite and trade in international equity and all corporate and government debt issues. More generally, the PRC pledged that as the scope of business activities of Chinese securities firms grows, there would be concomitant expansion in the permissible scope for foreign JV securities companies.

- **Fund Management Services**

The PRC agreed to permit foreign fund managers to operate in the PRC, but also subject to fairly tight restrictions. Foreign investment in JV fund management companies will be limited to 33% upon the PRC's accession. Three years following accession, the limit would rise to 49%. Thus, over time, foreign financial firms receive national treatment, and experience an expansion in the scope of business concomitant with Chinese firms.

- **Insurance Services**

The PRC agreed to award licenses to foreign insurance companies to do business in the PRC solely on the basis of prudential criteria. It pledged to abandon economic needs tests (*i.e.*, conditioning the grant of a license on the economic needs of the locality in which the foreign firm proposes to do business), and to eliminate quantitative restrictions on the number of licenses it issued. (The economic needs test had been used to protect domestic insurers that were losing money.)

With respect to FDI in specific insurance activities, the PRC agreed to grant foreign insurers the right, effective immediately upon WTO accession, to take up to a 50% equity stake in local life insurance companies, up to a 51% stake in non-life insurance companies, and up to 100% in re-insurance companies. (Non-life insurance products include health, pension, property policies.) These JVs would be empowered to insure large-scale risks, and foreign life insurance firms would be allowed to pick their own JV partners. However, their operations were restricted to key Chinese cities of priority interest to the U.S. during the first two-to-three years following accession, namely, a dozen cities including Shanghai and Guangzhou. Two years after accession, the PRC opened up a second dozen cities, including Beijing, and permit foreign non-life and re-insurance companies to form wholly-owned subsidiaries. Five years after accession, the PRC dropped all geographic restrictions on licensing, and permit nation-wide branching.

Regarding scope of activities, the PRC agreed to allow foreign property and casualty firms to insure large-scale commercial risks nation-wide immediately upon accession. During a five-year phase in period, the PRC expanded the scope of permissible activities of foreign insurance companies to include group, health, and pension products. (Relaxing restrictions on group insurance activities was of particular interest to foreign insurers. Group products account for the largest and most lucrative market segment. Thus,

foreign insurers chafed at being limited to selling policies to individuals.) However, whether foreign insurers could offer group plans to companies not based in the same city as the insurer, and whether these insurers could open branch offices, were left unclear. Significantly, the PRC made no commitments on market access for foreign insurance brokers.

- **Cultural Industries**

The PRC agreed to allow foreign movie companies to distribute significantly more movies than the pre-agreement limit of 10 annually. In the first year following accession, the PRC promised to permit 40 foreign movies to be distributed, and 50 by the third year. But, of the 40 and 50 movies, respectively, permitted, only 20 would be distributed on a revenue-sharing basis. (As for the rest, presumably, foreign movie companies would be paid a flat fee.) The PRC also agreed to allow foreign companies to establish JVs to distribute audio and video recordings, and software entertainment, to own and operate cinemas, and to hold up to 49% of the shares of these JVs.

- **Travel and Tourism Services**

The PRC pledged that immediately upon accession, foreign-owned hotel companies could establish majority-owned hotels in the PRC. There would be no geographic restrictions on operations. Three years after accession, the PRC permitted them to set up 100%-owned hotels. In addition, the PRC agreed to allow foreign travel operators to provide the full range of travel agency services, and have access to government resorts.

- **Accounting Services**

The PRC eliminated its mandatory localization requirement, thereby granting unrestricted access to individuals licensed in the PRC as CPAs. It pledged to award accounting licenses in a transparent manner and apply national treatment to foreign and Chinese applicants. Foreigners would be allowed majority control of accounting firms.

- **Legal Services**

Perhaps lawyers did not get the best of deals! The PRC promised to allow foreigners majority control not only of accounting firms, but also of architectural, computer services, dental, engineering, management consultancy, medical, and urban planning firms. But, not so with law. Like many WTO Members, the PRC declined to allow foreigners to hold majority control in local legal practitioner firms.

II. Lop-Sided Deal or Mistake?

- **President Clinton:**
  Lop Sided Deal

Impressive as these commitments China made were, they were only part of the deal.

Upon accession, the PRC assumed all of the obligations in the GATT-WTO regime.

For example, it implemented the *TRIMs Agreement*, and thereby eliminated trade and foreign exchange balancing requirements, and local content requirements. It abandoned the practice of conditioning investment approvals on performance requirements, offsets, and the conduct of R&D activities in the PRC. As another example, it implemented the *TRIPs Agreement*, and hence forswore forced technology transfer. Still another example concerns SOEs. (As of August 2018, SOEs held nearly 40% of China's industrial assets.[58]) The PRC began ensuring SOEs make purchases and sales based solely on commercial considerations (*e.g.*, price, quality, availability, and marketability), and provide foreign firms with the opportunity to compete for contracts on non-discriminatory terms. Significantly, the PRC agreed to the American demand that purchases and sales by SOEs would not be considered "government procurement," and thus would be subject to normal GATT-WTO disciplines. (Were they considered government procurement, the PRC could avoid signing the plurilateral *GPA* and thereby exempt its massive SOE sector.)

President Clinton, whose USTR, Charlene Barshefsky, was principally responsible for the 15 November 1999 bilateral accord, characterized it correctly: it was the "most one-sided trade deal in history." On 25 May 2000, the House of Representatives voted narrowly, but decisively, approved permanent normal trade relations (PNTR) for the PRC. The vote was 237-197. On 19 September, the Senate followed suit and approved PNTR legislation by an 83-15 margin. Through these legislative actions, China no longer was subject to annual review of its human rights record under the *Jackson-Vanik Amendment* to the *Trade Act of 1974*, as a condition to get MFN treatment from the U.S.[59]

Thereafter, China reached bilateral agreements with the few key remaining Members that had sought them. Notably, the EU insisted on better market access terms for luxury goods (a European export specialty) and eased terms of entry for large retail stores (such as Carrefour). Mexico proved to be the last hurdle. It was particularly concerned about competition from Chinese products in third country markets, and obtained concessions (*inter alia*) concerning dumping and other trade remedies.

- **Post-Accession Implementation Controversies**

Observe from the use of transition periods to manage trade on contested topics. Consider the extent to which the PRC fulfilled its commitments, especially in light of

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58 *See Five Sticking Points Keeping Xi and Trump from a Trade Deal*, 35 International Trade Reporter (BNA) 1122 (23 August 2018).

59 American and other non-Chinese MNCs that supported Chinese WTO accession sometimes argued that as a WTO Member of over 1 billion people, China would present unparalleled market opportunities for U.S. and other foreign exporters to the Mainland. What these corporate enthusiasts were less inclined to disclose was that the reverse was actually the case: by all other Members granting the new one, China, MFN treatment, China (bolstered by a large, relatively cheaper, pool of labor, state-supported SOEs, and industrial policy) would become the producer-exporter to the world. And, so it did. After 20 years in the WTO, China's exports to the world surged nine-fold. *See* Iori Kawate, *China's Trade with World Surges Ninefold After 20 Years in WTO*, Nikkei Asia, 7 November 2021, https://asia.nikkei.com/Economy/China-s-trade-with-world-surges-ninefold-after-20-years-in-WTO.

prominent WTO disputes like 2010 *China Audiovisual Products* case, where accession commitments were litigated.

Finally, to help ensure it would implement its commitments and fulfill its obligations, China agreed to a "Transitional Review Mechanism" whereby it would undergo annual reviews by the WTO for each of the first eight years of its Membership, followed by a review after 10 years. The final review under the Mechanism occurred in 2011.To be sure, now that China is in the WTO, the debate has shifted from entry commitments to full implementation and vigorous enforcement of those terms.

Despite these reviews, controversies exist in a number of areas, notably, discriminatory taxation, IP protection, SPS measures, subsidization, and foreign bank entry. Currency valuation, and whether China manipulates its currency by artificially linking it to the U.S. dollar at an over-valued rate, thereby discouraging China from importing American goods and contributing to the giant bilateral trade deficit, is a point of contention. While these debates are heated, two points must be kept in mind.

First, the world is a long way from a "Red" China implacably hostile to America. The countries may be strategic competitors, but they know well the benefits from cooperation and peaceful economic competition. Fighting about pirated music or software, as opposed to pointing weapons and firing real rounds at one another, is a sign of progress. Second, Chinese leaders have embarked resolutely on a course of economic openness and liberalization. In doing so, they have taken a bet that although reform will mean painful adjustments and uneven development, on balance and in the long run, the Chinese people can compete and win in global trade.

- **President Trump: Mistake**

These two points did not persuade the Administration of President Donald J. Trump (1946-, President, 2017-). In January 2018, the USTR issued the 16th annual report required by Section 421 of the *U.S.–China Relations Act of 2000*, 22 U.S.C. Section 6951.[60] This Section mandates an annual report on the extent to which the PRC complies with its international trade law obligations, especially those it undertook in acceding to the WTO. The *Report* was scathing, and the USTR concluded China should not have granted Membership.

UNITED STATES TRADE REPRESENTATIVE, 2017 REPORT TO CONGRESS ON CHINA'S WTO COMPLIANCE, EXECUTIVE SUMMARY, 2, 4-5 (JANUARY 2018)[61]

After its accession to the … WTO in 2001, China was supposed to revise hundreds of laws, regulations and other measures to bring them into conformity with its WTO obligations, as required by the terms set forth in its *Protocol of Accession*. U.S. policymakers hoped that

60 *See* https://ustr.gov/sites/default/files/files/Press/Reports/China%202017%20WTO%20Report.pdf.

61 Emphasis added.

the terms set forth in China's *Protocol of Accession* would dismantle existing state-led policies and practices that were incompatible with an international trading system expressly based on open, market-oriented policies and rooted in the principles of non-discrimination, market access, reciprocity, fairness and transparency. *But those hopes were disappointed*. *China largely remains a state-led economy today, and the United States and other trading partners continue to encounter serious problems with China's trade regime*. *Meanwhile, China has used the imprimatur of WTO Membership to become a dominant player in international trade*. Given these facts, it seems clear that *the United States erred in supporting China's entry into the WTO* on terms that have proven to be ineffective in securing China's embrace of an open, market-oriented trade regime.

Furthermore, it is now clear that *the WTO rules are not sufficient to constrain China's market-distorting behavior*. While some problematic policies and practices being pursued by the Chinese government have been found by WTO Panels or the Appellate Body to run afoul of China's WTO obligations, many of the most troubling ones are not directly disciplined by WTO rules or the additional commitments that China made in its *Protocol of Accession*. The reality is that the *WTO rules were not formulated with a state-led economy in mind*, and *while the extra commitments that China made in its Protocol of Accession disciplined certain state-led policies and practices existing in 2001, the Chinese government has since replaced them with more sophisticated – and still very troubling – policies and practices*.

Today, almost two decades after it pledged to support the multilateral trading system of the WTO, the Chinese government pursues a wide array of continually evolving interventionist policies and practices aimed at limiting market access for imported goods and services and foreign manufacturers and services suppliers. At the same time, China offers substantial government guidance, resources and regulatory support to Chinese industries, including through initiatives designed to extract advanced technologies from foreign companies in sectors across the economy. The principal beneficiaries of China's policies and practices are Chinese state-owned enterprises and other significant domestic companies attempting to move up the economic value chain. As a result, markets all over the world are less efficient than they should be.

…

… [T]here can be no serious question about the *underlying dynamic*. China has shown a willingness to take modest steps to address isolated issues, and it will sometimes make broader commitments when pressed at very high levels, *but it is not prepared to follow through on significant commitments or to make fundamental changes to its trade and investment regime*. *China is determined to maintain the state's leading role in the economy and to continue to pursue industrial policies that promote, guide, and support domestic industries*, while simultaneously and actively seeking to impede, disadvantage, and harm their foreign counterparts, even though this approach is incompatible with the market-based approach expressly envisioned by WTO Members and contrary to the fundamental principles running throughout the many WTO agreements.

...

... [I]t is simply unrealistic to believe that WTO enforcement actions alone can ever have a significant impact on an economy as large as China's economy, unless the Chinese

government is truly committed to market-based competition. *The notion that our problems can be solved by bringing more cases at the WTO alone is naïve at best, and at worst it distracts policymakers from facing the gravity of the challenge presented by China's non-market policies*.

...

While the WTO agreements do include a dispute settlement mechanism, *this mechanism is not designed to address a situation in which a WTO Member has opted for a state-led trade regime that prevails over market forces and pursues policies guided by mercantilism rather than global economic cooperation*. The WTO's dispute settlement mechanism is narrowly targeted at good faith disputes where one Member believes another Member has adopted a measure or taken an action that violates a WTO obligation. It can address this type of discrete problem, but it is not effective in addressing a trade regime that broadly conflicts with the fundamental underpinnings of the WTO system. *No amount of enforcement activities by other WTO Members would be sufficient to remedy this type of behavior*.

The *Report* recounted the exponential increase in the Sino-American trade deficit, from $83 billion when China joined the WTO, to $350 billion in 2016. It bemoaned the modest surplus in services, just $38 billion in 2016, but said that was due to travel-related services, and that American services exports to China underperformed those to other Asian countries (at least when measured in terms of total U.S. services exports to China versus total U.S. services exports to other Asian countries, expressed as a percentage of the services GDP of each country), especially in banking, insurance, and internet-related services, and professional and retail services – all thanks to Chinese government restrictions on services imports. The *Report* also chronicled China's attempts at technology transfer and IP infringement. In effect, the USTR was saying in trade terms, and reinforcing, what the DOD said in its contemporaneous *National Security Strategy*:

> The central challenge to U.S. prosperity and security is the *re-emergence of long-term, strategic competition* by ... revisionist powers. It is increasingly clear that China and Russia want to shape a world consistent with their authoritarian model – gaining veto authority over other nations' economic, diplomatic, and security decisions.[62]

China, then, was cheating its way to becoming a "revisionist" power.

III. Using GATT to Defend *Protocol* and 2014 *China Rare Earths* Case

- **Facts**

Rare earths have been a source of trade friction between the U.S. and China since at least 2010, when China restricted exports of these niche metals to Japan amidst a

[62] U.S. DEPARTMENT OF DEFENSE, SUMMARY OF THE 2018 NATIONAL DEFENSE STRATEGY OF THE UNITED STATES OF AMERICA – SHARPENING THE AMERICAN MILITARY'S COMPETITIVE EDGE (January 2018), www.defense.gov/Portals/1/Documents/pubs/2018-National-Defense-Strategy-Summary.pdf.

diplomatic dispute.[63] That sent rare earth prices skyrocketing, and "fuel[ed] tension between the U.S. and China goes back to at least 2010, when China limited exports to Japan after a diplomatic dispute, sending prices for the niche metals spiking and fueling concerns across the U.S. military that China could do the same to the United States."[64] In March 2020, the U.S. State Department launched a website to help stake America's claims to offshore rare earths deposits.[65] Doing so would "giv[e] countries with nascent resource industries an online 'toolkit' to help them develop assets in a way that will allow them to meet the standards of U.S. investors."[66]

And, in September 2020, President Donald J. Trump issued an *Executive Order* requiring his Cabinet to examine the extent to which the U.S. remained dependent on rare earths, consider the imposition of tariffs, quotas, or other restrictions on their imports, with a view to strengthening U.S. supply chains and ending China's dominance of the market for them.[67] Invoking the *IEEPA* (50 U.S.C. Sections 1701 *et seq*., discussed in a separate Chapter), the President declared a national emergency on the matter (quoted below). And, the U.S. government took a $25 million equity stake in a Dublin-based battery metals company, TechMet, to assist it in developing a cobalt and nickel mine in Brazil, and thus wean America off of its dependence on China and Chinese refining capacity for these

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63 *See generally* Ernest Scheyder, *American Quandary: How to Secure Weapons-Grade Minerals without China*, REUTERS, 22 April 2020, www.reuters.com/article/us-usa-rareearths-insight/american-quandary-how-to-secure-weapons-grade-minerals-without-china-idUSKCN2241KF (reporting the U.S. has only "one rare earths mine – and government scientists have been told not to work with it because of its Chinese ties," "[t]he mine is southern California's Mountain Pass, home to the world's eighth-largest reserves of the rare earths used in missiles, fighter jets, night-vision goggles and other devices," but DOE ordered "government scientists not to collaborate with the mine's owner, MP Materials, the DOE's Critical Materials Institute … because MP Materials is almost a tenth-owned by a Chinese investor and relies heavily on Chinese sales and technical know-how…," and "MP Materials, which bought the mine [out of bankruptcy] in 2017, describes itself as an American-controlled company with a predominantly U.S. workforce," [yet] [t]he privately held firm is 9.9%-owned by China's Shenghe Resources Holding Co., and Chinese customers account for all its annual revenue of about $100 million."). Interestingly, "Mountain Pass first opened in the late 1940s to extract europium, a rare earth used to produce the color red in televisions," "drew heavily on technology developed by Manhattan Project government scientists to separate the 17 rare earths, a complex and expensive process," and "[b]y the early 1980s, the mine was a top global rare earths producer," and "[i]ts minerals were in much of the equipment that U.S. soldiers used during the first Gulf War in 1990." *Id*.

64 Ernest Scheyder, *Exclusive: U.S. Army Will Fund Rare Earths Plant for Weapons Development*, REUTERS, 11 December 2019, www.reuters.com/article/us-usa-rareearths-army-exclusive/exclusive-u-s-army-will-fund-rare-earths-plant-for-weapons-development-idUSKBN1YF0HU (also noting "President Donald Trump earlier this year [2019] ordered the military to update its supply chain for the niche materials, warning that reliance on other nations for the strategic minerals could hamper U.S. defenses"). [Hereinafter: *Exclusive: U.S. Army*.]

65 The website is *Energy Resource Governance Initiative Toolkit*, https://ergi.tools.

66 Daniel Bochove, *U.S. Launches Tool to Stake Claim to World's Rare Earth Minerals*, BLOOMBERG, 1 March 2020, www.bloomberg.com/news/articles/2020-03-01/u-s-launches-tool-to-stake-claim-to-world-s-rare-earth-minerals?sref=7sxw9Sxl. [Hereinafter, *U.S. Launches Tool*.]

67 *See Executive Order on Addressing the Threat to the Domestic Supply Chain from Reliance on Critical Minerals from Foreign Adversaries*, www.whitehouse.gov/presidential-actions/executive-order-addressing-threat-domestic-supply-chain-reliance-critical-minerals-foreign-adversaries/ [hereinafter, September 2020 *Executive Order*]; *Trump Issues Fresh Rare Earth Mining Executive Order*, REUTERS, 30 September 2020, www.reuters.com/article/us-usa-rareearths/trump-issues-fresh-rare-earth-mining-executive-order-idUSKBN26M3ZI [hereinafter, *Trump Issues Fresh*].

minerals and their use in the cathodes of EV batteries.[68] Query, however, whether such overt intervention in the marketplace – in this case, through the U.S. IDFC (formerly OPIC) – smacked of the kind of industrial policy measures of which the U.S. complained against China in the Sino-American Trade War (discussed in a separate Chapter).

Rare earth elements are used in advanced catalysts (for cars and oil refineries), alloys, batteries (including nuclear batteries), cameras, cancer treatments, ceramics, computers (including memory), consumer goods (*e.g.*, iPhones, particularly their cameras and speakers, and their vibrating function, and electronic products such as DVD players, monitors, and TVs), fiber optics, flints and flint steel, glass polishing, green technology (*e.g.*, rechargeable batteries for EVs and hybrid cars, and in EV motors, dysprosium and neodymium), high-refractive index glass, lighting, magnets, medical devices, microwave equipment, military equipment (*e.g.*, anti-missile defense systems, jet engines, lasers, missile guidance and sonar systems), nuclear reactor control rods, steel, superconductors, wind turbines, x-ray tubes, and an array of dual civilian-military use items (*e.g.*, lasers, satellites, and sensors, and for night-vision equipment, lanthanum).[69]

There are 17 rare earths: cerium (Ce); dysprosium (dy); erbium (Er); europium (Eu); gadolinium (Gd); holmium (ho); lanthanum (La); lutetium (Lu); neodymium (Nd); praseodymium (Pr); promethium (Pm); samarium (Sm); scandium; terbium (tb); thulium (Tm); ytterbium (Yb); and yttrium (Y).[70] The September 2020 *Executive Order* articulated grave concern about U.S. dependence on China for these items:

> Our dependence on one country, … China, for multiple critical minerals is particularly concerning. The United States now imports 80 percent of its rare earth elements directly from China, with portions of the remainder indirectly sourced from China through other countries. In the 1980s, the United States produced more of these elements than any other country in the world, but China used aggressive economic practices to strategically flood the global market for rare earth elements and displace its competitors. Since gaining this advantage, China has exploited its position in the rare earth elements market by coercing industries that rely on these elements to locate their facilities, intellectual property, and technology in China. For instance, multiple companies were forced to add factory capacity in China after it suspended exports of processed rare earth elements to Japan in 2010,

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[68] *See* Eddie Spence, *U.S. Takes Stake in Battery-Metals Firm to Wean Itself Off China*, BLOOMBERG, 4 October 2020, www.bloomberg.com/news/articles/2020-10-04/u-s-takes-stake-in-battery-metals-firm-to-wean-itself-off-china?sref=7sxw9Sxl.

[69] *See Explainer: China's Rare Earth Supplies Could Be Vital Bargaining Chip in U.S. Trade War*, REUTERS, 22 May 2019, www.reuters.com/article/us-usa-china-rareearth-explainer/explainer-chinas-rare-earth-supplies-could-be-vital-bargaining-chip-in-u-s-trade-war-idUSKCN1SS2VW. [Hereinafter, *China's Rare Earth Supplies*.]

[70] *See* Valerie Bailey Grasso, *Rare Earths in National Defense: Background, Oversight Issues, and Options for Congress*, Congressional Research Service, 7-5700, R41744 (23 December 2013), https://fas.org/sgp/crs/natsec/R41744.pdf; Pratish Narayan & Joe Deaux, *U.S. Fighter Jets and Missiles Are in China's Rare-Earth Firing Line*, BLOOMBERG, 29 May 2019, www.bloomberg.com/news/articles/2019-05-29/u-s-fighter-jets-and-missiles-in-china-s-rare-earth-firing-line.

> threatening that country's industrial and defense sectors and disrupting rare earth elements prices worldwide.
>
> The United States also disproportionately depends on foreign sources for barite. The United States imports over 75 percent of the barite it consumes, and over 50 percent of its barite imports come from China. Barite is of critical importance to the hydraulic fracturing ("fracking") industry, which is vital to the energy independence of the United States. The United States depends on foreign sources for 100 percent of its gallium, with China producing around 95 percent of the global supply. Gallium-based semiconductors are indispensable for cell phones, blue and violet light-emitting diodes (LEDs), diode lasers, and fifth-generation (5G) telecommunications. Like for gallium, the United States is 100 percent reliant on imports for graphite, which is used to make advanced batteries for cell phones, laptops, and hybrid and electric cars. China produces over 60 percent of the world's graphite and almost all of the world's production of high-purity graphite needed for rechargeable batteries.
>
> …
>
> I therefore determine that our Nation's *undue reliance* on critical minerals, in processed or unprocessed form, *from foreign adversaries* constitutes an *unusual and extraordinary threat*, which has its *source in substantial part outside the United States*, to the *national security, foreign policy, and economy of the United States*. I hereby declare a *national emergency* to deal with that threat.[71]

The President's concern was not new. In 2019, President Trump ordered the Pentagon "to find better ways to procure samarium cobalt rare earth permanent magnets, which are often found in precision-guided missiles, smart bombs and military jets."[72]

In the above-quoted *Executive Order*, the President invoked the *IEEPA* (50 U.S.C. Sections 1701 *et seq*.) discussed in a separate Chapter), which would authorize imposition of tariff barriers and NTBs on Chinese rare earth imports (though it had not been used to do so as a tool to implement domestic policy). It also would prohibit financial transfers (to any foreign country or person) involving any banks, and block acquisitions and transactions (by any foreign country or person) in property subject to U.S. jurisdiction, in connection with rare earth transactions. Further, the President referenced the 1950 *Defense Production Act* (50 U.S.C. Sections 4501-4568) also discussed in a separate Chapter), directing the Secretary of the Interior to consider the provision of grants "to procure or install production equipment for the production and processing of critical minerals in the United States" under the *DPA*.

As to why these earths are called "rare" in the first place, the reason is they occur in low concentrations in the ground and are difficult and costly to mine.[73] The WTO case

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71 September 2020 *Executive Order*. (Emphasis added.)

72 *Trump Issues Fresh*.

73 *See China's Rare Earth Supplies*.

concerned the validity of three types of Chinese measures: export duties on rare earths, and on tungsten and molybdenum products; export quotas on rare earths, and on tungsten, and molybdenum products; and the administration and allocation of export quotas on rare earths and molybdenum. Insofar as these export barriers exposed reliance by the U.S. and other countries on Chinese-sourced rare earths as inputs into vital national security products, the case rang alarm bells in many Ministries and Departments of Defense.[74] On the one hand (as the above-quoted *Executive Order* indicates), America (as of May 2019) accounts for 9% of world demand for rare earths, and the Pentagon accounts for 1% of U.S. demand. On the other hand, "China hosts most of the world's processing capacity and supplied 80% of the rare earths imported by the United States from 2014 to 2017," and also in 2018,[75] and "[i]n 2017, China accounted for 81% of the world's rare earth production," and "is home to 37% of global rare earths reserves."[76]

In the 2014 WTO Appellate Body litigation, China lost its three appeals.[77] It also lost a business battle. Many countries scrambled as quickly as possible for reliable, non-Chinese sources of rare earths, opening and/or expanding mines and processing facilities in Australia, Brazil, Canada, Estonia, India, Malaysia, and South Africa.[78] Notably, Greenland, an autonomous region of Denmark, also is home to 38.5 million tons of the world's 120 million tons of reserves of rare earth oxides.[79] That explains why President Donald J. Trump offered in August 2019 to buy Greenland from Denmark – which, predictably, rejected the offer.[80] Given the "urgent push by Washington to secure domestic supply of the minerals used to make military weapons and electronics," the DOD proceeded with plans to "fund construction of rare earths processing facilities."[81] This move – which included Pentagon "fund[ing for] up to two-thirds of a refiner's cost and … fund[ing] at least one project and potentially more" – "mark[ed] the first financial

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74 *See, e.g., Factbox: Rare Earths Project Under Development in U.S.*, REUTERS, 22 April 2020 (www.reuters.com/article/us-usa-rareearths-projects-factbox/factbox-rare-earths-projects-under-development-in-u-s-idUSKCN2241L6 (reporting "[t]he U.S. government is planning to fund domestic rare earths projects in an attempt to reduce its reliance on China, the global leader of the specialized sector," "[r]are earths are a group of 17 minerals used in a plethora of military equipment and consumer electronics," "[t]here are no known substitutes.," "Apple Inc., for instance, uses rare earths in its iPhone's taptic engine, which makes the phone vibrate," "[w]hile the modern rare earths industry had its genesis in World War Two's Manhattan Project to develop the atomic bomb, China has spent the last 30 years building a monopoly over the sector," hence "[r]are earths are no longer processed in the United States," so "[i]n an attempt to change that, the Pentagon last year [2019] said it would fund mines and processors via the *Defense Production Act* [discussed in a separate Chapter] which gives the military wide berth to procure certain equipment.").

75 *See U.S. Launches Tool.*

76 *See China's Rare Earth Supplies* (*citing* U.S. Geological Survey data).

77 *See* WTO Appellate Body Report, *China – Measures Related to the Exportation of Rare Earths, Tungsten, and Molybdenum*, WT/DS431/AB/R, WT/DS432/AB/R, WT/DS433/AB/R, ¶¶ 5.1-5.74 (adopted 7 August 2014). [Hereinafter, *China Rare Earths* Appellate Body Report.]

78 *See China's Rare Earth Supplies*. Moreover, in the Section 301 Sino-American Trade War (discussed in a separate Chapter), the U.S. continued to exempt Chinese rare earths imports from its 25% tariff (as of May 2019), though China hit U.S.-origin rare earths that are shipped to China for processing with a 25% counter-retaliatory tariff.

79 *See* Harry Dempsey, *U.S. Enticed by Greenland's Rare Earths Resources*, FINANCIAL TIMES, 19 August 2019, www.ft.com/content/f418bb86-bdb2-11e9-89e2-41e555e96722?shareType=nongift.

80 *See Greenland: Trump Criticises "Nasty" Denmark Over Cancelled Visit*, BBC NEWS, 21 August 2019, www.bbc.com/news/world-us-canada-49423968.

81 *Exclusive: U.S.* Army.

investment by the U.S. military into commercial-scale rare earths production since World War Two's Manhattan Project built the first atomic bomb."[82]

- **Relationship between Chinese *Accession Protocol* and *WTO Agreement***

The first Chinese appeal focused on two narrow questions: "whether there is an objective link between *an individual provision* in [the Chinese] *Accession Protocol* and existing obligations under the *Marrakesh Agreements* and the Multilateral Trade Agreements," and whether an exception in a MTA can justify a violation under that *Protocol*.[83] Contrary to the Chinese argument, the Appellate Body found neither Article XII:1 of the *Marrakesh Agreement* nor Paragraph 1:2 of the *Protocol* definitively answered these questions. There is no general answer as to whether a GATT-WTO exception can be invoked to defend against an alleged *Protocol* breach. So, the Appellate Body relied upon its 2012 *China Raw Materials* and 2010 *China Publications and Audiovisual Products* decisions for answers.

Those answers must be based on "customary rules of treaty interpretation and the circumstances of the dispute."[84] So, the "analysis must start with the text of the relevant provision in [the Chinese] *Accession Protocol* and take into account its context," including relevant provisions in the *Accession Working Party Report* and *WTO Agreements*, and consider "the overall architecture of the WTO system as a single package of rights and obligations and any other relevant interpretive elements."[85] The analysis "must be applied to the circumstances of each dispute, including the measure at issue and the nature of the alleged violation."[86]

Did China's imposition of export duties on rare earths, tungsten, and molybdenum items violate Paragraph 11:3 of Part I of its *Accession Protocol*? China said Article XX(g) justified any such violation. Here, textual links between the *Protocol* and GATT were sufficient to permit China to invoke Article XX(g) in defense of an alleged breach of Paragraph 11:3 of the *Protocol*. That is, China was able to use GATT in defense of an alleged non-GATT violation regarding export restraints. However, (as explained below) it flunked Step One of the Two Step Test.

- **Distinction without Difference?**

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82 *Exclusive: U.S. Army* (also noting "China, which refines most of the world's rare earths, has threatened to stop exporting the specialized minerals to the United States, using its monopoly as a cudgel in the ongoing trade spat [the Sino-American Trade War, discussed in a separate Chapter] between the world's two largest economies," and that, "[a]fter processing, … rare earths need to be turned into rare earth magnets, found in precision-guided missiles, smart bombs and military jets and China controls the rare earths magnet industry, too," and estimating that "[a] rare earth processing pilot plant could cost between $5 million and $20 million, depending on location, size and other factors, with a full-scale plant potentially costing more than $100 million to build").

83 *China Rare Earths Appellate* Body Report, ¶ 5.74 (adopted 7 August 2014).

84 *China Rare Earths* Appellate Body Report, ¶ 5.74.

85 *China Rare Earths* Appellate Body Report, ¶ 5.74.

86 *China Rare Earths* Appellate Body Report, ¶ 5.74.

China lost the 2012 *Raw Materials* case, in which it argued it could use GATT Article XX in defense of an alleged breach of its *Protocol*. Nevertheless, in the *Rare Earths* case, it again tried the defense that it could rely on Article XX to justify a violation of the *Protocol*. But, in *Rare Earths*, China offered four new legal arguments. The *Rare Earths* Panel heard those arguments, because they were novel, but ultimately rejected all four of them. The Panel held China violated its *Protocol* commitments, and could not excuse the violation by invoking Article XX as a justification.

China appealed a finding by the Panel on one of the four arguments that it lost, but not the ultimate holding of the Panel. The argument China appealed was that its *Accession Protocol*, and all of its provisions (that is, each and every one of the Chinese commitments in the *Protocol*), is an integral part of the *Marrakesh Agreement* and one of the MTAs. China based its argument on Article XII:1 of the *Marrakesh Agreement* and Paragraph 1:2 of the *Protocol*. China made this argument for good reason: it wanted to expand the range of possible defenses it could use against alleged breaches of its *Protocol*.

If every one of the commitments China made in its *Protocol* was part of the corpus of GATT-WTO law, then it could use GATT Article XX (and any other exception in any other WTO agreement) in defense of any alleged violation of any one of those *Protocol* commitments. China could engage in what might be called "cross straits defense," where "straits" refers not to the Straits of Formosa (Taiwan), but to different GATT-WTO texts. China could use any text in defense of the *Protocol*: rather than being confined to use an exception in a particular agreement (*e.g.*, Article XX in GATT) to an alleged breach only in that same agreement (*e.g.*, Article XI of GATT), China could use the exception to alleged breaches of other texts (*e.g.*, the *Protocol*). It could do so on the logic that every commitment in the Protocol is part of the same corpus of GATT-WTO law as every exception in any text under the *Marrakesh Agreement* or MTAs. To continue with the military analogy, China wanted the Article XX weapon to be a versatile one, adaptable to several battlefronts, from the desert to the jungle. If the Mainland were attacked, *i.e.*, if its adherence to its *Protocol* commitments challenged, then it could defend itself from positions in the Straits, using weapons from non-*Protocol* texts, rather than have to hunker down on the Mainland and use only weapons inside the *Protocol*.

The Panel rejected the Chinese argument. The Panel said neither Article XII:1 nor Paragraph 1:2, support the Chinese contention. The Panel held the Chinese *Protocol*, and each one of its provisions, are not integral parts of the *Marrakesh Agreement*, and do not constitute one of the MTAs. So, China could not automatically rely on GATT Article XX in defense of an alleged breach of any one of the terms in its *Protocol*. That is because China could not presume that each and every provision in its *Protocol* is part of the seamless web in the GATT-WTO regime.

But, in an ostensibly odd twist, the Panel also held the *Protocol*, in its entirety (*i.e.*, taken as a totality), is an integral part of the *Marrakesh Agreement*. This finding is confusing, because it relies on a distinction between "all of its [the *Protocol's*] provisions," and "in its [the *Protocol's*] entirety." The Panel said (1) not each and every provision of

the *Protocol* is part of the *Agreement*, but also said (2) the totality of the *Protocol* is part of that *Agreement*. The Appellate Body agreed with the Panel, and upheld these findings.

Is this a distinction without a difference? From a common sense perspective, yes: if the overall *Protocol* is part of the corpus of GATT-WTO law, then surely that means each commitment in the *Protocol* is part of that corpus. In turn, China should be allowed to invoke any exception in GATT-WTO law as a defense to an alleged breach of any of its *Protocol* commitments.

But, from a legal perspective, no: it is vital to show a link between the particular *Protocol* commitment at issue, on the one hand, and the GATT-WTO defensive exception, on the other hand. Not every possible defense across the many GATT-WTO texts is related to every commitment in a *Protocol*. As the Panel rightly said, Article XII:1 of the *Marrakesh Agreement* prevents Members from cherry picking among which of the MTAs they will abide by. To join the WTO is to accept a package deal, all the rights and obligations under the *Marrakesh Agreement* and annexed MTAs. So, if a newly acceding WTO Member could use GATT Article XX on all battlefields, then that Member could pick and choose among MTA commitments to follow.

IV. Enter the Kingdom (Saudi Arabia)

KSA applied to become a GATT contracting party on 13 June 1993. On 9 September 2005, the Kingdom concluded its bilateral accession agreement with the U.S., the last of roughly 40 such agreements. On 28 October, the Working Party finished its work on the accession package, and on 11 November the WTO General Council adopted the terms of accession. The WTO Membership approved the terms of accession for the Kingdom, one of the last major economies then not in the WTO, on 11 December 2005, at the Hong Kong Ministerial Conference. Membership took effect on that day, which was 30 days after notification to the WTO Secretariat of ratification of the *Protocol of Accession* by the Saudi government.

In reviewing the key Saudi terms of entry, consider the extent to which Chinese commitments raised the bar. Consider the same comparisons with respect to Vietnam (which became a WTO Member on 11 January 2007).

● Application of Agreements

KSA agreed to apply the WTO agreements throughout its territory, including immediately the *SPS* and *TRIPs Agreements*.

● Market Access for Goods

KSA established an average bound tariff level of 12.4% and 10.5% for agricultural and non-agricultural products, respectively, by the end of a 10-year implementation period. It set 92.6% of its tariff rates, at the final bound level as of the date of accession. For the remaining rates, the Kingdom implemented the final bound levels in 2008, 2010, or 2015.

Final bound individual agricultural tariffs ranged from 5%-200%, with the highest rates on dates and tobacco products. For non-agricultural products, 11% are duty free, and the highest tariff is on iron, steel, and wood products.

- **Forbidden Products**

KSA invoked the GATT Article XX(a) public morality exception to ban entry into the Kingdom of products forbidden (*ḥarām*) by Islamic Law (*Sharī'a*). Such goods are alcohol, pork, pork items, and pornography.

- **List of Banned Items**

KSA agreed to review, at least once a year, its list of banned imports, and removal from that list of merchandise the importation of which would not compromise the legitimate objectives of the Kingdom.

- **NTBs**

KSA pledged to eliminate all NTBs inconsistent with WTO rules.

- **Banking Services**

KSA agreed to permit the commercial presence of foreign banks through a branch of an international bank, or through a locally-incorporated joint stock company, with a 60% equity cap on foreign participation in a JV. Foreign banks could establish branches in the Kingdom. Only commercial banks may offer financial services, though non-commercial banking financial institutions can provide asset management and advice.

- **Insurance Services**

KSA agreed to allow commercial presence of foreign insurance companies through a direct branch of a foreign insurer, or through a locally incorporated cooperative insurance joint stock company, in which the foreign equity cap will be 60%. It gave extant foreign insurers 3 years following accession to convert to either a direct branch or a Saudi cooperative insurance company, during which time they may continue their operations, and offer new products and services. However, *Shari'a* proscriptions on acceptable insurance products (*takaful*) must be respected.

- **Telecommunications Services**

Within three years of accession, KSA promised to permit up to 70% foreign equity ownership in the telecommunications sector, specifically, for both basic and value-added telecom services. But, a joint stock company must provide public telecom services.

- **Distribution Services**

During a three-year phase out period, the Kingdom said it would eliminate most restrictions on the distribution of goods within its territory.

- **Fees**

KSA agreed to review, within two years of accession, a fee it charges for authenticating trade documents, to bring this fee into conformity with WTO rules.

- **FDI**

The Kingdom agreed to broad opening to FDI, based on a Negative List approach (whereby all sectors are open save for those specifically listed), excluding a few key sectors such as upstream petroleum activities.

- **Implementation**

Consider also the record of the Kingdom in implementing its commitments. Of particular concern are FDI and its impact on Saudi employment. In May 2012, SAGIA suspended all new applications for services, and raised the minimum capitalization requirement for a retail or industrial service license from 1 million Saudi *riyals* (U.S. $266,000) to 50 million *riyals* ($13 million).[87] Following the Saudi WTO accession, foreign businesses had hoped SAGIA would eliminate or reduce FDI barriers, especially so as to help diversify the Kingdom away from dependence on oil. To be sure, it was expected SAGIA eventually would publish new, liberalized WTO-consistent reforms.

But, with 30% of the 26 million Saudis under age 15, and unemployment rates among 15-24 year olds of 28% and 45.8% for men and women, respectively, perhaps SAGIA was trying to advantage the domestic private sector to create non-oil export related jobs for young Saudis (the so-called "Saudi-ization" policy). After all, expatriates comprise 85% of the Saudi private sector workforce.[88] Might it also have been sensitive to hostility from religious conservatives chary of economic liberalization and the perceived values antithetical to the *Sharī'a* embedded in FDI?

V. Enter the Bear (Russia)

To enter the WTO after applying in June 1993, Russia had to complete 57 bilateral agreements on market access for goods, and 30 for services, plus agree with its WTO Working Party on an accession package spelling out its specific commitments, as memorialized by a *Protocol*. After 18 years of tortuous, sometimes bitter, negotiations, Russia did so. The WTO Membership approved the terms of accession for the Russian Federation on 16 December 2011, at the Geneva Ministerial Conference. On 10 July 2012 the Russian Parliament (*Duma*) ratified and accepted those terms, on 18 July approval the

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87 *See* Toula Murphy, *New Head of Saudi Investment Agency Reviewing Rules with Eye to Boosting Jobs*, 29 International Trade Reporter (BNA) 1358 (16 August 2012).

88 *See* Simeon Kerr, *Saudi Freebies Prompt Alarm Over Economic Change*, FINANCIAL TIMES, 9 February 2015, at 4.

Federal Council (the upper House of Parliament) approved them, and on 21 July President Vladimir Putin signed implementing legislation that Parliament passed to ensure Russian law conformed with the terms. Hence, Russia – the ninth largest exporter in the world (as of 2011) – became the 156th Member of the WTO effective 22 August 2012, 30 days after Russia notified the WTO of its acceptance of the accession terms.

Comparing Russia's terms with those of China and Saudi Arabia suggests the Dragon and Kingdom had raised the price of admission for the Bear, as the Dragon had for the Kingdom. For instance, the WTO permitted China to promise it would implement its WTO commitments into domestic law, and granted China long phase-in periods for some of its promises. Bitter experience with perceived delays by China in acting on its word through legislation caused WTO Members to insist the Kingdom make appropriate changes in its law (subject to over-arching requirements of Islamic Law, the *Sharī'a*) before entry. Yet, here again, the experience was not entirely rosy. Some Members felt that while the Kingdom put its promises on paper, it did not enforce them in practice, with one example being protections for IP. Consequently, with Russia (as well as Vietnam before it), Members refused to support accession until Russia had implemented and began enforcing its commitments. Specifically, Russia had to implement 80%-90% of its commitments before joining the WTO.

In addition to accepting the full panoply of multilateral GATT–WTO accords, to what did Russia commit? The accession documents consisted of a Working Party Report numbering over 700 pages, followed by over 1,000 pages of market access commitments on goods and services (*i.e.*, a Schedule for Goods, and a Schedule for Services) and a formal *Protocol of Accession*. A synopsis of the market access obligations in its terms of accession is as follows, along with comparisons to China and Saudi Arabia, and observations of critics.[89]

- **Industrial Tariffs**

[89] *See* World Trade Organization, Ministerial Conferences, *Briefing Note: Russia's Accession to the WTO* (December 2011), www.wto.org; Daniel Pruzin, *More Than One year After Deal, Georgia, Russia Still Working To Open Trade Corridors*, 30 International Trade Reporter (BNA) 312 (28 February 2013); Catherine Belton, *Russia Joins WTO After 19-Year Delay*, FINANCIAL TIMES, 23 August 2012, at 4; Daniel Pruzin, *Georgian Official Hopes for Quick Launch of Free Trade Agreement Talks with U.S.*, 29 International Trade Reporter (BNA) 210 (9 February 2012); Len Bracken, *Obama Says FTA Possible with Georgia After Meeting with President Saakashvili*, 29 International Trade Reporter (BNA) 173 (2 February 2012); Sergei Blagov, *Russia Urges U.S. to Lift Jackson-Vanik in Advance of Organization Membership*, 29 International Trade Reporter (BNA) 111 (26 January 2012); Daniel Pruzin, *Europe's Business Sector's Reaction to Russia's WTO Accession Somewhat Muted*, 28 International trade Reporter (BNA) 2016 (15 December 2011); Daniel Pruzin, *WTO Russia Working Party Adopts Package on Accession; Early 2012 Membership Seen*, 28 International Trade Reporter (BNA) 1844 (17 November 2011); Daniel Pruzin, *Russian Service Sector Access for Foreigners Spelled Out in its WTO Accession Schedule*, 28 International Trade Reporter (BNA) 1855 (17 November 2011); Sergei Blagov, *Russia Details WTO Accession Commitments in Car, Meat, Information Technology Sectors*, 28 International Trade Reporter (BNA) 1856 (17 November 2011); Charles Clover, *Russia Agrees to Cut Tariffs Ahead of WTO Entry*, FINANCIAL TIMES, 11 November 2011, at 3 [hereinafter, *Russia Agrees*].

Russia agreed to bind tariffs on agricultural and non-agricultural goods at lower levels than did China. Russia agreed to drop, within seven years of accession, its overall average tariff level from 10.3% (as of 2008-20110) to between 7.1% and 7.8%. Russia pledged to implement the final bound rate as of the date of accession for over one-third of all tariff lines, and to set the bound rate for another one-quarter of its lines three years after accession. In other words, but for a few product-specific exceptions (noted below), Russia agreed to a rapid period in which to establish its MFN bindings.

China had agreed to cut its industrial product tariffs to an average binding of 8.9%. In contrast, Russia pledged to decrease its average bound rate on industrial goods to between 6.4% and 7.3%. That meant it reduced many of its applied rates, which averaged 9.5% (as of 2008-2011). As regards implementation, for both industrial and agricultural products, Russia phased in the required bound rates for one-third of its total tariff lines immediately as of the date of its accession, and to phase in another one-quarter of the tariff cuts over the subsequent three years.

As regards industrial goods of keen export interest to the U.S., Russia committed to binding its tariff on chemicals at 5.2% (down from its 6.5% applied rate), on electrical machinery at 6.2% (down from 8.4%), and on paper and wood at 8% (down from 13.4%). China had agreed to bound tariffs on chemicals in the range of 2.5% to 5%. On civil aircraft, Russia agreed to a binding of 7.5%-12.5%, depending on the size of the aircraft, phased in over seven years. Interestingly, China agreed to a lower bound level on aircraft, namely, 2%-4%. Concerning space equipment, Russia agreed as of the date of accession to grant any tariff exemption on a MFN basis.

- **Autos**

Russia agreed to cut its MFN duty on imported autos, but the amount was unclear. The WTO said the cut was from an applied duty of 15.5% to a bound rate of 12%. Russia's Chief WTO Negotiator, Maxim Medvedkov, and Aleksey Portansky, a trade economist at the Higher School of Economics in Moscow, said the reduction was from 30% to 15% across 7 years, with an initial cut from 30% to 25% on the date of accession, followed by a drop to 15% within four years of accession. Critics charged either figure, 12% or 15%, reflected protectionism in favor of the Russian auto sector, and found the exact phase in schedule murky.[90] Special implementation periods applied to motor vehicles, as well as civil aircraft and helicopters (seven years, second longest after the pork phase-out period of eight years, discussed below).

Russia also pledged to phase out a measure that even it admitted was inconsistent with GATT national treatment principles and the WTO *TRIMs*, namely, differential tariffs and tariff exemptions under the vehicle assembly regulations of its Auto Investment

[90] Still another account said Russia promised its auto tariff as of the date of accession would be 15.5%, representing a 23% reduction. *See* Daniel Pruzin, *Europe's Business Sector's Reaction to Russia's WTO Accession Somewhat Muted*, 28 International trade Reporter (BNA) 2016 (15 December 2011).

Program.[91] Russia imposed lower tariffs on imported auto parts and components to manufacturers that have set up a production facility in Russia than to those companies that have not done so. In some instances, it granted duty-free treatment to manufacturers with direct investments in Russia. After the phase out, required by 1 July 2018, the tariffs would be non-discriminatory.

- **IT**

Russia joined the post-Uruguay Round *ITA*. Thus, within three years of its accession, it removed tariffs on all high-technology products, namely, the roughly 180 computer, semiconductor, telecommunications, and other information technology items the *ITA* covers. Before accession, the average applied Russian duty on ITA products was 5.4%.

However, Russia refused to join the WTO *CTHA*, which cuts chemical import tariffs to 0, 5.5%, or 6.5%.[92] Therefore, Russia retained its duties on petrochemical product imports of 6.5% to 9%.

- **Export Duties and Quotas**

Critics pointed out that on over 700 goods, Russia retained the right to impose export tariffs. Its tariff on natural gas exports is 21%. The EU was especially miffed at these restrictions, but through difficult negotiations, Russia agreed to certain limits on its export restraints for these goods.

Timber is a case in point. Russia agreed not to impose prohibitive export duties. On raw spruce wood, Russia set an export quota of 6.25 million cubic meters, and an export tariff of 13%. On raw pine wood, it agreed to an export quota of 16 million cubic meters, with an export tariff of 15%. Copper and nickel are other examples. Russia agreed to reduce its export tariffs within 4 years of accession from 10% to zero and 5% to zero, respectively, on these commodities. Still other illustrations of goods (among the list of over 700) for which Russia agreed to fix its export tariffs were base metals, crustaceans, fish, raw hides and skins, pulp and paper.

- **Agricultural Tariffs**

On farm products, Russia pledged to decrease its average bound MFN rate to between 10.8% and 11.3%. That meant it reduced many of its applied rates, which averaged between 13.2% and 15.6% (as of 2008-2011). Special implementation periods applied to

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91 One example concerns a JV between America's Ford Motor Company and the Russian car manufacturer Sollers. They agreed to invest $1.4 billion to make 180,000 cars annually by 2015 in Yelabuga, which is located in the Alabuga Special Economic Zone, in Tatarstan, central Russia. Sergei Blagov, *Russia Urges U.S. to Lift Jackson-Vanik in Advance of Organization Membership*, 29 International Trade Reporter (BNA) 111 (26 January 2012).

92 *See* Daniel Pruzin, *Punke Says U.S. Frustrated by Talks with Brazil, China, India on Doha Tariffs*, 27 International Trade Reporter (BNA) 973 (1 July 2010). There are 50 WTO Members that have signed the *CTHA*. *See id*.

certain farm goods, with the longest being poultry (eight years). Overall, Russia agreed to bind tariffs on agricultural goods at lower levels than did China than did China. China had agreed to cut its farm tariffs to an average bound level of 15%.

On particular farm goods, Russia committed to bound MFN rates, resulting in cuts in actual rates, as follows: cereals, 10% (down from a 15.1% applied rate); dairy products of 14.9% (down from 19.8%); and oilseeds, 7.1% (down from 9%). On sugar, Russia decreased its specific duty from U.S. $243 to $233 per metric ton, and on cotton, Russia consented to DFQF treatment.

Russia agreed that by 1 January 2020, it would phase out all agricultural TRQs. Until then, it bound its total annual:

(1) beef quota at 530,000 tons (with a 15% in-quota MFN tariff, and an 55% above-quota MFN rate)
(2) poultry quota (for selected products) at 350,000 tons (with a 25% in-quota MFN tariff and 80% over-quota MFN rate),
(3) pork quota at 400,000 tons (with a zero-duty in-quota rate, and ceiling of 25% as of 1 January 2020).

Russia also agreed to phase out its TRQ on whey products, which attracted a 10% in-quota (and 15% out-of-quota) rate. Pork stood out: of all products, agricultural or industrial, it had the longest implementation period for phasing out the TRQ.

Several Russian quotas contained country-specific allocations. However, once Russia eliminated its TRQs, those allocations, too, would be gone. There would be no restriction on import volumes of beef, poultry, and pork, and Russia would impose a flat bound rate of 25% tariff on these products. Manifestly, the tariff-only regime would be more transparent than the TRQs.

Further, Russia agreed to establish within 18 months of accession a national definition of "high-quality beef" that is non-discriminatory. Concomitantly, it agreed to abandon the American definition of the term, which benefited the U.S., Argentina, and Canada, because it allowed their producers to ship less expensive, poorer quality cuts of beef under the tariff heading pertaining to "high quality beef." Doing so discriminated against other major beef exporters, namely, Australia, Brazil, and Uruguay, which shipped more expensive, better quality cuts under that heading.

- **Agricultural Quotas**

Critics explained Russia did not give up its country-specific quotas for meat imports, which favor the U.S. and EU. Moreover, Russia can retain in perpetuity its TRQs on beef and poultry.

- **Agricultural Subsidies**

Russia agreed to reduce dramatically, albeit gradually, its farm subsidies. It pledged to cut its OTDS in half across six years, from U.S. $9 billion in 2012 to $4.4 billion by 2018. However, critics pointed out that through 2014, Russia was permitted to increase them.

Russia also agreed to impose per product limitations on domestic farm support, so as to avoid concentrating subsidies on individual commodities. From its accession to 31 December 2017, Russia said annual agricultural support to specific products would not exceed 30% of non-product specific agricultural support. That is, funding directed at any one crop could not be greater than one third of generalized funding available to all crops.

Russia accepted a limit on agricultural subsidies of no more than 5% of the total annual value of its domestic farm production. That 5% cap, known as the *de minimis* threshold, was the same as set for all developed countries in Article 6:4(a)(i) of the WTO *Agreement on Agriculture*. China bargained for an 8.5% cap, and Article 6:4(b) of the *Agreement* affords developing countries a 10% limit. Subsidies below the threshold are not counted in the Amber Box (*i.e.*, as part of the Aggregate Measure of Support, or AMS), and thus not subject to reduction.

So, by accepting the 5% threshold, Russia agreed not to seek special and differential treatment as a developing country. Additionally, Russia agreed to bind its agricultural export subsidies at zero, and as of accession, eliminate the VAT exemption to which some domestic farm products had been eligible.

- **Industrial Subsidies**

Russia made three major commitments on industrial subsidies. First, as a general rule, it agreed to eliminate all such subsidies. Second, as an exception, for certain industrial support programs Russia wanted to keep, Russia agreed to modify the terms of those programs to ensure subsidy benefits were not contingent on either exportation or the use of domestic versus imported inputs. Russia said it would notify the WTO of these programs. Third, Russia pledged not to invoke Articles 27-28 of the WTO *SCM Agreement*, meaning it would not seek special and differential treatment as a developing country (Article 27), nor would it extend the scope or renew upon expiry any of its notified programs that are inconsistent with GATT-WTO rules (Article 28).

- **QRs and Customs Procedures**

As a general principle for all imported products, whether farm or manufactured, Russia pledged to eliminate all QRs that it could not justify under GATT-WTO rules. Such import restraints included bans, licensing requirements, permit restrictions, prior approvals or authorizations (*e.g.*, expert evaluations), and quotas. For example, no license would be needed to import alcohol, certain products with encryption technology (*e.g.*, electronic digital signature devices, personal smart cards, and wireless radio equipment), or pharmaceuticals.

Russia retained two minor exceptions. First, certain encryption technology related products would require an import license, with a one-time only expert evaluation and approval. Second, certain products, notably, alcohol, meat, and wood, would require declaration and entry at designated Russian customs checkpoints.

Still, overall, eliminating quantitative restrictions signaled enhanced transparency in Russian trade rules. Concomitantly, Russia also agreed not to apply any customs procedures in a country-specific manner, *i.e.*, to adhere to non-discriminatory treatment with respect to those procedures. And, Russia pledged to respect all GATT-WTO rules on the transit of goods, including energy, through its territory. Consequently, it said it would publish customs fees before applying them.

- **SPS Measures**

Russia committed to full implementation upon accession of the *SPS Agreement*. On SPS measures, Russia pledged to apply international standards developed by *Codex Alimentarius*, the OIE, and 1952 *International Plant Protection Convention* (*IPPC*).

The EU and U.S. share a long history of SPS disputes with Russia. Consequently, Russia's agreement not to suspend imports of merchandise, except in cases of serious risks to human or animal health, based on on-site inspection before giving the exporting country the change to take corrective action was significant. Russia identified a single authority, *Rosselkhoznadzor*, as its Federal Service for Veterinary and Phytosanitary Surveillance. So, in the event of a potential SPS threat, that authority would send its counterpart in the relevant exporting country its inspection report, so that the other country could take action.

Furthermore, Russia agreed to a number of common product certification requirements and veterinary standards to ensure consistency with international norms. Further, for any country requesting one prior to 1 January 2013, Russia agreed to offer a veterinary export certificate that included information different from the data set forth in the standard documentation of the *Eurasian Economic Community and Customs Union*.

- **TBT Measures**

Likewise, on TBT measures, Russia committed to full implementation upon accession of the *TBT Agreement*. Thus, it agreed to use international standards, unless (as is allowed under Article 2:4 of the *Agreement*) those standards are ineffective or inappropriate to achieve its policy objectives.

Russia pledged to review regularly its list of products subject to obligatory certification, and all of its TBT measures (including those of the *Eurasian Economic Community and Customs Union*), to ensure they remained necessary, and thus consistent with the *TBT Agreement*. To streamline administration and eliminate bureaucracy, Russia agreed to replace all extant certification bodies with a single national accreditation body by 30 June 2012. In a key sector, telecommunications, Russia said that by the end of 2015,

it would limit mandatory requirements for telecom equipment used in public networks to the technical regulations adopted by the *Union*.

- **Energy Pricing**

The question of dual pricing of NG, an input or feedstock into the production of intermediate and finished goods arose in both the Saudi and Russian accessions. The applicants said they did not subsidize NG to domestic industries, and in any case, all industries in their countries, whether foreign or domestic, received NG at the same, non-discriminatory price. Some WTO Members, especially ones like the U.S. and EU with competing industries, were skeptical, and argued the Saudi and Russian energy providers (namely, Saudi Aramco and Gazprom, both state-owned, respectively) subsidized their feedstock, thus benefiting downstream industries through cheaper input costs.

That is, skeptics highlighted the gap between domestic Saudi and Russian prices, on the one hand, and industrial prices on the world market, on the other hand. They said any Saudi or Russian energy-intensive sector, such as a producer of fertilizers, metals, or petrochemical products, benefits. These industrial consumers allegedly get NG at below its cost of production, or at least far below international market prices.

Both the Saudis and Russians countered cheaper energy resources in their countries simply result from natural comparative advantages: they have those resources in abundance, and transportation costs to industrial consumers are small. In the end, both applicants resolved the issue in a controversial manner. Russia agreed its:

> producers and distributors of natural gas would, in regard to their industrial consumers, *"operate on the basis of normal commercial considerations,"* and that the government would ensure that these operators would *"recover their costs,"* and *"be able to make a profit, in the ordinary course of their business."*[93]

Specifically, Russia agreed that as of the date of accession, its producers and suppliers of NG, such as *Gazprom*:

> will, in respect of their supplies to industrial users, would *recover their costs* (including the cost of production, overheads, financing charges, transportation, maintenance and upgrade of extraction and distribution infrastructure, investment in the exploration and development of new fields) and *would be able to make a profit, in the ordinary course of business*.[94]

The key language (italicized) – operation on normal commercial considerations, namely, cost recovery and profits – was little more than a restatement of some of the principles in

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[93] Daniel Pruzin, *WTO Russia Working Party Adopts Package on Accession; Early 2012 Membership Seen*, 28 International Trade Reporter (BNA) 1844 (17 November 2011). (Emphasis added.)

[94] *Quoted in* Daniel Pruzin, *Europe's Business Sector's Reaction to Russia's WTO Accession Somewhat Muted*, 28 International trade Reporter (BNA) 2016 (15 December 2011). (Emphasis added).

GATT Article XVI. So, critics charged this language was a weak discipline. Critics queried how the requirement of cost recovery plus profit would be possible given that (as of December 2011), *Gazprom* charged Russian industrial users, such as fertilizer manufacturers, just U.S. $3 per one million British Thermal Units (MMBTU). The EU fertilizer industry estimated *Gazprom* would have to double the price to $6 per MMBTU to meet this requirement.[95]

Underlying their skepticism was a harsh Russian reality. Many towns in that vast country were single-industry ones, dependent for their existence on energy-intensive industries like fertilizers. If *Gazprom* rapidly doubled the cost of feedstock to these industries, then social unrest could erupt in these towns – and spread. In that respect, Russia retained its sovereign right to regulate quantity and pricing of energy to households and other non-commercial users. Thus, it could apply its own social policies in that sphere.

- **Services Generally**

From the perspective of a foreign services supplier seeking market access in any foreign country, three broad, categorical questions are relevant:

(1) Entity Regulation:
In what form of business association must services be supplied in the foreign country?

(2) Activity Regulation:
What specific kinds of services products may be offered in the foreign country?

(3) Geographic Regulation:
May the products be offered throughout the foreign country?

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95 In December 2013, Russia lodged its first WTO case, accusing the EU of violating Articles 2:2:1:1 and 2:4 of the *Antidumping Agreement*. The EU imposed AD duties on three kinds of subject merchandise: (1) ammonium nitrate and solid fertilizers with high ammonium content (ranging from €28.88 to €47.07 per ton); (2) certain seamless steel pipes of iron or steel (ranging from 24.1% to 35.8%); and (3) certain welded tubes and pipes of iron or non-alloy steel (ranging from 16.8% to 20.5%). The first Article requires that costs of production normally be calculated based on records of the respondent producer-exporter, while the second Article mandates comparison between Normal Value and Export Price be fair.

Gazprom provided NG as feedstock for all 3 types of subject merchandise. Russia said that when the EU computed Normal Value, it adjusted upward the input prices to the subject merchandise, specifically, of NG, to the level at which Russia sold the gas overseas. The EU did so, it explained, because the natural gas prices billed by Gazprom to the respondent producer-exporters were cheaper prices than those charged to foreign buyers. Thanks to the upward adjustment, Normal Value increased, hence the dumping margin and consequent AD duties increased.

The EU first imposed AD duties on ammonium nitrate in 1995, on seamless pipes and tubes in 2006, and on welded tubes and pipes in 2008. So, facts of the WTO case arose before Russia's accession and commitment to eliminate any dual pricing. Nevertheless, the case illustrated the continued mistrust between the sides on the topic. *See* Daniel Pruzin, *Russia Hits EU for Factoring in Low Cost Of Gas in Russia in Dumping Investigations*, 31 International Trade Reporter (BNA) 80 (9 January 2014).

In respect of these questions, on balance, Russia agreed to open more service sectors and sub-sectors, with fewer exclusions, than had China or Saudi Arabia.

Of course, a threshold matter is whether a foreign country agrees to open a particular services sector or sub-sector to foreign providers. Impressively, Russia made market access commitments in 11 services sectors and 116 sub-sectors. These sectors and sub-sectors included audio-visual, communications, computer, education, finance, professional, retailing, and transportation. Many of the Russian commitments are horizontal, meaning they apply across all sectors and sub-sectors.

The key areas in which Russia made no commitment to open its services markets were air passenger transport, energy distribution (except for consulting, in which foreigner could engage), mass media news (only Russians could set up a news agency). Additionally, Russia reserved the right to impose a state monopoly (rather than foreigners) to distribute alcoholic beverages. Russian reluctance to open these areas was not unusual, as several WTO Members have similar areas cordoned off to foreigners. It also was understandable in the Russian context.

In the sectors and sub-sectors it did open, Russia insisted on three key horizontal limitations. First, concerning entity regulation, with some exceptions, the supply of a service must be through a subsidiary. That is, commercial presence (Mode III delivery under *GATS* Article I:2(c)) must be established by a juridical person of the Russian Federation, not by a branch or representative office. Critics charged this requirement severely limits freedom of choice as to the form of entry into Russia, and imposes administrative and transactions costs on them.

Second, Russia maintained its prohibition on foreign ownership of agricultural land, and restricted such ownership on non-farm land. For instance, foreigners are limited to rental periods of 49 years for certain land plots.

Third, any service Russia deems a public utility at either a national or local level may be subject to a public monopoly, or to an exclusive right granted by the government to a private supplier. The second and third limits are types of activity and geographic regulation of foreign services suppliers.

Despite these limitations, even critics admitted the Russian Services Schedule afforded better market access than did the Schedules of long-standing GATT Members like Brazil, India, and several Southeast Asian nations.

- **Banking Services**

Russia agreed to provide market access for foreign service suppliers, including banks. Foreign banks could establish 100% owned subsidiaries in Russia. They also could buy individual Russian financial institutions, with no equity limit, and operate in Russia through representative offices. Russia made no commitment allowing a foreign bank to

establish branches, but said it would review the issue of foreign bank branching before it joined the OECD or the next round of WTO MTNs on services.

Critics charged some equity caps remained, and complained of technical barriers. In particular, Russia limited the overall foreign ownership of the Russian banking sector to 50%. However, in ascertaining whether a foreign bank breaches the 50% ceiling, capital that bank invests in a potentially privatized Russian bank is not counted. The exclusion is an incentive for foreign banks to help re-capitalize Russian banks.

From the Russian perspective, there was logic to each restriction. Via the first restriction, Russia sought to ensure foreign banks had capital in Russia, and could easily be ring-fenced, in the event of liquidity or solvency problems. (Recall under basic Accounting and Corporate Law principles, a branch has no assets or liabilities of its own; rather, the branch is included on the balance sheet of its parent.) Via the second restriction, Russia sought to avoid foreign domination of its financial industry.

In respect of the activities in which foreign banks could engage, Russia was liberal. It committed to them accepting deposits and making loans in local and foreign currency, financial leasing, payments, and money transmission (*e.g.*, issuing bank drafts, credit, charge, and debit cards, and travelers' checks). Russia also agreed banks could engage in asset management, OTC trading (including of derivatives, foreign exchange, money market instruments, and securities such as stocks and bonds), and clearing and settlement of trades. To ensure a level competitive playing field, Russia said deposits in foreign banks would have the same government-backed guarantees, including any deposit insurance scheme, as do Russian banks, including state owned banks.

- **Insurance Services**

As regards activities, foreign insurers could sell life or non-life insurance, and re-insurance. The key limitation concerned a subsidiary established by a foreign insurer after the Russian accession that sought to issue automobile, civil liability, or life insurance policies. For up to five years from the date of accession, Russia retained the right to set limitations on the subsidiary issuing such policies.

As regards business association form, Russia imposed entity regulations to be as sure a foreign-owned insurer would not go bankrupt. Essentially, the regulations mandated hard assets on Russian soil to which claimants could look to if and when they invoked their insurance policies.

Specifically, during the initial nine years following accession, Russia said foreign insurers had to operate through a subsidiary. Following that period, Russia agreed they could establish branches. However, any foreign insurer seeking to establish a branch would have to have total assets of at least U.S. $5 billion. Moreover, the foreign insurer would have to provide separate capitalization for the branch, and Russia could deny the insurer a license to set up the branch if the foreign capital contribution exceeded 50% of the overall capital committed to the planned branch.

Critics charged some equity caps remained on foreign insurance companies buying Russian insurers. They also complained of TBTs and long transition periods. But, Russia grandfathered the rights it previously granted through an operating license to any extant foreign subsidiary insurer, the foreign ownership of which exceeded 49%.

- **Securities Services**

Russia liberalized access of securities brokers, dealers, and underwriters. They could set up wholly-owned subsidiaries or representative offices. But, as with commercial banks, securities firms could not branch in Russia, for the same capital and ring-fencing reasons. Russia capped aggregate foreign ownership of all securities firms at 25%.

- **Telecommunications Services**

Russia agreed to remove within four years the 49% equity limit on foreign companies investing in Russian telecommunications businesses. Foreign investors could take majority stakes, and even 100% ownership, in Russian telecom companies.

Still, critics found three deficiencies. First, a subsidiary was the only permissible form of business association in which a foreigner could provide telecom services. Second, some equity caps remained. In particular, for up to the first 4 years following its accession, Russia limited to 49% total foreign investment in the voting shares (also called "charter capital") of an incumbent telecom operator, regardless of whether it provided fixed-line, internet, or mobile services. Third, critics complained of technical barriers and long transition periods. Russia also agreed to accept all liberalization commitments under the 1998 WTO *Basic Telecommunications Agreement*.

- **Legal and Other Professional Services**

Russia opened its market to foreign lawyers, subject to the standard horizontal limitations, plus an additional restriction. Foreign lawyers cannot represent clients before Russian criminal courts or arbitration panels unless they obtain the status of an advocate under Russian law. Likewise, subject to horizontal restrictions, foreigners could provide advertising, computer, construction, and engineering services.

- **Courier and other Transportation Services**

Russia agreed to open its market to foreign providers of courier and express delivery services, as long as they established their commercial presence in Russia via a subsidiary. Russia also opened its maritime and road transportation services markets to foreign providers, for both freight and passenger carriage. In respect of rail transportation, Russia said that by 1 July 2013, it would impose charges on goods only in conformity with GATT-WTO rules. The consequences were: (1) no charges would be applied to goods in transit unless they were published before their entry into force; and (2) any charges on

imported products shipped by rail across Russia would be the same as those applied to similar products moving domestically by rail.

- **Distribution Services**

Russia accepted that, upon accession, 100% foreign-owned companies could engage in wholesale or retail distribution of services, and in franchising of services. Thus, there would be no legal need for a Russian JV partner to distribute services.

- **IP**

Russia agreed to implement the *TRIPs Agreement* fully upon accession, thus eschewing any transition period. That meant it applied the IP conventions on which the *Agreement* piggy backs, such as the 1886 *Berne Convention for the Protection of Literary and Artistic Works*. Moreover, Russia agreed to take specific enforcement measures against certain alleged IP pirates.

This pledge reflected the frustrations of WTO Members, notably the EU and U.S., with the rampant IP piracy in China after its WTO accession. The Members wanted Russia to do more than simply sign the *TRIPs Agreement*, as China had done. They demanded Russia to crack down on pirates, which they felt China had not done (at least not with sufficient vigor). So, Russia said, first, it would act against websites with servers in Russia that promote the illegal distribution of copyright-protected material. Second, it agreed to investigate and prosecute individuals and companies that distribute infringing merchandise over the internet.

The U.S. also was concerned Russian firms would enter the market with lower-cost generics before American producers of pharmaceuticals, specifically biologics, could recoup their investments in developing the original branded drug. So, Russia agreed to give 6 years of data exclusivity to original patent holders of biologic pharmaceuticals before Russian companies could use their clinical test data to seek approval for a generic.

- **Government Procurement**

Russia pledged to join the plurilateral WTO *GPA* in a two-phased manner. First, upon accession, it became an observer to the *GPA*. Second, within four years of accession, it aimed to be a full *GPA* member.

- **Treatment of Poor Countries**

Comparatively less time seems to have been spent in the Russian accession negotiations, than in the Chinese and Saudi talks, on developing country status. Russia did not push hard the claim it was entitled to this status. Instead, impressively, Russia agreed it would apply preferential tariff treatment to 152 developing countries and LDCs.

How so? Russia pledged to apply the Custom Union *GSP* scheme to them. Under that scheme, the tariff on any eligible product originating in a developing country is 75% that of the normal MFN rate, and while the tariff on any eligible product originating in a least developed country is zero.

- **RTAs**

Russia agreed to adhere to GATT disciplines on FTAs and CUs, regardless of whether the FTA or CU to which it was a party was formed before or after its WTO accession. It applied retroactively to its pre-accession FTAs and CUs these disciplines.

- **Transparency**

The era of Russian accession negotiations was a tumultuous one in the history of the former Soviet Union. From involvement in the post-9/11 War on Terror to sponsoring post-Berlin Wall privatization programs, the ex-Eastern bloc countries had to navigate difficult political and economic waters. One important development was the formation on 1 January 2010 of the *Eurasian Economic Community and Customs Union*. This *Union* consists of Russia, Belarus, and Kazakhstan. On 1 July 2011, the three countries eliminated customs boundaries among them, and on 1 July 2012, forged an integrated trade community. Russia initially wanted the Union to accede to the WTO as a bloc, which would have been unprecedented in GATT-WTO history. No RTA had joined as such; rather, parties to an RTA have acceded as individual sovereign nations, but thereafter may choose to speak with a single voice, like the EU. As part of its accession package, Russia conceded that any *Union* trade measures would follow GATT-WTO transparency rules, including prior publication and a reasonable period of time for comment from WTO Members.

Moreover, no doubt with a view to enhancing its global appeal as a place in which to do business, Russia made accession commitments on transparency beyond the generic requirements of GATT Article X. It said it would publish all legislation affecting trade in goods, services, or IP before their adoption, and would give WTO Members a reasonable period of time of no less than 30 days to comment. No trade measure would take effect before publication. As for commentary on proposed measures, Russia limited the exceptions to cases of emergency, national security, monetary policy, law enforcement necessity, public interest, or prejudice to individual public or private enterprises. To be sure, because of their ambiguity, some of these exceptions remain susceptible to abuse. Nevertheless, the over-riding fact was Russia opened itself to critical foreign analyses. Similarly, Russia pledged annual reports to the WTO on its ongoing privatization program for as long as that program continued.

Additionally, Russia agreed that, as of the date of accession, it would publish in its *Rossiiyskaya Gazeta* the list of goods and services subject to state price controls. Russia signaled that the goods on the list would include baby food, natural gas, raw diamonds, medical goods, and vodka, and the services would include natural gas supply, water supply, and public and railway transportation.

- **Motivations?**

Why did the Russian Bear agree to commitments even more sweeping than those the Chinese Dragon and Arabian Kingdom made? First, Russia had little choice. Its predecessors raised the bar for WTO entry. Russian counter-leverage was confined to one, albeit important, area: energy. Russia was the largest exporter of NG in the world, and is the source for over one-third of it the EU consumes. Russian energy importers had no interest in levying tariffs on it. Never was it likely that Members would confront Russian obstinacy by saying "accept the deal or we will raise duties on oil and gas."

Second, ambitious terms were in Russia's self-interest. Russia had to counter the global perception that the Russian business climate was poor and deteriorating. Foreign businesses complained about the lack of rule of law, corruption, and a low-quality infrastructure. Accepting significant market access obligations sent a "Good Housekeeping seal of approval" signal to foreign businesses that Russia was serious about modernizing and diversifying its economy, integrating into the global trading system, and thus an appealing location in which to do business.[96] While inefficient businesses in certain sectors might be adversely affected by foreign competition, Russian officials knew well this challenge was precisely the fillip they needed.

Third, the political economy context favored Russia, Following the global economic slump triggered in 2008, WTO Members needed new trade and investment markets to help stimulate their economies through high-paying, export-oriented growth. The Russian economy was too large to ignore, and Russia knew it. Russia understood it was wise for the Members to lock Russia into ambitious accession terms. Those terms were international legal obligations Russia would implement in its legal system.

As for politics, Georgia, which joined the WTO in June 2000, finally dropped its opposition to Russian accession. The countries broke off diplomatic relations in August 2008 and fought a brief war that summer, won by Russia – the South Ossetia War. Georgia was the last hold out against accepting Russia into the WTO. As part of the Russian accession package, Russia and Georgia agreed in November 2011 to:

(1) Customs administration and monitoring of trade in goods across their border, with the trade monitoring mechanism reported to an integrated database maintained by the WTO Secretariat.
(2) Memoranda of Understanding (MOUs) between Russia and Switzerland, and Georgia and Switzerland, in which Switzerland acts as a neutral third party to monitor Russo-Georgian border relations.
(3) Diplomatic notes among Russia, Georgia, and Switzerland allowing for monitors (from a private company selected by Switzerland) to be present physically at the entry and exit points of specified trade corridors at the Russo-Georgian border.

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96 *Russia Agrees* (*quoting* an unnamed analyst).

The choice of Switzerland under terms (2) and (3) reflected the fact that following the 2008 war, that country played the role of mediator. The idea was Switzerland was a neutral third country that could be trusted to supervise private sector monitors, who would be physically present at trade corridors between Georgia and Russia, particularly in Abkhazia and South Ossetia.

Obviously, such terms suggest how broad the scope of a WTO accession package can be, essentially extending into matters that in bygone decades might have been dealt with through a boundary dispute case before the ICJ. The agreement between the recently warring parties did not address the break-away regions of Abkhazia and South Ossetia. In 2008, Russia had intervened on behalf of these separatists in the war with Georgia, and remained the only country in the world to do so. Hence, the international legal status of these regions remained murky. Nonetheless, once each side agreed on commercially reasonable terms, timing favored that the Russians and Georgians accept them.

It also could be the case Georgia was enticed to agree to Russian entry by a quiet pledge from the U.S.: an FTA. In January 2012, President Barack H. Obama (1961-) announced the United States and Georgia would build on their 2007 *TIFA*, and explore an FTA. The timing of that announcement, so soon after Georgia dropped its opposition to Russian accession, seemed not to be coincidental.

How effective was the inducement, at least for securing expeditious implementation of the November 2011 accord between Georgia and Russia to open trade corridors between them? By February 2013, the corridors still were shut. The sides had yet to finalize contract terms with a private sector firm to be responsible for monitoring passage of goods between the disputed regions of Abkhazia and South Ossetia.

- **Aftermath**

Negotiations for Russia to join the WTO took 18 years, longer than both China (15 years) and Saudi Arabia (12 years). During that momentous period of Russian history, Russia adjusted many of its laws and practices with a view to WTO accession. But, Algeria easily held the record – over 35 years, having applied to become a GATT contracting party in 1987, but still not a Member as of 2012, and still an Observer as of 2023. With the entry of China, Saudi Arabia, and Russia to the WTO, the last remaining major economy not in the Club was Iran.

In light of the crisis in Ukraine that commenced in November 2013, and became an outright war in February 2022, has WTO Membership for Russia mattered? If so, in what ways? If not, why not?

VI. Enter the Land of a Million Elephants (Laos)

Consider the July 2012 *Decision* and its five benchmarks via the case study of Laos. Laos was the first country to win WTO entry under the new LDC rules. On 28 September 2012, the WTO approved the terms of accession for that small, landlocked, impoverished

Indochinese nation, which had been among the most heavily bombed in human history during the Vietnam War (1964-1975). In fact, Laos was "the most heavily bombed country *per capita* in the world," and (as of January 2023), an estimated 80 million unexploded ordnance – 30% of all bombs America dropped on Laos – were "still scattered nationwide."[97] Tragically, Laotians suffered regular casualties: some of the bombs "explode when farmers accidentally unearth them while working, others when people cook outdoors near aging and unseen ordnance."[98]

Laos initially applied to join the WTO initially in July 1997, and the Working Party first met in 2004. Hence, Laos went through 12 years of negotiations. Laos officially acceded to the WTO on 2 February 2013, becoming its 158th Member. Laos was the sixth LDC, and the last of the 10 countries in the *ASEAN*, to join.[99] Highlights of its accession package under the new rules were:

- **Tariffs**

Laos agreed to bind its average maximum tariff rate at 18.8%.

- **Quantitative Restrictions**

Laos said it would refrain from imposing any licenses, quotas, or other non-tariff import prohibitions unless such measures were taken to protect its BOP, and in accordance with GATT-WTO rules.

- **Services**

Laos pledged to open its market to foreign suppliers in 10 services sectors and 79 sub-sectors.

- **S&D Treatment**

Laos received until 1 January 2015 to comply with the *SPS* and *TBT Agreements*, respectively), and until 31 December 2016 to comply with the *TRIPs Agreement*. But, it had to comply with all other WTO agreements immediately upon accession.

Query whether these terms of accession benefit economic growth and development, and poverty alleviation, in Laos.

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97 Kosuke Inoue, *Laos Struggles with Unexploded Bombs 50 Years after Paris Accords*, NIKKEI ASIA, 28 January 2023, https://asia.nikkei.com/Economy/Laos-struggles-with-unexploded-bombs-50-years-after-Paris-Accords. [Hereinafter, *Laos Struggles with Unexploded Bombs*.]

98 *Laos Struggles with Unexploded Bombs*.

99 For a review of the first decade of Laos' membership, as well as a synopsis of its accession package, see World Trade Organization, *Eleventh China Round Table Marks Lao's 10th WTO Accession Anniversary* (2 February 2023), www.wto.org/english/news_e/news23_e/acc_03feb23_e.htm; Patrick Low, World Trade Organization, *Lao People's Democratic Republic: A Retrospective on 10 Years of WTO Membership* (undated), www.wto.org/english/news_e/news23_e/acc_03feb23_e.pdf [hereinafter, *Lao People's Democratic Republic: A Retrospective*.].

- **Aftermath**

A decade after Laos's WTO entry, the WTO produced a study on the effects of its Membership. The WTO, despite the possible temptation to laud the benefits of accession, was candid about the challenges Laos faced:

> Lao PDR has made considerable progress over the last 20 years or so in strengthening its economy, moving towards a more market-oriented approach, and fostering trade and investment as vehicles for growth and development. The Lao PDR has also played a proactive and constructive role in the WTO, operating at the frontier of its capacity and capabilities, as the country prepares to graduate out of LDC status. After several years of dynamic growth, the last few years have seen a slowdown, culminating in a dramatic reduction in growth from 2019 onwards. Macroeconomic instability, taking the form of rapid exchange rate depreciation, high inflation, and excess debt has dampened performance.
>
> These trends have not been helped by the COVID-19 pandemic, nor by the crisis in Ukraine and the recent reduction in growth and rising inflation in major economies. But current macroeconomic difficulties also have domestic origins that call for swift remedial action. Trade and FDI are vital components of sustained resilience and future progress. …
>
> Trade and investment have so far remained buoyant and maintained a solid pace of growth over the last decade, with imports and exports recovering after slippage in 2020, largely as a consequence of the pandemic. Success in this area is partly attributable to Lao PDR's WTO-driven regulatory and market access reforms. Strong links with countries in the immediate vicinity and part of the *ASEAN* community have also been very important.
>
> There are, however, certain aspects of Lao PDR's trade profile that need attention. Exports are still concentrated largely on power generation, minerals and mining, and agriculture. Most of these exports do not add as much value to the domestic economy as they could. This is reflected in the small share of manufacturing in GDP and the minimal level of manufactured exports. Having a natural resource base as rich as Lao PDR's offers opportunities for adding more value through manufacturing. This would raise incomes, create new jobs, and diversify the product base. Diversification is a key component of resilience.
>
> A second vulnerability in the trade sphere is the geographical concentration of the country's export base. While it is unsurprising that neighboring markets with shared borders are in many ways the easiest to serve, given that Lao PDR is landlocked and that operating further afield automatically implies transit trade. Nevertheless, with a more diversified and higher

value-added export base, there are likely to be profitable trading opportunities further afield, from which Lao PDR could benefit while reducing the risk of excessive geographical concentration. This would certainly imply a strengthening of the manufacturing sector.

Lao PDR has been one of the most active LDCs in the WTO. The country has participated in a range of activities, often going beyond boilerplate participation in major committees and meetings. Participation in three *Joint Statement* Initiatives, signing up to the two *Information Technology Agreements*, and active engagement in the field of trade facilitation are cases in point. Lao PDR has also been diligent in meeting its WTO accession commitments. The country has made good use of training and technical cooperation opportunities offered by the WTO and other international agencies.

Three areas that … are going to be important going forward are services, environmental issues, and the rise of the digital economy. Services have traditionally been neglected in many countries, but this is beginning to change in important ways. As countries become richer, services become a larger source of value. This results from forces on both the consumer and producer sides. As individuals gain higher levels of income, proportionately more of their consumption baskets are devoted to services.

On the production side, there is virtually no activity that does not require inputs of core producer services – namely financial services (banking and insurance), business services, transport, information and communication technologies, construction, and distribution. They are thus proportionately more in demand than other inputs as the economy grows and diversifies. Moreover, these services are key to international trade since they are either embedded as value in production or are required to move products from one place to another. These realities make it incumbent governments to pay special attention to ensuring that the production and marketing of services is as free as possible from inefficiency and excessive regulation.

Secondly, on the environmental side, climate change and environmental conservation are increasingly moving to center-stage in policy-making as governments seek to raise standards and avoid unsustainable resource use and production methods. These concerns will increasingly influence regulation in ways that will affect all countries that trade and seek investment, regardless of whether or not the country concerned is a significant source of environmental degradation. Thirdly, digitization is becoming an increasingly dominant feature of modern economies. Countries that do not keep up with digital technologies in production and exchange will be left behind. This is about infrastructure, connectivity, and the capacity to reap the efficiency rewards associated with digitization.[100]

[100] *Lao People's Democratic Republic: A Retrospective*, 31-32.

In appraising the above-quoted conclusions, consider how many of the challenges are thanks to domestic reforms in Laos, and the participation of Laos in ASEAN and the WTO, and how many of them are beyond the control of Laos, ASEAN, and the WTO. In other words, what is cause, and what is effect?

VII. Enter *Arabia Felix* ("Happy Arabia" – Yemen)

● Peace through Trade in Yemen?

An ancient civilization and former British colony (specifically, Aden, from 1839-1967), Yemen boasts the only purely republican form of government on the Arabian Peninsula, with a President, Prime Minister, and bicameral legislature.[101] It was the first to grant women the right to vote. Yet, Yemen is one of the world's poorest countries. It has seen more than its fair share of bloodshed since uniting as the Yemeni Republic in May 1990 from the previous North Yemen (formally, the "Yemen Arab Republic") and socialist South Yemen (the "People's Democratic Republic of Yemen") following the 1986 South Yemen Civil War – a War dating back at least to a 1972 dispute.

Since the 1990s, it has been a breeding ground and hotbed for Islamist extremists. Perhaps no country other than Afghanistan, Iraq, Pakistan, and possibly Somalia has been more embroiled in the War on Terror on its home soil than Yemen. Many terrorist attacks have been met with American military force, including (controversially) drone strikes. To add to the disruption of everyday life, in early 2011 Yemen became one of the Arab Spring countries, resulting in February 2012 in a transfer of power from Ali Abdallah Saleh (1942-) who had been in power since becoming President of North Yemen in 1978.

That Spring was short-lived. In January 2015, *Houthi Shī'īte* rebels controlled much of the country, including the capital, Sana'a, and seized the Presidential Palace. *Al Qaeda* and Islamic State operated in the South. Yemen was more like a failed state than WTO Member. Subsequently, Saudi Arabia led a coalition that intervened militarily in Yemen against the *Houthis*, who were backed by Iran. Thousands of civilians died in what became a nasty proxy war between the *Sunnite* Kingdom and *Shī'īte* Iran that continued into 2016 with no end in sight.

Yemen, therefore, is a vitally important experiment in which to test the vision of "peace through trade." Yemen has known trade since at least the 12th century B.C., when its imports and exports of incense and spices flowed across the Near and Far East, and Indian Sub-Continent. Can modern trade liberalization, in part via the integration of Yemen into the world trading system, raise economic growth, alleviate poverty, and thereby give hope to Yemenis? Or, will it do little to stem a perception of marginalization and oppression that weakens defenses against extremist messages?

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[101] This discussion draws partly on *Yemen*, WIKIPEDIA, en.wikipedia.org/wiki/Yemen; *Aden Emergency*, WIKIPEDIA, en.wikipedia.org/wiki/Aden_Emergency; *Yemeni Civil War (2015-Present)*, WIKIPEDIA, https://en.wikipedia.org/wiki/Yemeni_Civil_War_(2015-present). The data cited above are summarized in *Yemen*, WIKIPEDIA, en.wikipedia.org/wiki/Yemen.

The challenges are enormous. Yemen has 24 million people (as of June 2011), 46% of whom are under 15 years old. It has experienced rapid population growth: in 1950, it had just 4.3 million people, and by 2050, it is projected to have 60 million. That is because it has the 30th highest Total Fertility Rate (TFR) in the world: 4.45 children per women. The Yemeni employment rate is just 35%, its agricultural base is small and sparse, and industrialization outside of hydrocarbons hardly has occurred. While it has petroleum (oil) reserves, they were largely depleted around 2017. Its proven NG reserves are plentiful, but not until October 2009 did it open its first LNG production facility. And, Yemen – like many countries – faces endemic corruption.

So, after a 13-year long odyssey, Yemen joining the WTO was both an end and a beginning in facing these challenges. Yemen applied for accession in July 2000, and the first Working Party meeting occurred in November 2004. The WTO terms of accession were finalized by the Working Party for Yemen on 26 September 2013 and approved by the WTO at its 3-6 December 2013 Bali Ministerial Conference. Yemen officially acceded as an LDC, and the 160th WTO Member, on 26 June 2014, thereby bringing under the rules of multilateral trade law 97.1% of the global economy.

They are summarized below.[102] For a desperately poor country fighting an Islamist extremist insurgency, Yemen pledged it would respect and apply its WTO commitments uniformly throughout its territory, without the need for judicial intervention.

- **Market Access for Goods**

Yemen agreed to an average bound tariff rate of 21.1% for all products, agricultural and industrial. For farm goods, its average bound commitment was 24.9, and for industrial merchandise it was 20.5%. For ODC under GATT Article II:1(b), Yemen said it would bind them at 0.25% immediately, and put at zero within 4 years of accession. It also pledged to get rid of all QRs on imports. Such QRs included bans, licenses, prohibitions, and quotas. But, Yemen kept the right to impose QRs for BOP reasons.

- **Subsidies**

Yemen agreed to bind at zero its agricultural export subsidies right upon accession.

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102 *See* World Trade Organization, *Yemen to Become 160th Member*, 27 May 2014, www.wto.org/english/news_e/news14_e/acc_yem_27may14_e.htm; World Trade Organization, *Ministerial Conference Approves Yemen's WTO Membership*, 4 December 2013, www.wto.org; World Trade Organization, Ninth WTO Ministerial Conference, *Day 2: Consultations on "Bali Package" Begin as Yemen's Membership Accepted,"* 4 December 2013, www.wto.org; World Trade Organization, *Briefing Note: Yemen's Accession to the WTO*, November 2013, www.wto.org/english/thewto_e/minist_e/mc9_e/brief_acc_yemen_e.htm - commitments; World Trade Organization, *WTO Agrees Membership Terms for Yemen, Paving Way for Formal Decision in Bali*, 26 September 2013, www.wto.org/; World Trade Organization, *Yemen*, 26 September 2013, www.wto.org; Daniel Pruzin, *WTO Working Party Finalizes Membership Terms for Yemen*, 30 International Trade Reporter (BNA) 1515 (3 October 2013).

- **Market Access for Services**

Yemen pledged to liberalize trade in 11 service sectors, encompassing 78 sub-sectors. Thus, the covered service sectors were (1) business (including the sub-sectors of accounting, auditing, and book keeping, architectural, medical, dental, and veterinary sub-sectors), (2) computer, (3) research and development, (4) communication (including telecommunication), (5) construction and engineering, (6) distribution, (7) educational and environmental, (8) financial services (covering banking and insurance), (9) health, (10) tourism, travel, recreational, cultural, and sporting services, and (11) transport. Concomitantly, Yemen said it would ensure its government fees and charges on services imports were WTO-compliant by January 2014.

- **Trading Rights**

Yemen promised to grant trading rights, *i.e.*, the right to import or export merchandise, by 21 December 2014 based on the principles of non-discrimination and non-discretion. Any person (legal or natural) from a WTO Member could import to or export from Yemen, whether or not that person had a physical presence or investment in Yemen.

- **Customs Rules**

Yemen agreed to implement fully the WTO *Customs Valuation Agreement* by 31 December 2016, eliminate certification and notarization requirements (which it previously imposed on exports to Yemen) by 1 January 2017, and get rid of consularization fees by 1 January 2017.

- **Customs Valuation**

Yemen promised to adhere to the WTO *Customs Valuation Agreement*, and not impose minimum pricing rules on imports.

- **Price Controls and SOEs**

Yemen agreed to dismantle over time price controls. These controls would be applied to certain goods (*e.g.*, agricultural products) and services that are specifically listed and published in the Yemeni *Official Gazette*. Yemen said SOEs would operate on commercial terms, including in importation and exportation transactions.

- **SPS and TBT Measures**

Yemen said it would follow fully by 31 December 2016 disciplines on SPS measures, as to food safety and the protection of human, animal, and plant health, and TBT measures, as to product labeling and standards, in the WTO *SPS* and *TBT Agreements*, respectively.

- **Transparency and Participation**

Yemen promised to publish in its *Official Gazette* all trade measures before making them effective. It would submit to the WTO all required notifications in a timely fashion. Yemen also promised individuals and business associations would have a right to appeal, particularly against governmental action affecting WTO-related rules, such as those affecting customs valuation, subsidies, IPRs, or domestic regulation of services.

- **IP**

Yemen promised to implement fully by 31 December 2016 the *TRIPs Agreement*.

Yemen's post-accession WTO history has not been happy. The Yemeni Civil War, which began in March 2015, continues, with tens of thousands of military and civilian casualties, famine, and disease.

VIII. Hope for Afghanistan and/or Help for Accession Negotiators?

Sadly, WTO accession presaged a descent into a bloody hell for Yemen. That did not stop officials from the WTO Secretariat or Members engaged in accession negotiations to push for the entry of Afghanistan. On 29 July 2016, Afghanistan became the 164th Member, the 36th LDC in the WTO, and the ninth LDC to join since 1995. (As of February 2024, there were 166 Members, with the terms of accession for Comoros and Timor Leste approved at MC 13 in Abu Dhabi.) Afghanistan completed nine bilateral market access agreements on goods, and seven on services, including with the U.S. in both areas (following the 2004 bilateral *TIFA*). The essential multilateralized commercial terms included:[103]

(1) An overall average bound tariff rate of 13.5%, reflecting an array of tariff concessions.

(2) Average tariff rates on agricultural and industrial products of 33.6% and 10.3%, respectively.

(3) The binding of export tariffs on 243 product lines, one-third of those lines at a 10% export duty, and one-quarter of them at 2½ percent.

(4) Horizontal, trade-liberalizing commitments in 11 Services Sectors and 104 Sub-Sectors, including land leasing and services for hydrocarbons and

[103] The accession documents are December 2015 Protocol (WT/L/974), November 2015 Working Party Report (WT/ACC/AFG/36, WT/MIN/(15)/6), Schedule of Goods Concessions (WT/ACC/AFG/36/Add.1, WT/MIN/(15)/6/Add.1), and Schedule of Services Concessions (WT/ACC/AFG/36/Add.2, WT/MIN/(15)/6/Add.2), www.wto.org/english/thewto_e/acc_e/a1_afghanistan_e.htm. The 28 Members of the Working Party were: Argentina, Australia, Brazil, Canada, China, EU, India, Haiti, Japan, Jordan, Korea, Kyrgyz Republic, Nepal, Nigeria, Norway, Pakistan, Panama, Philippines, Russia, Saudi Arabia, Taiwan, Tajikistan, Thailand, Turkey, Ukraine, U.S., Vietnam, and Yemen. What might have been the trade interests of each such Member *vis-à-vis* Afghanistan?

minerals, plus Mode III commitments on banking, and Modes II and III pledges on insurance.

(5) Acceptance of the *TFA*.

Afghanistan identified its post-accession aims as "attracting foreign direct investment, promoting its exports and building the capacity of its officials to take part in trade negotiations," and, of course, economic growth and poverty alleviation.[104] But, the Kabul-based regime hardly was in full control of the country's borders, much less internal transportation links. Their minds poisoned with religious ideology and political agendas, warring factions were disinclined to generate wealth through trade and FDI.

In August 2021, Afghanistan fell to the Taliban. The country was back to where it was on the eve of 9/11. WTO Membership meant nothing amidst an extreme, un-Islamic approach to Islamic Law the Taliban enforced in its land-locked ever-less developed country.[105]

Query whether the vision of "peace through trade" was one they ever had imagined. Query, too, whether some officials responsible for the Afghan accession did so with an eye to their own careers. Could they boast they had worked on that accession, but not have to worry about its efficacy or outcome? Simply put, is it responsible to bring the likes of Yemen and Afghanistan into the WTO?[106]

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[104] World Trade Organization, *DG Azevêdo Welcomes Afghanistan as 164th WTO Member*, 29 July 2016, www.wto.org/english/news_e/news16_e/acc_afg_29jul16_e.htm.

[105] *See* Raj Bhala, UNDERSTANDING ISLAMIC LAW (*SHARĪ'A*) (Durham, North Carolina: Carolina Academic Press, 3rd ed., 2023).

[106] For a study of the effect of WTO accession on LDCs, see World Trade Organization, Accessions Division, *Accessions of Least-developed Countries to the WTO –Challenges and Opportunities*, WT/ACC/41, WT/COMTD/LDC/29 (23 February 2022) (prepared for the Tenth China Table Round, 18-20 January 2022), www.wto.org/english/news_e/news22_e/ldcs_accession_study.pdf. The paper "summarizes the commitments undertaken by the nine LDCs" that "acceded to the WTO under Article XII of the *Marrakesh Agreement*, "looks into the challenges and opportunities for LDCs regarding WTO Membership, including the importance of participating in WTO activities," "examines the economic performance of recently acceded LDC Members to see how they … fared since joining the WTO," offers "some suggestions and recommendations for those LDCs … currently negotiating their WTO accessions or contemplating doing so," but does "not assert direct causality between WTO Membership and economic and policy outcomes, as many diverse influences are at work." World Trade Organization, *New Study Looks at Challenges and Opportunities of LDCs' Accession to WTO* (24 May 2022), www.wto.org/english/news_e/news22_e/acc_24may22_e.htm.

Part Two

ADJUDICATION

Chapter 4

PRE-URUGUAY ROUND GATT CIVIL PROCEDURE (1948-1994)[107]

I. Positivism and Whether International Trade Law Is "Law"?

It is not a complete answer to the question "why the need for a Uruguay Round" to speak only of the need for substantive market access in services, IP industries, and agriculture. Weaknesses in the pre-Uruguay Round dispute resolution system also were a cause. It would be an overstatement to say that the Uruguay Round was needed to strengthen the GATT multilateral dispute resolution mechanism – but, it would not be that great of an overstatement.

In his 1832 work, *The Province of Jurisprudence Determined*, John Austin (1790-1859) espoused a strict brand of Legal Positivism according to which a rule qualifies as "law" only if the rule is a command issued by a sovereign and is habitually obeyed under threat of punishment. To Austinian Positivists, international law was not law at all. Rather, it was a custom or more, with no greater or lesser strength than social or dress fashions. There was, after all, no central sovereign, no habitual obedience, and no enforcement mechanism. Austinian Positivists could have pointed to the insufferably weak pre-Uruguay Round dispute settlement system as "Exhibit A." Positivists following H.L.A. Hart (1907-1992) and his 1961 *The Concept of Law* could offer a rebuttal. What would it be?

In thinking about whether International Trade Law really is "law," especially in light of the *DSU* versus pre-Uruguay Round dispute settlement system, under either or both Schools of Positivism – Austin and Hart – consider the remarkable success of the *DSU*. For good reason, the *DSU*, which appears in Annex 3 to the *WTO Agreement*, is billed as the "Crown Jewel" in the WTO system.

In the first 20 years of *DSU* operation (1 January 1995, when the *WTO Agreement* entered into force, through September 2014), there were 482 requests for consultations, which in the first 16 years covered at least $1 trillion worth of trade. That case volume was well over the 300 disputes handled in the pre-Uruguay Round GATT system in its 47-year lifespan (1 January 1948 through 31 December 1994). Moreover, under the *DSU* (depending on the measurement period), the pace of case filings has accelerated, and there has been a higher-then-expected rate of appeals.

The metrics of success also intimate a vulnerability of the *DSU*: overload, which causes delays and risks compromises in the quality of judgments. Do these problems undermine the law *qua* "law"?

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[107] Documents References:
(1) *Havana Charter* Articles 41, 47-48, 66, 92-97
(2) GATT Articles XXII-XXIII
(3) WTO *DSU*

II. Nullification or Impairment and GATT Articles XXII-XXIII

● Violation versus Non-Violation Claims

To appreciate the inherent frailties the Uruguay Round negotiators needed to fix, it is necessary to understand the textual bases for those frailties, namely, GATT Articles XXII and XXIII. Article XXII calls upon each contracting party to accord "sympathetic consideration" to and consult with other contracting parties. Article XXIII establishes a skeletal framework for handling cases where one contracting party believes another contracting party is acting at variance with GATT obligations, technically known as "violation nullification or impairment," or otherwise behaving in a way that denies benefits that should be available, technically known as "non-violation nullification or impairment."[108] The distinction between violation and non-violation nullification or impairment is worth emphasizing, because it is unique.

The labels are indicative. A "violation" claim, authorized by GATT Article XXIII:1(a), means the complainant alleges the respondent has implemented a trade measure that is a violation of some provision of GATT or an agreement negotiated thereunder. In a "non-violation" claim, made pursuant to GATT Article XXIII:1(b), the respondent is not accused of maintaining a trade measure that runs afoul of GATT. Rather, implementation of the respondent's lawful measure results in denial or disruption of trade benefits to the complainant that the complainant negotiated within the GATT framework. Simply put, the respondent's measure does not violate a GATT rule, but it allegedly deprives the complainant of an expected benefit, like market access.

● *TRIPs Agreement* Context

As the distinction between "violation" and "non-violation" claims is built into GATT in Article XXIII, and as GATT remains a foundational document of multilateral trade law in the post-Uruguay Round era, the distinction remains as relevant as ever. Non-violation claims are entertained for goods and services thanks to the *DSU*. Should they be

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[108] For a review of the negotiating history of GATT Article XXIII:1(b) and the term "non-violation nullification or impairment," which dates to the 1927-1933 League of Nations Conferences, and an explanation that "[b]ecause diplomats were the primary actors at the negotiations of GATT obligations, the precise interpretation of language mattered less than reaching some mutually acceptable resolution," see James P. Durling & Simon N. Lester, *Original Meanings and the Film Dispute: The Drafting History, Textual Evolution, and Application of the Non-Violation Nullification or Impairment Remedy*, 32 THE GEORGE WASHINGTON UNIVERSITY JOURNAL OF INTERNATIONAL LAW & ECONOMICS number 2, 211-269, 215 (1999).

For a discussion of violation versus non-violation nullification or impairment, and an argument that American trade policy is sub-optimal in shifting from a rules-based to power-based approach, and, therefore, the U.S. should file both types of claims against China, see Ian M. Sheldon, *Filing WTO Violation and Non-Violation Complaints: A Possible Solution to China's Market Access Commitments?*, *in* THE FUTURE OF TRADE: A NORTH AMERICAN PERSPECTIVE, Chapter 9, 175-227 (Cheltenham, United Kingdom: Edward Elgar, David A. Gantz & Tony Payan eds., 2023).

Note the conjunctive "and" sometimes is used to connect "nullification" with "impairment," though technically based on the GATT Article XXIII text, the disjunctive "or" is more accurate.

for IP, too?

> Non-violation and situation complaints refer to whether and under what conditions members should be able to bring WTO dispute complaints where they consider that another Member's action, or a particular situation, has deprived them of an expected advantage under the *TRIPs Agreement*, even though no obligation under the *Agreement* has been violated.[109]

During the Uruguay Round, negotiators from Brazil, India, and other developing countries thought such claims are inappropriate in the context of IP. They worried non-violation cases may be brought against developmental, environmental, health, social, or even cultural policies, and if successful, their sovereignty might be infringed. So, they inserted into the *TRIPs Agreement* a moratorium (Article 64:2) on such claims. With a five-year sunset, it was set to lapse at year-end 2000, but (as discussed in a separate Chapter) WTO Members renew it periodically.

In June 2014, the U.S. proposed ending the moratorium, arguing non-violation claims are exceptional, but consistent with that *Agreement*. Along with Switzerland, the U.S. takes the position there is a place for non-violation complaints on IP matters under the *Agreement*. The U.S. and Switzerland also argue the moratorium allows India to infringe on a pharmaceutical patent, and then make and export a generic version of the patented medicine. Most other Members disagree:

> Members have historically differed on whether such non-violation cases are feasible in intellectual property. Some delegations consider non-violation complaints essential to maintaining the proper balance of rights and obligations within the *TRIPs Agreement* while helping to ensure that legitimate obligations are not circumvented or avoided. Others believe there is no place for the application of non-violation complaints in the area of intellectual property because of the legal insecurity and curtailment of flexibilities that could ensue and favor their complete ban in the *TRIPs* area.[110]

Alas (as discussed in a separate Chapter), the WTO repeatedly extends the moratorium, as it did in December 2015 (for another two years, through 2017) at its Ministerial Conference in Nairobi, and again in Geneva at MC 12 in November 2021.

- **Expelling China?**

In August 2018, another use of the GATT Article XXIII:1(b) non-violation nullification or impairment concept was suggested, namely, by the U.S. to force China out

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109 *See, e.g.*, World Trade Organization, *Members Agree on Recommendation to Extend Moratorium on IP "Non-violation" Cases* (5 November 2021), www.wto.org/english/news_e/news21_e/trip_05nov21a_e.htm. [Hereinafter, *Members Agree on Recommendation*.]

110 *Members Agree on Recommendation*.

of the WTO.[111] China had joined effective 11 December 2001 (as discussed in a separate Chapter), but amidst the Sino-American Trade War (also discussed in a separate Chapter), the U.S. argued China ought not to have been admitted to the club. China, said the U.S., had failed to undertake fundamental structural reforms to transition its economy from a state-dominated Socialist one to a market-oriented Capitalist one, and only the later type was compatible with WTO Membership. President Donald J. Trump (1946, President, 2017-) vowed to expel China from the WTO, but his Administration had no legal basis to do so. That is, there is no Article about expulsion among the GATT-WTO treaties. Conceivably, the WTO Membership could take a decision to kick China out, but they would have to do so by consensus, and surely China would block such a consensus, or by a super-majority vote, and China might win sufficient support to stay in. Why not try launching a broad non-violation complaint against China, it was thought?

The core claim would be that even if many Chinese *de jure* measures and *de facto* practices were not outright violations of GATT-WTO rules, nevertheless they nullified or impaired benefits that the complainants expected from China. For example, unpublished Chinese subsidies, including providing raw materials and other inputs to, or buying them from, SOEs, and granting SOEs low-cost loans, offset tariff concessions, unleveled the competitive playing field with foreign producers of like products in their home country, Chinese, and third-country markets. Hidden NTBs offset the value of China's tariff concessions. Discriminatory licensing treatment plus technology transfers in JV arrangements undermined IP protections of foreign firms. Because the Chinese government behaves non-transparently, proving its transgressions as outright instances of violation nullification or impairment would be difficult. But, adducing evidence to show they exist, with the result of non-violation nullification or impairment of benefits, might be possible. And, if the complainants won, then China would be forced to change its behavior – or quit the WTO if the CCP was unwilling to undertake the necessary reforms.

- **Relation to Tokyo Round *Codes***

In the pre-Uruguay Round era, GATT Articles XXII-XXIII were criticized – properly – as insufficiently precise and, therefore, ineffective. Such criticisms were a major impetus behind the Uruguay Round negotiations, and specifically, the *WTO Agreement* and *DSU*. But, these Articles were not the only source of difficulty. After the Tokyo Round, it was not always clear how they related to various Tokyo Round *Codes*. Some of these *Codes* contained dispute settlement procedures. Consequently, there was controversy as to whether a dispute should be governed by the general provisions of Articles XXII-XXIII, or specific procedures established in a Tokyo Round *Code*.

- **Diplomatic versus Legalistic Approach**

Still another important part of the context to appreciate is the clash of philosophies of dispute resolution evident in the pre-Uruguay Round era. GATT Articles XXII-XXIII,

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[111] *See* Greg Ip, *For U.S. to Stay in WTO, China May Have to Leave*, THE WALL STREET JOURNAL, 22 August 2018, www.wsj.com/articles/for-u-s-to-stay-in-wto-china-may-have-to-leave-1534935600.

and the dispute settlement system they spawned, reflected a "pragmatic" approach to multilateral dispute resolution, as distinct from a "legalistic" one. American-trained lawyers might prefer a litigation-style approach to dispute resolution that contains precise, rules-based adjudicatory procedures. That way, all parties operate on a level playing field – procedural due process ensures equality. It also operates as a shield against domestic political pressures. But, the pre-*DSU* system was a European-style conciliatory one. The emphasis was on negotiation and diplomacy.

The implicit assumption in the negotiation/diplomacy approach was contracting parties would act nobly toward one another, or at least they would realize that not following the "Golden Rule" in one case would haunt them in a future one. Probably most Austinian Positivists, and certainly any adherent of the realist schools of international relations theory, would call that assumption naive – and it was. In case after case, talks between contracting parties to resolve disputes turned into power games that added to trade friction rather than leading to mutually acceptable, balanced solutions. To be sure, the American legalistic approach risked turning GATT adjudication into the worst sort of personal injury circus trials. But, the European pragmatic approach was worse than simply non-transparent, elitist, and effete. It was incongruous with how nation-states interact if they have not bound themselves to a rigorous procedural mechanism for resolving disputes.

In retrospect, perhaps the clash between dispute resolution styles was inevitable. Until the Uruguay Round, the world was not ready for a formal adjudicatory mechanism with the sort of "teeth" that John Austin's austere positivism demanded. Such a mechanism would be law-applying, but it also might wind up being law-creating, thus threatening the sovereignty of nation-states. Keep that point in mind when reading WTO Panel and Appellate Body Reports. Ask whether they do not – in effect – amount to an emerging body of international common law on trade.

III. 10 Step GATT Procedure

How did dispute settlement actually "work" before the *DSU*? The steps outlined below were followed *in seriatim*, though not all of the steps would be used in every case as a settlement could be negotiated at any point.

- **Step 1: Informal Bilateral Consultations**

A complaining contracting party would call upon another contracting party, the respondent, for bilateral consultations. GATT Article XXII:1 obligated the respondent to look "sympathetically" upon the request and afford opportunities for consultations.

- **Step 2: Informal Multilateral Consultations**

The complaining contracting party, pursuant to GATT Article XXII:2, would call for multilateral consultations, in the hopes additional interested parties not only would bring pressure to bear on the respondent, but also suggest creative solutions.

- **Step 3: More Formal Bilateral Consultations**

The complaining party would trigger the formal dispute resolution procedures of GATT Article XXIII. Paragraph 1 of that Article calls for more formal bilateral consultations. It also identifies violation nullification or impairment (Article XXIII:1(a)) and non-violation nullification or impairment (Article XXIII:1(b)) as justiciable claims.

- **Step 4: Request for Panel**

The complaining party would request formation of a Panel pursuant to GATT Article XXIII:2. (Early in GATT history, complaints were heard by the CONTRACTING PARTIES. Soon, however, it became customary to refer cases to a subset of the membership, *i.e.*, a Working Party that included the complainant and respondent, along with a few other contracting parties. By the mid- to late-1950s, the practice of using Panels of three-to-five experts was established, and the practice was codified in the 1979 Tokyo Round *Understanding on Dispute Settlement*.)

- **Step 5: Panel Formation**

Assuming no blockage (discussed below), a Panel would be formed pursuant to GATT Article XXIII:2 by consensus of the GATT Council.

- **Step 6: Oral and Written Submissions**

The Panel would receive written and oral submissions from the complaining and respondent parties, all in secret.

- **Step 7: Panel Deliberations and Report**

The Panel would deliberate and prepare its Report, again all in secret.

- **Step 8: Submission of Report and Adoption**

The Panel would present its Report to the GATT Council. Assuming no blockage (discussed below), the GATT Council would adopt the Report by consensus. Only if a Report were adopted could its recommendations take effect.

- **Step 9: Compliance**

The losing contracting party was supposed to comply with recommendations in the adopted Report. If the case involved violation nullification or impairment, then the key recommendation would be removal of the offending measure. If the case involved non-violation nullification or impairment, then the key recommendation would be restoration of the competitive relationship that had been upset owing to the disputed measure.

- **Step 10: Compensation or Retaliation, if Necessary**

If the losing contracting party refused to comply with the Panel's recommendations, then it could pay compensation to the winning party. Failing an agreement on compensation, the winning party might seek a consensus from the GATT Council for authorization to retaliate, in the form of suspending or withdrawing GATT obligations owed to the losing party in an amount equal to the trade damage caused by the losing party to the winning party as a result of the measure at issue.

As intimated earlier, these steps were riddled with problems that rendered the entire system insufferably weak. The four key problems were: delays, blockages, compliance, and enforcement through remedial action.

IV. Four Weaknesses of Pre-Uruguay Round Dispute Settlement

● 1st: Delays

Four serious weaknesses plagued the GATT Panel system used from 1948 to 1994. First, there were no time periods for the various steps. Any step could go on seemingly interminably. Consequently, cases could – and did – drag on for years. For example, the infamous *Oilseeds* case (in which the U.S. complained about the EC's subsidy payments to processors, and later to farmers, of oilseeds), took four and one-half years to resolve. The U.S. first requested a Panel in April 1988. In November 1992, after contentious negotiations during the Uruguay Round that threatened to derail the entire Round, the dispute finally was resolved.

● 2nd: Blockage

Any party to a case – typically, it would be the respondent contracting party – could block the formation of a GATT Panel. As a result, an adjudicatory body might never be established. Moreover, assuming a Panel was agreed to and the Panel issued a Report, adoption of that Report by the CONTRACTING PARTIES could be blocked. Typically, the losing party would block adoption of either Panel formation, Report adoption, or both. Even if neither Panel formation nor Report adoption were blocked, authorization to retaliate in the event of non-compliance could be blocked.

Blockage was possible because under pre-Uruguay Round rules, a consensus among the contracting parties was needed to agree to form a Panel or adopt a Report. In the sometimes-perverse lexicology of GATT, "consensus" essentially meant unanimity. If there was an objection from even one contracting party, then the action was blocked. To those seeking to advance the international rule of law, this situation was ludicrous: it was as if a defendant in a trial could veto the very holding of a trial and, if one were held, could overturn the verdict.

Thus, in the *Oilseeds* case, the EC (specifically, France) blocked adoption of the second Panel Report, issued in March 1993, which held that the EC's subsidy payments to farmers constituted a non-violation nullification or impairment of the zero-tariff bindings

on oilseeds during the Dillon Round. In the first Panel Report, issued in November 1989, a Panel had found the EC's subsidy payments to processors to be inconsistent with the national treatment obligation of GATT Article III:4, and also a non-violation nullification or impairment of the tariff bindings. The EC responded by altering its subsidy scheme, paying European farmers directly instead of processors. The U.S. challenged the alteration, thus precipitating the second Report.

- **3rd: Compliance**

There was no obligation on a losing party to explain to either the winning party, or more generally to the contracting party, how it planned to comply with the recommendations set forth in a Panel Report. Indeed, assuming no voluntary undertaking by the losing party to comply, whether there was even an obligation under international law to comply with those recommendations was arguable. Certainly, the U.S. had no such obligation under domestic law. Thus, a losing party could – and sometimes did – dither about for months or years, refusing to commit to any plan of action to rectify its trade measures against which a Panel had ruled.

If and when the losing party finally did do something, its plan of action might not result in compliance with the Panel's recommendation. Indeed, it might be a clever subterfuge. Put more mildly, compliance was somewhat of a self-judging matter: the losing party could alter its disputed trade measure in some way, and declare it implemented the recommendation. The EC response to the first Panel Report in the *Oilseeds* case is a good example. While that Report was issued in November 1989 and adopted in January 1990, the EC did not modify its subsidies scheme until the end of 1991. The modification did not, in the eyes of the U.S., rectify the non-violation nullification or impairment defect of the initial subsidies scheme. But, there was no "court" to judge compliance. Like Sisyphus rolling the rock up the hill one more time, America had to challenge the new scheme.

- **4th: Remedies**

Remedial action to enforce compliance was nearly impossible. The only way a winning party could – consistent with its GATT obligations – retaliate was to obtain the approval of the CONTRACTING PARTIES. But, their approval required a consensus, and once again, that could be blocked by just 1 contracting party – typically, the losing one. Thus, not surprisingly, in only one pre-Uruguay Round case did the CONTRACTING PARTIES condone retaliation (a 1952 case in which the Netherlands was authorized to retaliate against the U.S.). Small wonder the U.S. put such great emphasis on Section 301 actions, which it took unilaterally. So exasperated was the Administration of President George H. W. Bush (1924-, President, 1989-1993) with the EC's blockage of the second Panel Report in the *Oilseeds* case that it announced unilateral imposition of 200% tariffs on European wine, cheese, and other products worth $1 billion as of December 1992 if no settlement was reached. Fortunately, the November 1992 Blair House Accord settled the matter (the EC agreed to reduce the number of hectares of European oilseed production eligible for a subsidy) and paved the way toward the Uruguay Round *Agreement on Agriculture*.

The defects in the pre-Uruguay Round dispute settlement system gave credence to the Austinian Positivistic position. How could GATT rules be considered "law"? Disputes over the application of the rules might never be adjudicated, and even if they were the losing party might never comply with the result. These weaknesses were more than just theoretical possibilities. Pre-Uruguay Round GATT history is littered with disputes whose resolution was either imperiled or rendered impossible because of them.

Chapter 5

POST-URUGUAY ROUND WTO CIVIL PROCEDURE (1995-)[112]

I. Resolving Pre-Uruguay Round Weaknesses via *DSU*

The *DSU* is one of the principal achievements of the Uruguay Round and a cornerstone of the modern multilateral trading system. The *DSU* applies to all disputes brought after 1 January 1995, even if the facts giving rise to the dispute occurred earlier. The four key frailties of pre-Uruguay Round dispute settlement were delays, blockages, compliance, and enforcement. The *DSU* goes far to cure these defects.

First, the *DSU* creates a multi-step procedure. There are specific time deadlines associated with each of these stages. There is no prospect of long delays associated with the process, nor of the consequent unlikelihood of obtaining a GATT Panel decision in a

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[112] Documents References:
(1) *Havana Charter* Articles 41, 47-48, 66, 92-97
(2) GATT Articles XXII-XXIII
(3) WTO *DSU*

For an excellent summary of the *DSU*, authored by a former trade negotiator and Uruguay Round specialist, see Peter Gallagher, *Guide to Dispute Settlement* (The Hague, Netherlands: Kluwer Law International, 2002).

For a defense of the *DSU* (authored by an economist), touting its successes and arguing against radical changes (other than enhancing transparency and opportunities for participation of non-state actors), see Robert Z. Lawrence, *The United States and the WTO Dispute Settlement System*, Council Special Report Number 25 (Washington, DC.: Council on Foreign Relations, March 2007).

Concerning two excellent GAO studies about impact on America of the *DSU* after five years of experience with it (1995-2000), see United States General Accounting Office, *World Trade Organization – Issues in Dispute Settlement*, GAO/NSIAD-00-210 (Washington, D.C.: August 2000) (concluding (at pages 3-4): "*Overall, the results of the WTO's dispute settlement process have been positive for the United States*. Our examination of 42 completed cases involving the United States shows that most led to changes in foreign laws, regulations, and practices that offer commercial benefits to the United Stees. Conversely, none of the changes the United States has made in response to WTO disputes have had major policy or commercial impact to date, though the stakes in several were important. However, a ruling that U.S. tax provisions violated export subsidy rules [in the *FSC* case, discussed in a separate Chapter] has potentially high commercial consequences, but the United States has not fully determined how to comply with the ruling. In addition, WTO rulings have upheld major trade principles important to the United States, such as requirements that imported goods must be treated in the same way as domestic goods in applying internal taxes and regulations.") (Emphasis added.); United States General Accounting Office, *World Trade Organization – U.S. Experience to Date in Dispute Settlement System*, GAO/NSIAD/OGC-00-196BR (June 1990) (concluding (at page 4): "*Overall, our analysis shows that the United States has gained more than it has lost in the WTO dispute settlement system to date*. WTO cases have resulted in a substantial number of changes in foreign trade practices, while their effect on U.S. laws and regulations has been minimal. In about three-quarters of the 25 cases filed by the United States, other WTO Member agreed to change their practices, in some instances offering commercial benefits to the United States.") (Emphasis added.). In light of these empirically-based analyses, could it be argued America was happy with the *DSU* in the early years of its operation, when the U.S. had a strong "batting average," which it gained form filing easy-to-win cases (*i.e.*, plucking "low-hanging fruit"), but once its average declined, in part because the American claims were more difficult to prove than before, and in part because the respondents improved at WTO litigation, America lost patience with the system?

timely fashion. Or is there?

The WTO has been so flooded with cases, and so starved of resources, that Panels and Appellate Body have not always met their deadlines. The adjudicators exacerbate the problem by penning unconscionably long decisions, many of which before 2017 were in the range of 500-1,000 pages. With the failure of the Doha Round and *DSU* reform negotiations under its auspices, between 2010 and 2012 WTO Members took it upon themselves to modify informally *DSU* procedures, on an *ad hoc* basis, to alleviate delays. They imposed limitations on the length of written submissions, and required submissions to conform to a standard format. They also empowered Panels to submit questions to complainants and respondents before the first meeting of the parties, so that at that meeting Panels could focus substantive legal issues, rather than on getting straight the facts of the case.

The Members also set limits on the size of executive summaries of the arguments of the parties, and required the parties themselves (rather than the WTO Secretariat) to prepare those summaries. Oddly, though, the Members still do not obligate the parties to exchange written arguments and rebuttals before the first Panel hearing in a case. Doing so would ensure consideration of legal issues at that hearing, and possibly eliminate the need for a second hearing. They also did not remove from the disputing parties the power to use outside experts. A simple, standard process controlled by Panels to select experts and obtain their testimony surely would help expedite cases.

Second, the *DSU* also resolves the problem of blockages, by "reversing the presumption" necessary for action. A Panel will be formed, a Panel or Appellate Body Report will be adopted, and retaliation will be authorized, unless there is a consensus *against* doing so. "Consensus" means no formal objection from any WTO Member. Thus, if even one Member opposes the prevention of creating a Panel (*i.e.*, wants a Panel to be formed), opposes the rejection of a Report (*i.e.*, wants the Report to be adopted), or opposes the refusal to authorize retaliation (*i.e.*, wants to allow retaliation), then blockage is impossible. Invariably, there always is one such Member – the complainant as to Panel formation, and the winning party as to Report adoption and retaliation.

What about the third and fourth pre-*DSU* defects, compliance, and enforcement? Once a Panel or Appellate Body Report is adopted, the losing WTO Member must notify its intentions as regards implementation of the recommendations contained in the Report. If immediate compliance is impracticable, then a "reasonable period" is permitted. The presumptive RPT is not to exceed 15 months. As for enforcement, if the losing Member refuses to comply, then it is supposed to negotiate a mutually acceptable compensation package with the prevailing Member. Failing that, the DSB must authorize trade retaliation by the winning Member. (Third Party participants in *DSU* cases, though they may make submissions, have no retaliatory rights.)

In general, through the *DSU*, WTO Members commit to eschew unilateral determinations of violations, and unilateral trade actions, on matters dealt with by a GATT-WTO text. That is, an indispensable feature of WTO membership is submission to the *DSU*

for all trade disputes to which it applies. Aside from the *DSU*'s cures for delays, blockages, compliance, and enforcement, this submission goes a long way to addressing the skepticism of Austinian Positivists about international legal regimes.

All of this is not to say the *DSU* embodies the most sublime multilateral dispute settlement procedures known. No adjudicatory mechanism is perfect, and while the *DSU* is being used regularly, serious concerns exist. For example, consider the following:

(1) *Quality*:
Are the rulings of Panels and the Appellate Body likely to be at least as well-reasoned as those of pre-Uruguay Round GATT Panels and domestic courts like the CIT and Federal Circuit?

(2) *Impartiality*:
Is the make-up of the Panels and the Appellate Body such that the complaining and responding parties are assured an unbiased hearing?

(3) *Due Process*:
Do *DSU* procedures comport with procedural due process rights such as adequate and timely notice, reciprocal discovery, and appeal?

(4) *Equal Justice*:
Do developing countries have the same ability to obtain justice as developed countries? What about LDCs?

(5) *Ambiguities*:
What ambiguities exist in the *DSU*? How are they, and how should they be, dealt with?

Under the *1994 Uruguay Round Agreements Act*, America implemented provisions on dispute settlement conforming to the *DSU*.[113]

II. "Nullification or Impairment" and "Adverse Impact" under *DSU*

In addition to curing many deficiencies in the pre-Uruguay Round dispute settlement system, the *DSU*, along with WTO Appellate Body jurisprudence, go some way to clarify the GATT Article XXIII concept of nullification or impairment. Uruguay Round negotiators took "violation nullification or impairment" and equated it with the concept of "adverse impact." Article 3:8 of the *DSU* creates a rebuttable presumption a breach by one WTO Member of a rule in a covered agreement, *i.e.*, in any GATT-WTO text, has an adverse impact on other Members. That is, acting inconsistently with an agreement is presumed to nullify or impair benefits accruing to other Members. The rebuttable presumption benefits complainants. The burden to rebut the presumption is on the respondent. What, then, is an "adverse impact"?

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[113] *See* 19 U.S.C. §§ 3531-3538.

The *DSU* does not define the concept. But, subsequent case law is of assistance. For example, in *European Communities – Export Subsidies on Sugar*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (adopted 19 May 2005) (complaints by Australia, Brazil, and Thailand), the Appellate Body explained:

> 298. … [T]he Complaining Parties [Australia, Brazil, and Thailand] provided evidence to the Panel suggesting that the EC sugar regime [consisting of price regulations and export subsidies] caused them losses, for example, of US $494 million for Brazil and US $151 million for Thailand in 2002. The Panel specifically found that "the European Communities has not rebutted the evidence submitted by the Complainants with regard to the amount of trade lost by the Complainants as a result of the EC sugar regime." The European Communities has not attempted to rebut this evidence on appeal. The European Communities, instead, appears to suggest that, to rebut the presumption of nullification or impairment, it need only demonstrate that the Complaining Parties "could not have expected that the EC would take any measure to reduce its exports of C sugar."
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> 299. The text of Article 3:8 of the *DSU* suggests that a Member may rebut the presumption of nullification or impairment by demonstrating that its breach of WTO rules has no adverse impact on other Members. Trade losses represent an obvious example of adverse impact under Article 3:8. Unless a Member demonstrates that there are no adverse trade effects arising as a consequence of WTO-inconsistent export subsidies, we do not believe that a complaining Member's expectations would have a bearing on a finding pursuant to Article 3:8 of the *DSU*. Therefore, the European Communities has failed to rebut the presumption of nullification or impairment pursuant to Article 3.8 of the *DSU*.

The penultimate sentence of the second paragraph is worthy of comment. Whether a complainant expected nullification or impairment, *i.e.*, an adverse effect, is immaterial. What matters is what actually happened.

III. 12 Step *DSU* Procedure

There are four general phases to post-Uruguay Round dispute resolution: (1) consultation; (2) use of a Panel; (3) appeal to the Appellate Body; and (4) surveillance and implementation. Some of these *DSU* phases may be broken down into more specific steps, set out below. Appreciate some of its finer points contained in these steps, including the tight deadlines.

- **Step 1: Informal Dispute Resolution Mechanisms**

In most cases, a Panel is not the first mechanism to be tried. Rather, the use of good offices, conciliation, or mediation – *i.e.*, informal mechanisms – is tried first.[114] The use of these mechanisms can be terminated at any time.) How long must consultations last? If consultations fail to settle a dispute within 60 days, or if the parties mutually agree that the dispute cannot be settled by consultation within 60 days, then the complainant can request the establishment of a Panel.[115] In an urgent situation, a Panel can be established earlier.

- **Step 2: Recourse to Panel**

If informal mechanisms fail, then a Panel can be convened upon request. There is no express requirement that a panel be used after informal mechanisms have been tried and failed. Such a requirement could be inferred from *DSU* Articles 3:4 and 6, plus the desire to carry-over pre-Uruguay Round practice.

- **Step 3: Waiting Period Requirement**

Assume an aggrieved WTO Member seeks consultations on day 1 and requests conciliation before day 60. The respondent must address the request within 10 days of the request. Consultations should begin within 30 days, though the parties can agree otherwise. Then, the complainant must wait at least 60 days from the day consultations were requested before seeking a Panel.[116] The purpose of this 60-day "waiting period" is to assure that consultations are given adequate time to succeed.

However, there are two exceptions to the waiting period requirement. First, both parties to the dispute can jointly agree to the appointment of a Panel before the expiration of the waiting period. Second, if no timely response to the request for consultations is offered (*i.e.*, no response is offered within 10 days of the request), or if consultations do not begin within 30 days of the request, then the aggrieved party can seek a Panel.

- **Step 4: Formation of Panel**

When a complainant requests a Panel, the Panel must be established no later than the first meeting of the DSB following the request. This rule ensures Panels are formed expeditiously.[117] The Panel must consist of three persons, unless the parties agree otherwise within 10 days of its establishment.[118] The Panelists must be well-qualified and are drawn from a roster maintained by the WTO Secretariat.[119] If there is no agreement on composition within 20 days of establishing the Panel, then the Director General must pick Panelists at the request of either party within 10 days of the request.[120] The WTO Rules and Legal Affairs Division manages Panels and Panel proceedings.

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114 *See DSU* Article 5.
115 *See DSU* Article 4:7.
116 *See DSU* Article 5:4.
117 *See DSU* Article 6:1.
118 *See DSU* Article 8:5.
119 *See DSU* Articles 8:1, 8:4.
120 *See DSU* Article 8:7.

- **Step 5: Operation and Functions of Panel**

As soon as practicable, the Panel must fix the timetable for resolution of a dispute.[121] If possible, the timetable should be set within one week of the composition of the Panel and the establishment of the Panel's terms of reference. Thus, the Panel must stipulate precise deadlines for written submissions from the parties. However, there is no sanction for failure to provide such deadlines. The Panel must issue its Report to the complainant and respondent Members within six months of its establishment, or three months in an urgent case.[122] No extension beyond nine months is permitted.[123]

- **Step 6: Suspension of Panel**

The complainant can ask the Panel to suspend work for 12 months. That might facilitate settlement in highly complex or politically-charged cases.[124]

- **Step 7: Adoption of Panel Report by DSB**

The DSB cannot consider a Panel Report until 20 days after the Report is issued to the Members. Members objecting to the Report must do so in writing within 10 days of the DSB meeting. The DSB must adopt the Report within 60 days of its circulation to the Members, unless the DSB decides by consensus not to adopt it or a party to the dispute notifies the DSB of its intention to appeal the Panel's decision.[125] The entire process – from establishment of a Panel to adoption of the Report – must take place within nine months, or 12 months where there is an appeal.[126]

- **Step 8: Appeal**

A party may appeal an adverse Panel decision to the WTO Appellate Body, a standing seven-member group, three of whom hear an appeal.[127] Appellate Body members are nominated by WTO Members for four-year terms, and the DSB must approve them (traditionally by consensus). Their terms may be renewed once for a total of eight years. (By contrast, ICJ justices have nine-year renewable terms.) The Appellate Body operates under *Working Procedures for Appellate Review*, which it periodically revises, and which it notifies to the DSB (but which the DSB does not formally approve).

An appeal must be confined to issues of law and legal interpretation. Issues of fact may not be appealed. Query how to differentiate facts from law, and how to handle issues

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121 *See DSU* Article 12:3.
122 *See DSU* Article 12:7-9.
123 *See* DSU Article 13:3.
124 The EU did just this with its complaint against the U.S. over the *Helms-Burton Act*, and a settlement was negotiated involving suspension and waiver of the *Act's* sanctions, and a commitment by the President to seek changes in the *Act*. Suspension of the Panel also occurred in the *Boeing–Airbus* dispute between the U.S. and EU over alleged aircraft subsidies.
125 *See DSU* Article 16:4.
126 *See DSU* Article 20:1.
127 *See DSU* Article 17.

mixed with facts and law. Generally, the Appellate Body must render a decision within 60 days, and in no case longer than 90 days. Thus, an appeal adds 90-to-120 days (*i.e.*, three-to-four months) to the overall process of nine-to-12 months.[128] So, assuming an appeal, the case should be adjudicated fully within 12-to-16 months, or an average 18 months.

Between 1995 and 2011, over two-thirds of WTO cases were appealed, and in 2011 that figure rose to 75%. Yet, the size of the staff in the Appellate Body Division is just one-third that of the Rules and Legal Affairs Division. This incongruity is one source of delays in the aforementioned timeline. (This and other *DSU* problems are discussed in a separate Chapter). Note (as discussed in a separate Chapter) that the Appellate Body ceased to function as of 10 December 2019, and was replaced – for those Members who opted to participate – by the *MPIA*.

- **Step 9: Recommendations**

Article 19:1 of the *DSU* requires a Panel, or the Appellate Body, to recommend a Member found to have a measure inconsistent with a GATT-WTO agreement bring the offending measure into compliance with the agreement. Compliance may entail amending the measure or removing it entirely. But, neither the Panel nor the Appellate Body is obligated to state precisely how the losing Member should fulfill its obligations. Almost invariably, the "judges of Geneva" avoid infringing on sovereignty by phrasing their "court order" generically, in the last paragraph of their Report, as a "recommendation to bring the inconsistent measure into conformity with the relevant agreement."

In special cases, such as subsidies, the situation is a bit different. *DSU* Article 1:2 says the *DSU* applies subject to additional rules on dispute settlement in covered agreements listed in *DSU* Annex 2. This Annex states (*inter alia*) the *SCM Agreement*. Article 4:7 of the *SCM Agreement* states if a Member is found to have a prohibited subsidy, then the Panel "shall recommend that the subsidizing Member withdraw the subsidy without delay," and "shall specify … the time-period within which the measure must be withdrawn."

- **Step 10: Adoption of Appellate Body Report by DSB**

The DSB must adopt an Appellate Body Report within 30 days of its circulation to the Members, unless – again applying the reverse consensus rule – there is a consensus against adoption. When the DSB adopts an Appellate Body Report, it also adopts the underlying Panel Report, as modified by the Appellate Body.

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[128] Why did the Uruguay Round negotiators agree to a 90-day deadline for the Appellate Body to circulate its Reports? For an argument based on the *DSU travaux préparatoires* that the drafters anticipated the Appellate Body would correct only "fundamental" or "exceptional" errors, and thus play a limited function, and that the Body itself would be a "small institution," hence 90 days would suffice, see Yoshinori Abe, *Revisiting the Travaux Préparatoires of DSU Article 17: Some Suggestions Concerning the Appellate Body Crisis*, 26 INTERNATIONAL TRADE LAW & REGULATION issue 2 79-87 (2020).

- **Step 11: Compliance**

In all cases, within 30 days of adoption by the DSB of a Panel or Appellate Body Report, the losing Member must inform the DSB of its intentions regarding implementation of the recommendations contained in the Report. Aside from cases involving an agreement listed in *DSU* Annex 2, neither the Panel nor the Appellate Body is required to set out a time frame for implementation. But, generally, compliance is expected within a "Reasonable Period of Time" not to exceed 15 months.[129]

- **Step 12: Compensation or Retaliation**

If a Panel recommendation is not implemented within an RPT, then the losing Member unable or unwilling to comply with the recommendation must enter into negotiations with the winning Member to develop a satisfactory scheme of compensation.[130] Suppose the offending Member fails to implement a Panel's recommendation or ruling and, after 20 days of negotiations, no satisfactory compensation scheme is arranged. In that case, the injured Member has a right to retaliate pursuant to authorization from the DSB.[131]

As a general principle, retaliation should be limited to the same sector as that in which nullification or impairment occurred. For example, the injured Member can seek permission from the DSB to suspend concessions in the sector at issue that had been granted previously to the offending Member.[132] But, if same-sector retaliation would be impracticable or ineffective, then the DSB may grant authorization for the winning Member to engage in cross-sectoral retaliation.[133] This scenario has occurred when the winning and losing Members are of different economic size and status, with the winner being smaller than the loser, and dependent on imports from the loser.

The 1997 *Bananas* and 2005 *Antigua Gambling* cases are examples. Ecuador defeated the EU in the first case, as the Appellate Body found the European TRQ scheme for bananas violated numerous provisions of GATT, especially Article XIII. Antigua beat America in the second case, as the Appellate Body found the U.S. (despite its intention to the contrary) scheduled market access commitments for gambling services during the Uruguay Round, and thus failed to grant non-discriminatory (national) treatment to online gambling services provided from Antigua, as required by *GATS*.

But, as to the first case, as the largest exporter of bananas in the world, Ecuador did not import bananas from Europe. So, putting tariffs or quotas on European bananas was not an option. Ecuador thus secured authorization to suspend enforcement of European IPRs that it otherwise was obliged to protect under the *TRIPs Agreement*.

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129 *See DSU* Article 21:3.
130 *See DSU* Article 22.
131 *See DSU* Article 22:2.
132 *See DSU* Article 22:3(a).
133 *See DSU* Article 22:3(b).

Similarly, in the second case Antigua received authorization in January 2013 to impose $21 million of sanctions on the U.S. for the American failure to meet the April 2006 deadline to comply with the 2005 Appellate Body ruling. But, imposing tariffs on goods or services Antigua imported from America would have done damage to the Antiguan economy (*e.g.*, by driving up import costs, thus contributing to import-driven inflation, making certain items unaffordable to Antiguans, and increasing costs of production of finished goods using the affected imports). So, the DSB permitted Antigua to suspend the obligations it owed to the U.S. under the *TRIPs Agreement*. In particular, Antigua could decline to enforce American copyrights under *TRIPs* Section 1, trademarks under *TRIPs* Section 2, Industrial Designs under *TRIPs* Section 4, Patents under *TRIPs* Section 5, and Trade Secrets under *TRIPs* Section 7. The U.S., of course, accused Antigua of "theft" of IP and "government authorized piracy."[134] Yet, query what other meaningful remedy a small Member has that will get the attention of the likes of the EU or U.S., and not impose a self-inflicted wound?

In rare instances, a respondent in WTO litigation might elect not to contest the facts or arguments set out by the complainant, in effect pleading *nolo contendere* (no contest). Yet, the respondent might not withdraw its case. Why not? The answer is doing so would cut off its future rights, namely, to contest implementation of a Panel (or Appellate Body) ruling, and to retaliate if need be.[135] In turn, as no mutually agreeable result has been reached, the Panel must fulfill its fundamental obligation under *DSU* Article 11 to make an "objective assessment of the matter." In other words, absent a mutually agreed solution, there is no settlement. But, as the basis for its right to expect compliance with, and implementation of, a decision, and its right to retaliate in the event of non-compliance, a complainant needs a favorable judgment in hand.

- **Retaliation in *Boeing-Airbus* Air Wars**

Whether retaliation is same- or cross-sectoral, it must be granted in expeditious manner. After all, justice delayed is justice denied. So, the DSB must grant authorization to retaliate within 30 days unless it decides to the contrary by consensus.[136]

Might a WTO Member subject to retaliation object to the level of retaliation? Definitely. Controversies about the correct computation of damages abound. They are referred to arbitration. Jurisprudence on measuring damages remains inchoate and arguably unsophisticated, at least relative to Anglo-American Tort Law.

The *Boeing-Airbus* LCA subsidy Appellate Body Reports (discussed in a separate Chapter) illustrate the point about controversial damage assessments. This U.S.-EU "Air War" was fought over allegedly illegal subsidies each side accused the other of bestowing on its LCA industry and (as of June 2020) had dragged on for 15 years. In October 2019,

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134 *See* Daniel Pruzin, *War of Words Heats Up Between U.S., Antigua on Retaliation in Gambling Dispute*, 30 International Trade Reporter (BNA) 334 (7 March 2013).

135 This scenario occurred in an antidumping zeroing case. *See* WTO Panel Report, *United States – Anti-Dumping Measure on Shrimp from Ecuador*, WT/DS335/R (issued 30 January 2007).

136 *See DSU* Article 22:6.

following WTO dispute settlement that began with a request for consultations on 6 October 2004, a WTO arbitrator authorized the U.S. to impose $7.5 billion *per annum* worth of retaliatory tariffs on EU products, because of the EU's failure to bring its offending Airbus subsidy measures into conformity with WTO rules.[137] (The decision covered the 2011-2013 reference period, was 156 pages, which given the several hundred-page decisions in the 2011 *Airbus* and 2012 *Boeing* Appellate Body Reports.) The outcome of an EU challenge to the appropriate level of American retaliation, this figure was less than the $11

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[137] *See* World Trade Organization, *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 22:6 of the DSU by the European Union, Decision by the Arbitrator*, WT/DS316/ARB (2 October 2019), www.wto.org/english/tratop_e/dispu_e/316arb_e.pdf; World Trade Organization, *Arbitrator Issues Decision in Airbus Subsidy Dispute*, 3 October 2019, www.wto.org/english/news_e/news19_e/316arb_e.htm; James Politi & Peggy Hollinger, *U.S. Tariffs to Hit Aircraft, French Wine and Cheese, and Spanish Olive Oil*, FINANCIAL TIMES, 3 October 2019, www.ft.com/content/9a2c5af6-e51c-11e9-9743-db5a370481bc?shareType=nongift [hereinafter, *U.S. Tariffs to Hit*]; Tim Hepher, Philip Blenkinsop & David Lawder, *U.S. Widens Trade War with Tariffs on European Planes, Cheese, Whisky to Punish Subsidies*, REUTERS, 2 October 2019, www.reuters.com/article/us-wto-aircraft/u-s-widens-trade-war-with-tariffs-on-european-planes-cheese-whisky-to-punish-subsidies-idUSKBN1WH0SI [hereinafter, *U.S. Widens Trade War*].

In a subsequent compliance decision, a WTO Panel rejected the EU contention that it no longer provides subsidies to the A350 and A380 model aircraft, and authorized the U.S. to retaliate against such subsidies. *See* Tim Hepher & Philip Blenkinsop, *U.S. May Increase Tariffs After WTO Rejects EU Claims Over Airbus*, REUTERS, 2 December 2019, www.reuters.com/article/us-wto-aircraft/u-s-may-increase-tariffs-after-wto-rejects-eu-claims-over-airbus-idUSKBN1Y60YJ. The Panel held the effects of previous lending to Airbus for those models continued to benefit their production. Though the EU decided to discontinue A380 production, that decision would not take effect until mid-2021 (apparently to fill existing orders). Hence, along with the effects of prior lending, the remaining production disadvantaged Boeing's competitor product, the 747 Jumbo Jet (not in the form of lost sales, because Airbus had ceased marketing the A380, but in the form of diminished market share). As for the A350, the Panel held Airbus subsidies adversely affected Boeing's 787 Dreamliner, specifically through lost sales and impedance of market share. As for the amount of possible retaliation, the figure ranged from $2-$5.5 billion, in addition to the $7.5 billion (discussed above) already authorized.

Following this WTO Panel compliance decision in favor of the U.S., the USTR proposed modifications to its preliminary retaliation list (which it initially published in April 2019, discussed below), namely, asking for comments on the following issues:

(1) Should products previously and preliminarily targeted (in Annex I of the USTR's earlier list) be removed, and if they are to remain as targets, should the retaliatory duty on them be increased up to a 100% level, or perhaps be reduced? Such merchandise included certain airplanes, food, and single malt scotch, targeted for a 10% tariff, and certain machinery tools, targeted for a 25% tariff.

(2) Should additional retaliatory tariffs be imposed on specific products (listed in Annex II of the USTR's prior proposal)? If so, should the additional levy be up to 100%? Such merchandise included additional products not previously targeted, including non-military aircraft and aircraft parts, base metal products, bicycles, carpet, clocks, certain food products, motorcycles, stone, wine, wooden tools, and yarn.

(3) Would maintaining or imposing additional tariffs help induce the EU to comply with the WTO and Appellate Body and compliance Panel recommendations?

(4) Would additional tariffs disproportionately harm U.S. consumer and business and consumer interests?

See Office of the United States Trade Representative, *Review of Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute* (9 December 2019), https://ustr.gov/sites/default/files/enforcement/301Investigations/Review_of_Action_Enforcement_of_U.S._WTO_Rights_in_Large_Civil_Aircraft_Dispute.pdf.

billion figure in annual trade damage the U.S. proposed in April 2019.[138]

Though $7.5 billion equaled the amount of three-days' worth of EU-U.S. trade, it was the largest ever condoned by the WTO – almost doubling the amount the $4.04 billion judgment the EU won in the 2002 *FSC* case, which in turn dwarfed the nearly $200 million figure that the U.S. and its co-complainants won against the EU in the 1997 *Bananas* case. The $7.5 billion figure reflected what the WTO ruled to be adverse effects," specifically, "serious prejudice" suffered by the U.S. in the form of lost sales, lost market share, and disruption in deliveries of Boeing aircraft, under Article 5(c) of the *SCM Agreement*, as well as GATT violations, s caused by EU-subsidized loans. Moreover, the WTO decision allowed for cross-sectoral retaliation by the U.S. action against EU services (except for financial services providers). The decision made clear that America's "countermeasures may take the form of (a) suspension of tariff concessions and related obligations under the GATT 1994, and/or (b) suspension [under *GATS*] of horizontal or sectoral commitments and obligations contained in the United States' Services Schedule with regard to all services defined in the Services Sectoral Classification List, except for financial services."

In the *Airbus* case, on 2 October 2019, the USTR published its counter-retaliation list, effective 18 October.[139] The list consisted of specific eight-digit HTSUS categories organized into 15 sections, with duties of either 10% or 25% depending on the country of origin. On it subject to a 25% duty (on top of the MFN rate) were:

(1) From across the EU, butter, cheese (Gruyère, Parmesan, Pecorino, Provolone, Reggiano, Romano, Stilton, and Swiss), cherries (preserved), fish, fruits, fruit and vegetable juices, and yoghurt.
(2) British, German, Irish, Italian, and Spanish liqueurs.

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[138] For the USTR's announcement of its preliminary list, which called for retaliatory tariffs of up to 100% on an array of products such as agricultural products, aircraft, handbags, helicopters, and metals, see Office of the United States Trade Representative, *USTR Proposes Products for Tariff Countermeasures in Response to Harm Caused by EU Aircraft Subsidies* (8 April 2019), https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/april/ustr-proposes-products-tariff. That list is Office of the United States Trade Representative, *Initiation of Investigation; Notice of Hearing and Request for Public Comments: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute*, 84 Federal Register number 71, 15028-15036 (12 April 2019), https://ustr.gov/sites/default/files/enforcement/301Investigations/Preliminary_Product_List.pdf. The USTR proposed a supplemental list on 1 July containing additional targeted items, such as certain fruits, dairy, meat, and wine. *See* Office of the United States Trade Representative, *USTR Proposes Additional Products for Tariff Countermeasures in Response to Harm Caused by EU Aircraft Subsidies*, 1 July 2019, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2019/july/ustr-proposes-additional-products.

[139] *See* United States Trade Representative, *Section 301 Investigation – EU Large Civil Aircraft, Final Product List* (2 October 2019), https://ustr.gov/sites/default/files/enforcement/301Investigations/EU_Large_Civil_Aircraft_Final_Product_List.pdf, 84 Federal Register number 196, 54245-54264 (9 October 2019).

Note that for merchandise subject to the Section 301 duties imported into an FTZ, Privileged Foreign (PF) status had to be declared to avoid those duties and the applicable tariff to be locked in as of the condition of merchandise upon entry into the FTZ, regardless of work done involving that merchandise in the FTZ and the classification of the merchandise, such as its incorporation as an input into a finished good, upon exit from the FTZ. (FTZs are discussed in a separate Chapter.) *See id*.

(3) British, French, German, Spanish wine (other than non-carbonated Tokay) with an alcohol content of less than 14% in bottles two-liters or less.
(4) British, French, German, and Spanish green olives and olive oil (shipped in containers of 18 kg or more, but not small-bottled olive oil).
(5) British, German, and Spanish fresh cheese, Edam and Gouda cheese, and pork products, British bed linen and cotton blankets, cashmere and wool pullovers and sweaters, sweatshirts, and waistcoats, plus fine wool suits and women's nightwear.
(6) British and German biscuits (sweet), wafers, and waffles.
(7) German coffee, knives, machinery, metalwork tools, and scissors.
(8) Irish and Scotch single-male (or straight) whisky.

Also on that list, subject to a 10% additional tariff, were Airbus LCAs made in the four EU Airbus consortium countries, namely, France, Germany, Spain, and the U.K. (Though the U.K. was scheduled for Brexit on 31 October, presumably because the facts of the case arose while it was within the EU, it would be subject to retaliation after leaving that customs union.) Note the 10% levy was on aircraft such as the A319 jet, which is $92 million per plane, and A350 widebody, which is $366.5 million per plane.[140] The U.S. carrier, Delta, had 170 Airbus aircraft on order, and – given long production lead times – such orders are placed years in advance, so even a 10% duty on these high-value items would adversely affect it, and passengers might face higher airfares.

However, the USTR intentionally omitted aircraft parts imported from the EU into the U.S., because those parts were consumed by Airbus manufacturing facilities in Alabama, as well as by Boeing. Retaliating against aircraft parts (which the USTR had planned to do in the preliminary list it published in April) would drive up the cost of U.S.-made LCA, and imperil American jobs. Note, too, that including merchandise from non-Airbus consortium countries was justified, said the USTR, because the failure by the EU to reform its illegal LCA subsidies was a collective one.[141]

For good reason, the USTR made clear it sought a negotiated settlement with the EU:

> The authorization of countermeasures is a rare occurrence in the history of the WTO, as trading partners typically pursue negotiated solutions to avoid the cascade of consequences of additional tariffs, or do not actually exercise their rights granted by WTO arbitrators. While addressed at products originating in the respective trading partner, the imposition of such additional tariffs can also have important domestic implications. Importers of EU products in the U.S., including U.S. airlines that purchase and import Airbus aircraft, reportedly already urged the U.S. Government to be sensitive of the U.S.' own interests and to avoid "collateral damage" to the U.S. economy.

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140 *See U.S. Widens Trade War*.
141 *See U.S. Tariffs to Hit.*

> Highly integrated global supply chains make businesses increasingly dependent on seamless trade. Businesses must monitor any development that could affect their supply chains, as trade measures, such as the forthcoming additional tariffs, as well as any new restrictive or discriminatory non-tariff measures, that could significantly disrupt trade flows and/or prove very costly for businesses and consumers around the world, are being proposed or adopted/applied.[142]

And, the USTR understood America's vulnerability – the EU might soon win the right to retaliate against America thanks to the Appellate Body's decision in the *Boeing* case holding that U.S. defense contracts and tax breaks constituted illegal subsidies. After all, just as a WTO Panel (in 2016) and the Appellate Body (in 2018) ruled that the EU had failed to comply with all of the Appellate Body recommendations in the *Airbus* Report, a Panel and the Appellate Body confirmed that America had filed to comply with all Appellate Body recommendations in the *Boeing* Report. (Underscoring America's vulnerability to counter-retaliation by the EU, Airbus pointed out that 40% of its aircraft procurement came from suppliers in the U.S., and that Airbus supports 275,000 jobs in 40 States.[143]) Indeed, the EU published a proposed retaliation list of its own that covered $20 billion worth of American imports covering items such as certain chemicals, certain processed food products, fish, fruit, nuts, machinery, playing cards, spirits and wine, vegetables, and video game consoles.[144]

Nevertheless, the USTR said it would consider carousel retaliation (discussed in a separate Chapter), thereby upping the pressure on EU businesses that were innocent non-combatants in the LCA disputes to lobby their governments to resolve the matter. Thus, for example, European chocolate, and Italian olive oil and wine, plus helicopters and seafood, were spared from the first round of retaliation. Yet, the USTR could put them on a subsequent round of the carousel. Query whether such tactics are ethical, much less logical.

With no settlement in sight, the USTR did indeed resort to carousel retaliation on a six-month review cycle.[145] On 14 February 2020, it adjusted (albeit not greatly, and with

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142 FratiniVergano European Lawyers, *Another Hit for EU-U.S. Trade – A WTO Arbitrator Allows the U.S. to Impose Countermeasures Against the EU in the Amount of USD 7.5 Billion per Year*, TRADE PERSPECTIVES, Issue Number 18 (4 October 2019), www.fratinivergano.eu/en/trade-perspectives/.

143 *See U.S. Tariffs to Hit*.

144 *See* European Commission, *WTO Boeing Dispute: EU Issues Preliminary List of U.S. Products Considered for Countermeasures*, 17 April 2019, http://trade.ec.europa.eu/doclib/press/index.cfm?id=2011; *U.S. Set to Impose Tariffs on $7.5bn of EU Exports in Airbus Row*, BBC NEWS, 2 October 2019, https://ustr.gov/sites/default/files/enforcement/301Investigations/EU_Large_Civil_Aircraft_Final_Product_List.pdf.

145 The February 2020 revision of the October 2019 retaliation list followed a December 2019 request by the USTR for comments on imposition of Section 301 retaliatory duties of up to 100% on a range of EU-origin merchandise, including aircraft assemblies and aircraft parts. This request was a sure sign the USTR was contemplating carousel retaliation. *See* Office of the United States Trade Representative, *Review of Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute*, 84 Federal Register number 239, 67992-68007 (12 December 2019), https://ustr.gov/sites/default/files/enforcement/301Investigations/Review_of_Action_Enforcement_of_U.S._WTO_Rights_in_Large_Civil_Aircraft_Dispute.pdf.

effect on 18 March) its October 2019 list of EU products subject to tariffs.[146] Though 25% duties remained on items such as certain machinery tools, cheese, single-malt Scotch,[147] Spanish olives, and French wines, the USTR raised from 10% to 15% the duty on aircraft, thus covering Airbus wide-body LCAs not assembled in America.[148] Notably, the new list

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146 *See* Office of the United States Trade Representative, *Notice of Modification of Section 301 Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute*, 14 February 2020, https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice_of_Modification_of_Section_301_Action_Enforcement_of_U.S._WTO_Rights_in_Large_Civil_Aircraft_Dispute.pdf; Office of the United States Trade Representative, *Notice of Modification of Section 301 Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute*, 85 Federal Register 10204 (21 February 2020); Bruce Baschuk, Jenny Leonard & Shawn Donnan, *Trump Administration Raises Duties on EU Aircraft to 15%*, BLOOMBERG, 14 February 2020, www.bloomberg.com/news/articles/2020-02-15/trump-administration-raises-duties-on-european-aircraft-to-15?sref=7sxw9Sxl [hereinafter, *Trump Administration Raises*]. In respect of FTZ, all products subject to these Section 301 retaliatory tariffs needed to be admitted under PF status on or after the effective dates of the levies.

147 Single-malt scotch is an interesting case study that perhaps evidences the efficacy of carousel retaliation, *i.e.*, pressure by a foreign-producer exporter that is unrelated to the underlying substantive dispute on its government to resolve that dispute. The Scotch Whisky Association accused the U.K. Trade Secretary of being "inexplicably slow" to deal with the USTR on the 25% carousel retaliation tariff on its single malt product. *See* George Parker, *Anger Over U.S. Single Malt Whisky Tariffs in Aircraft Subsidy Dispute*, FINANCIAL TIMES, 13 August 2020, www.ft.com/content/35836815-974f-4a17-832d-a02d65d43f7d?shareType=nongift. [Hereinafter, *Anger Over U.S.*] The American market was significant to the Association: "The U.K. sells about £1bn of Scotch whisky to the U.S. annually, of which one-third is single malt," *i.e.*, "[t]he U.S. market accounts for 22 per cent of global exports by value and 11 per cent by volume." *Id*.

148 Interestingly, the tariffs on Airbus aircraft applied only to new planes. Cleverly, Delta Airlines found a way to avoid paying as much as $270 million in those duties:

> The U.S. carrier has taken delivery of seven European-built Airbus SE planes since President Donald Trump's levies took effect in October 2019. Rather than flying them home as it had in the past, Delta has based the aircraft overseas. The decision, coupled with the definition of new planes in the tariff rules, has kept the jets from being considered imports even though some of them regularly enter the U.S.
>
> …
>
> "We have made the decision not to import any new aircraft from Europe while these tariffs are in effect," Delta said in a statement…. "Instead, we have opted to use the new aircraft exclusively for international service, which does not require importation."
>
> The Delta strategy rests on language that classifies planes as used once they've flown for any reason other than testing and delivery. Tariffs on new-plane imports then don't apply, even if the aircraft are soon flying to the U.S.
>
> …
>
> Since the U.S. imposed the punitive tariffs in October 2019, it has sought to collect more than $55 million on planes imported from France, Germany, the U.K. and Spain, the countries subject to the higher levies, according to data provided by U.S. Customs and Border Protection.
>
> …
>
> In the case of the Airbus tariffs, the Trump Administration appears to have created the very loophole Delta may be using.
>
> The definition of a new plane – included in an annex attached to the original 2019 order that imposed the tariffs – doesn't appear to have applied before that…. Nor was the definition changed in subsequent orders increasing the tariff rate….
>
> …

"continued to spare an Alabama Airbus plant that assembles single-aisle aircraft like the A320 by not hitting airplane parts."[149] Other modifications included (effective 5 March) eliminating the 25% tariff on prune juice, and adding a 25% tariff on butcher and kitchen knives from France and Germany. These modifications, and the prospect of further ones as well as increasing tariffs up to 100%, obviously were designed to boost the pressure on EU governments, and producer-exporters and importers of EU-origin products, to reach a settlement that would end subsidies to Airbus.

Effective 1 September 2020, the USTR rotated the imports on its list – but held off increasing the amount of its retaliation above the 15% and 25% figures, which would have created a veritable "carousel of pain."[150] The tariffs covered $3.1 billion worth of European merchandise, particularly of French, German, Spanish, and U.K. origin. The USTR targeted beer, gin, hand tool parts (including specialty tools), machinery (for lifting, handling, loading, and unloading, *e.g.*, forklifts), olives, trucks (specifically HTSUS Sub-Heading 8427.10.80 and 8427.90.00), and water heaters, and hiked duties on aircraft, cheese, and yoghurt. Several items were not on the previous list (*e.g.*, beer, chocolate, forklifts, olives, and specialty tools). The rotation also threatened to "hammer European

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> According to the U.S. Trade Representative, a new aircraft is one with "no time in service or hours in flight other than for production testing" or for delivery to the U.S. That suggests the plane is no longer new once it's flown a non-U.S. route for any other purpose.
>
> …
>
> The Delta planes include a single-aisle Airbus A321 jet and six twin-aisle aircraft normally used for longer flights.
>
> The A321 was built in Hamburg, Germany, and first sent to El Salvador – a hub for aircraft maintenance operations – where it stayed more than two weeks…. The jet was then used on routes to Canada and parked in Mexico during the height of the virus lockdown. Since August [2020], it has ferried passengers between Montego Bay, Jamaica, and Atlanta, where Delta is based.
>
> The wide-body planes, assembled at an Airbus factory in Toulouse, France, were first sent to either Amsterdam or Japan, where some had Wi-Fi antennas installed at Tokyo's Narita airport. Two A350s delivered in September have been flying to cities including Detroit, Atlanta, Amsterdam, Paris and Seoul. Of the four remaining A330s, three are parked in Tokyo and Nagoya, Japan. The other has traveled mainly between Seattle and either Seoul, Tokyo or Amsterdam.

Siddharth Vikram Philip, Mary Schlangenstein & Shawn Donnan, *Delta Skirts Trump Tariffs by Sending Airbus Jets on Tour*, BLOOMBERG, 17 November 2020, www.bloomberg.com/news/articles/2020-11-17/delta-skirts-trump-tariffs-by-sending-airbus-jets-on-world-tour?sref=7sxw9Sxl.

149 *Trump Administration Raises*.

150 *See* Office of the United States trade Representative, *Notice of Modification of Section 301 Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute* (12 August 2020), https://ustr.gov/sites/default/files/files/Press/Releases/FRN081220.pdf, 85 Federal Register (18 August 2020); Office of the United States Trade Representative, *Review of Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute* (23 June 2020), https://ustr.gov/sites/default/files/enforcement/301Investigations/Review_of_Action_Enforcement_of_U.S._WTO_Rights_in_Large_Civil_Aircraft_Dispute_June_23_2020.pdf; Bryce Baschuk, *U.S. Targets $3.1 Billion of EU and U.K. Imports for New Tariffs*, BLOOMBERG, 24 June 2020, www.bloomberg.com/news/articles/2020-06-24/u-s-targets-3-1-billion-of-eu-u-k-imports-for-new-tariffs?sref=7sxw9Sxl [hereinafter, *U.S. Targets $3.1 Billion*].

luxury brands like Givenchy and Hermes – which produce leather goods – and Remy Cointreau and Pernod Ricard, which make cognac and champagne," as well as "LVMH Moet Hennessy Louis Vuitton … [which was] particularly vulnerable, because it produces a wide array of these products."[151] On some merchandise, the USTR could have, but did not, levy a 100% duty, which would have doubled the price of that good and effectively knocking it out of the U.S. market. Likewise, with respect to other merchandise (such as Irish and Scotch whisky, and cordials and liqueurs from Germany, Ireland, Italy, Spain, and the U.K.), the USTR refrained from adding to the 25% tariff it initially levied in October 2019.

The USTR also refrained from elevating tariffs to 100%, and hitting the full value of its authorized retaliation, $7.5 billion.[152] It omitted key products such as blended whisky and gin.[153] Perhaps that was because it was aware of what loomed: retaliation by the EU against the U.S. in its win in the 2012 *Boeing* case (discussed in a separate Chapter). The EU sought to impose $11.2 billion worth of tariffs on U.S.-origin exports. America countered that the right amount, *i.e.*, the actual trade damage to Airbus from U.S. subsidies of Boeing, was just $300 million.[154] On 30 September 2020, the EU and U.S. were informed by a WTO Arbitral Panel that the EU would be authorized to impose tariffs on $4 billion worth of American merchandise.[155] (The decision was finalized in a 121-page arbitral decision published on 13 October.[156]) The EU warned it would retaliate against the U.S. unless America withdrew its penalties on European merchandise and settled both

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151 *U.S. Targets $3.1 Billion*.

152 *See U.S. Holds Off on Threatened Tariff Hike in EU Airbus Fight*, BBC NEWS, 13 August 2020, www.bbc.com/news/business-53756201.

153 *See Anger Over U.S.*

154 *U.S. Targets $3.1 Billion*.

155 *See* Jim Brunsden, Peggy Hollinger & Aime Williams, *EU Given Green Light to Hit U.S. with Tariffs in Airbus-Boeing Ruling*, FINANCIAL TIMES, 13 October 2020, www.ft.com/content/3198d2ef-c3bb-44b9-a1e0-b27d9c1483de?shareType=nongift (observing "[t]he retaliation rights of $3.99bn are less than the $7.5bn the U.S. received in a parallel case last year against Airbus, and also less than the $8.58bn requested by the EU"); Tim Hepher & Andrea Shalal, *WTO Backs EU Tariffs on $4 Billion U.S. Goods over Boeing Subsidies: Sources*, REUTERS, 30 September 2020, www.reuters.com/article/wto-aircraft/wto-backs-eu-tariffs-on-4-bln-u-s-goods-over-boeing-subsidies-sources-idUSL8N2GQ706 (also reporting "the latest award does not include some $4.2 billion of tariffs against the United States left over from an earlier case, giving the EU $8.2 billion in total firepower," and that "[t]he United States says the previous award, granting the EU tariffs to retaliate against special tax treatment for U.S. exporters, which the EU never implemented, is no longer valid because a law creating the disputed system was repealed in 2006).

156 *See* World Trade Organization, *WTO Arbitrator Issues Decision in Boeing Subsidy Dispute*, 13 October 2020, www.wto.org/english/news_e/news20_e/353arb_e.htm; World Trade Organization, *Decision by the Arbitrator, United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint), Recourse to Article 22:6 of the DSU by the United States*, WT/DS353/ARB (13 October 2020), www.wto.org/english/tratop_e/dispu_e/353arb_e.pdf; Philip Blenkinsop & Tim Hepher, *EU Wins Tariff Clearance on $4 billion of U.S. Imports in Boeing Case*, REUTERS, 13 October 2020, www.reuters.com/article/wto-aircraft/eu-wins-ok-for-tariffs-on-4-billion-in-u-s-imports-over-boeing-subsidies-idUSKBN26Y0YF [hereinafter, *EU Wins Tariff Clearance*]; Jim Brunsden, Alan Beattie & Sam Fleming, *Brussels Calls on U.S. to Drop Tariffs in Airbus-Boeing Dispute*, FINANCIAL TIMES, 11 October 2020, www.ft.com/content/c37a78f2-b58d-4830-8686-88f2a8085106?shareType=nongift. [Hereinafter, *Brussels Calls on U.S.*] The DSB approved the EU's retaliation request on 26 October. *See* World Trade Organization, *Members Grant EU Authorization to Impose Countermeasures Against U.S. in Boeing Dispute* (26 October 2020), www.wto.org/english/news_e/news20_e/dsb_26oct20_e.htm.

cases.[157] Cleverly, the European Commission targeted goods relevant to the economic fortunes of battleground states crucial to the 2020 re-election bid of President Donald J. Trump: aircraft, casino tables, diggers, fitness machines, frozen fish, planes, suitcases, tractors, wines and spirits, and an array of agricultural products (such as blueberries grown in Florida, along with cherries and dried onions).[158]

Following his election loss, President Trump did anything but withdraw the penalties. On 30 December 2020, his Administration announced modifications to the tariffs it previously imposed on EU merchandise.[159] With effect on 12 January 2021 – days before the inauguration of Joseph R. Biden (1942, President, 2021-) as President – the outgoing Administration added aircraft fuselages and fuselage sections, certain French and German cognac, grape brandies, and non-sparkling wines, horizontal and vertical stabilizers, and wings and wing assemblies. The U.S. made plain its strike was in response to the EU duties of 15%-25%, which the U.S. argued were disproportionate. The U.S. alleged the EU wrongly relied on a benchmark reference period adversely impacted by the COVID-19 pandemic (thus imposing tariffs on "substantially more products" than would have been the case if the EU had used a "normal period"),[160] and wrongly excluded shipments involving the U.K.

There were at least four incentives for both WTO Members to resolve the 16-year-old Air Wars. First, the large sums involved: the staggering combined retaliatory amounts in the *Boeing* and *Airbus* cases ($7.5 and $4 billion, respectively, totalling $11.5 billion) meant the dispute was the largest corporate conflict in international legal history.[161] (The claim amounts, discussed in separate Chapters, also bespoke the unprecedented size of the case: the U.S. argued in its initial 2004 complaint that the EU granted $22 billion in unlawful subsidies, while a few months thereafter, the EU alleged that the U.S. gave Boeing $23 billion in illegal assistance.) Inflicting such huge damage on each other's economy was not in the interest of either side. Second, at least some of the underlying grievances no longer seemed relevant. As to Boeing, Washington State had repealed its B&O tax that (through tax breaks) subsidized Boeing and against which the EU had complained. As to Airbus, Airbus had agreed to increase its loan repayments for its A350 model, as the U.S. sought, to the French and Spanish governments (because, as per the

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157 *Brussels Calls on U.S.*

158 *See EU Wins Tariff Clearance* (also noting that European airlines, such as Ryan Air, importing Boeing aircraft might have to pay a 15% tariff on those planes).

159 *See* Office of the United States Trade Representative, *Notice of Revision of Section 301 Action: Enforcement of U.S. WTO Rights in Large Civil Aircraft Dispute* (30 December 2020), https://ustr.gov/sites/default/files/files/Press/Releases/LCARevisionNotice.pdf, 86 Federal Register number 3, 674-691 (6 January 2021), https://ustr.gov/sites/default/files/enforcement/301Investigations/LCARevisionNotice_January_2021.pdf; James Politi & Mehreen Khan, *U.S. Increases Tariffs on EU Products Over Aircraft Subsidies Dispute*, FINANCIAL TIMES, 31 December 2020, www.ft.com/content/7969ec9b-8a0b-47b7-b631-04e366f530db?shareType=nongift [hereinafter, *U.S. Increases Tariffs on EU Products*]; *U.S. Slaps Tariffs on French and German Wines, Aircraft Parts Amid EU Dispute*, REUTERS, 30 December 2020, www.reuters.com/article/us-usa-eu-trade/u-s-slaps-tariffs-on-french-and-german-wines-aircraft-parts-amid-eu-dispute-idUSKBN2942GS.

160 *Quoted in U.S. Increases Tariffs on EU Products*.

161 *See EU Wins Tariff Clearance*.

2012 WTO Appellate Body ruling, discussed in a separate Chapter, underpayments thanks to low interest rates constituted subsidization), and ended production of the wide-body A380 (which had received support, and for which all relevant launch-aid contracts the EU amended in July 2020 to comply with that Appellate Body decision). Third, the litigation had produced thousands of pages of testimony and cost the two sides a total of over $100 million in legal fees, *i.e.*, to what end would sinking yet more effort and money lead? Fourth, what was in their mutual interest was "a comprehensive deal on aircraft subsidies … [that would help] curb China's massive subsidization of its domestic aerospace industry."[162]

Nevertheless, the U.S. had rejected all EU settlement offers, instead demanding two concessions from the EU: "a pledge from Europe to end its subsidies to Airbus and monetary compensation," with the USTR Ambassador Robert Lighthizer intoning in July 2020: "It is going to require commitments not to do it again but also paying back some element of the subsidy."[163] And, unfortunately, the COVID-19 "pandemic … complicated the prospects for a deal," because both the U.S. and EU were "mulling ways to support their airline industries through a period in which global travel restrictions have hammered passenger air travel."[164]

In advance of the WTO Arbitral Panel authorization to the EU to retaliate against the U.S., the USTR offered to drop its retaliatory tariffs against EU products if Airbus paid back several billion dollars' worth of aid it had received from EU governments:[165]

> Under the U.S. offer, interest rates on past loans to support Airbus development programs would be reset to a level that assumed that only as few as half of the projects would succeed…. [In other words, the U.S. said on 14 October 2020 it would agree to a truce if Airbus agreed to repay state loans at a level of interest that assumed a 50% product failure rate.]
>
> That would assume a higher risk than Airbus partner nations – Britain, France, Germany and Spain – have traditionally priced into the loans and reflects a speculative type of investment.
>
> Such repricing could cost Airbus up to $10 billion….[166]

The American offer was coupled with a warning from President Trump, who on 15 October

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162 Bryce Baschuk & Jonathan Stearns, *EU Weighs When to Hit U.S. Products With Tariffs Approved by WTO*, BLOOMBERG, 13 October 2020, www.bloomberg.com/news/articles/2020-10-13/timing-of-eu-tariff-strike-on-u-s-may-hinge-on-election-winner?sref=7sxw9Sxl. [Hereinafter, *EU Weighs When*.]

163 *EU Weighs When*.

164 *EU Weighs When*.

165 *See* Tim Hepher, Andrea Shalal & Philip Blenkinsop, *Exclusive: U.S. Offers Tariff Truce if Airbus Repays Billions in Aid – Sources*, REUTERS, 15 October 2020, www.reuters.com/article/wto-aircraft-exclusive/exclusive-u-s-offers-tariff-truce-if-airbus-repays-billions-in-aid-sources-idUSKBN2701AP. [Hereinafter, *Exclusive: U.S. Offers Truce*.]

166 *Exclusive: U.S. Offers Truce*.

said America "would 'strike back harder' if the EU went ahead with tariffs."[167]

The EU rejected the truce offer. The repayment of previously-bestowed subsidies was controversial (and remains so, as per the topic of pre-privatization subsidies, discussed in a separate Chapter). *DSU* remedies are prospective, that is, forward-looking – there are no compliance obligations for past transgressions, so remedies do not constitute restitution for past sins. So, the EU urged that its duty was to eschew any subsidization of Airbus in the future – full stop. Yet, the U.S. "argue[d] that merely addressing future types of support would fail to resolve ongoing harm to Boeing caused by the presence on the Airbus balance sheet of past loans that it can still use to develop jets and offer unfairly low prices."[168] In rebuttal, the EU observed:

> Airbus repays government loans only when its sales exceed a certain threshold, while loans for weak-selling planes such as the A380 superjumbo can be waived partly or fully.
>
> Airbus says the disputed system favors taxpayers because loan repayments on successful jets such as the A320 far outweigh amounts written off on jets that fail to reach sales targets.[169]

Not surprisingly, the American offer was a non-starter for the EU, which called it "insulting."[170] The EU rejected it on 16 October.[171]

Effective 10 November 2020, the EU imposed retaliatory tariffs of of 15% on U.S. aircraft (including certain Boeing aircraft models, but not aircraft parts) and 25% on a range of U.S. agricultural goods (*e.g.*, albumins, cereal, cheddar cheese, chocolate, coffee, condiments, essential oils, fish, fruit, fruit juice, ketchup, mate extracts, molasses, nuts, orange juice, prepared sauces, preserves, seafood, soups, spirits, sweet potatoes, tea, unmanufactured tobacco, vanilla, vegetable fats, vermouth, and wheat) and industrial products (*e.g.*, arcade and billiard games, bicycle and motorcycle parts, casino and fitness equipment, peptones, suitcases, sweet potatoes, tractors, trunks, video game consoles, and vinyl chloride polymers), with a total value of $4 billion.[172] The USTR objected, again

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167 *Quoted in Exclusive: U.S. Offers Truce*.

168 *Exclusive: U.S. Offers Truce*.

169 *Exclusive: U.S. Offers Truce*.

170 *Exclusive: U.S. Offers Truce* (*quoting* an unnamed EU source).

171 *See* Jakob Hanke Vela & Florian Eder, *EU Rejects U.S. Demands to Repay Airbus Subsidies*, POLITICO, 16 October 2020, https://subscriber.politicopro.com/trade/whiteboard/2020/10/eu-rejects-us-demands-to-repay-airbus-subsidies-3984655.

172 *See Commission Implementing Regulation (EU) 2020/1646 of 7 November 2020 on Commercial Policy Measures Concerning Certain Products from the United States of America Following the Adjudication of a Trade Dispute under the Dispute Settlement Understanding of the World Trade Organization*, OFFICIAL JOURNAL OF THE EUROPEAN UNION, L373/1-8 (9 November 2020), https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32020R1646&from=EN; European Commission, Press Release, *Boeing WTO Case: The EU Puts in Place Countermeasures Against U.S. Exports*, (9 November 2020), https://ec.europa.eu/commission/presscorner/detail/en/IP_20_2048?utm_source=POLITICO.EU&utm_campaign=fe0c4a1b55-EMAIL_CAMPAIGN_2020_11_09_03_09&utm_medium=email&utm_term=0_10959edeb5-fe0c4a1b55-

pointing out, "The alleged subsidy [*i.e.*, tax breaks by the State of Washington] to Boeing was repealed seven months ago."[173] The EU replied it had received WTO authorization to retaliate, and noted its "counter-measures bring the EU equal footing with the U.S.," against America's levies that had been in place since 18 October 2019, and the goods the EU targeted "strictly mirror[ed]ed those on which the U.S. had imposed tariffs."[174] In taking its action, the EU gave no time to President-Elect Joe Biden and Vice-President-Elect Kamala Harris (1964-, Vice President, 2021-) to reach what the EU said it most wanted, namely, a negotiated solution. Their victory in the 3 November 2020 general election – one of the most contentious in American history – had been confirmed through media analysis of vote counts on 7 November.

However, the EU indicated it "was ready to suspend its measures at any time if the United States did the same, "whether under the current [Trump] or the next [Biden] Administration."[175] The prospects of a rapprochement and settlement certainly rose under President Joseph R. Biden (1942-, President, 2021-). First, his USTR announced a suspension of carousel retaliation.[176]

Second, clearly indicating an end to Trumpian "America First" trade policy and a rededication to multilateralism,[177] and disavowing his predecessor's characterization of the EU as a "foe,"[178] Mr. Biden declared: "I'm sending a clear message to the world: America is back. The transatlantic alliance is back."[179] He underscored that America's alliances

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190057913&source=email [hereinafter, November 2020 European Commission Press Release]; Jonathan Stearns, *EU Gives Green Light to Trigger $4 Billion Tariff Strike on U.S.*, BLOOMBERG, 9 November 2020, www.bloomberg.com/news/articles/2020-11-09/eu-gives-green-light-to-trigger-4-billion-tariff-strike-on-u-s?sref=7sxw9Sxl [hereinafter, *EU Gives Green Light*]; *EU Imposes Tariffs on $4bn of U.S. Goods in Boeing Row*, BBC NEWS, 9 November 2020, www.bbc.com/news/business-54877337 [hereinafter, *EU Imposes Tariffs*]; Philip Blenkinsop & Michael Nienaber, *EU "Regrettably" Hits U.S. with Tariffs, Seeks Better Biden Ties*, REUTERS, 9 November 2020, www.reuters.com/article/us-usa-trade-eu/eu-regrettably-hits-u-s-with-tariffs-seeks-better-biden-ties-idUSKBN27P102 [hereinafter, *EU "Regrettably" Hits*].

173 *EU Imposes Tariffs* (*quoting* USTR Ambassador Robert Lighthizer).

174 November 2020 European Commission Press Release.

175 *EU "Regrettably" Hits* (*quoting* EU Trade Commissioner Valdis Dombrovskis.] *See also EU Gives Green Light* (observing, [t]he move may make it easier for President-Elect Joe Biden to embrace longstanding European calls to settle the transatlantic dispute over aircraft aid at the negotiating table"); *EU Imposes Tariffs* (*quoting* Commissioner Dombrovskis, "[r]emoving these tariffs is a win-win for both sides, especially with the pandemic wreaking havoc on our economies," and "[w]e now have an opportunity to reboot our transatlantic co-operation and work together towards our shared goals.").

176 *See* Andrea Shalal, *EU Says It Is Ready to Work with Biden Administration to Settle Trade Disputes*, REUTERS, 11 February 2021, www.reuters.com/article/us-usa-trade-eu/eu-says-it-is-ready-to-work-with-biden-administration-to-settle-trade-disputes-idUSKBN2AC05I.

177 *See* Justin Sink, *Biden to Ditch "America First" in Appeal for Partnership*, BLOOMBERG, 19 February 2021, www.bloomberg.com/news/articles/2021-02-19/biden-to-ditch-america-first-in-appeal-for-global-partnership?sref=7sxw9Sxl. [Hereinafter, *Biden to Ditch*.]

178 *Quoted in* Alberto Nardelli, *EU Weighs Temporary Tariff Freeze Before First Biden Call*, BLOOMBERG, 5 February 2021, www.bloomberg.com/news/articles/2021-02-05/eu-weighs-temporary-tariff-freeze-ahead-of-first-call-with-biden?sref=7sxw9Sxl.

179 *Quoted in* Katrina Manson & Guy Chazan, *Biden Tells World "America is Back" But Warns Democracy Under Assault*, FINANCIAL TIMES, 19 February 2021, www.ft.com/content/0c29d1f1-e25b-47c5-b942-063b9cba0100?shareType=nongift.

were "not transactional."[180]

Third, on 4 March 2021, the Biden Administration suspended for four months all retaliatory tariffs against U.K. – but not EU – products.[181] So, for example, it lifted the 25% additional duty on biscuits, cashmere, cheese, clotted cream, machinery, and Scotch whisky.[182] (Hoping to resolve the case, on 1 January 2021, Britain had dropped indefinitely retaliatory tariffs on some U.S. merchandise, but the Trump Administration did not reciprocate.[183]) The Biden Administration did so not only to focus on a solution to what had become the longest running (17 years, starting in 2004) and most expensive (nearly $12 billion in retaliatory tariffs, consisting of $7.5 billion imposed by the U.S. since October 2019, and $5 billion by the EU since November 2020) disputes in WTO history, but also to focus on the challenge posed both to Airbus and Boeing by LCA competition from China. Indeed, in their joint statement, the U.S. and U.K. said they wished to concentrate on "addressing the challenges posed by new entrants to the civil aviation market from non-market economies, such as China."[184]

Happily, the next day, the U.S. and EU announced a four-month suspension of their reciprocal retaliatory tariffs.[185] That provided much needed relief for Boeing and Airbus,

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180 *Biden to Ditch*.

181 *See* Office of the United States Trade Representative, *Joint U.S.-U.K. Statement on Suspension of Large Civilian Aircraft Tariffs*, 4 March 2021, https://ustr.gov/about-us/policy-offices/press-office/press-releases/2021/march/joint-us-uk-statement-suspension-large-civilian-aircraft-tariffs; 86 Federal Register number 46 13961-13962 (11 March 2021), www.govinfo.gov/content/pkg/FR-2021-03-11/pdf/2021-05035.pdf (suspending retaliatory tariffs on U.K. goods from 4 March to 4 July 2021); Joe Mayes & Bryce Baschuk, *U.S. Suspends Tariffs on U.K. Goods in Airbus-Boeing Dispute*, BLOOMBERG, 4 March 2021, www.bloomberg.com/news/articles/2021-03-04/u-s-suspends-tariffs-on-u-k-goods-in-airbus-boeing-dispute?sref=7sxw9Sxl [hereinafter, *U.S. Suspends Tariffs*].

182 *See U.S. Suspends Tariffs on Single Malt Scotch Whisky*, BBC NEWS, 4 March 2021, www.bbc.com/news/business-56279525 (reporting: "Karen Betts, head of the Scotch Whisky Association, called the suspension of tariffs 'fabulous news.' 'The tariff on single malt Scotch whisky exports to the U.S. has been doing real damage to Scotch whisky in the 16 months it has been in place, with exports to the U.S. falling by 35%, costing companies over half a billion pounds.'"). [Hereinafter, *U.S. Suspends Tariffs*.]

183 Moreover, post-Brexit, the EU questioned whether the U.K. had the legal right to continue to put retaliatory tariffs on U.S. goods. On the one hand, Britain was a party to the Boeing and Airbus disputes. On the other hand, it had left the EU bloc. *See* William James & Andrea Shalal, *U.S., U.K. Suspend Tariffs and Seek Aircraft Row Resolution*, REUTERS, www.reuters.com/article/uk-britain-usa-trade-whisky/u-s-uk-suspend-tariffs-and-seek-aircraft-row-resolution-idUSKBN2AW1EB. *See also* Peggy Hollinger, Sebastian Payne & Aime Williams, *U.S. Suspends Tariffs on U.K. Exports in Airbus-Boeing Trade Dispute*, FINANCIAL TIMES, 4 March 2021; www.ft.com/content/f4844a11-2fef-4150-a64b-986bdf244161?shareType=nongift (reporting: "Britain's departure from the EU has raised questions about how effective any U.K.-U.S. suspension can be. With no precedent to follow, … it is unclear whether the U.K. still had a right to impose or suspend tariffs that were granted to the EU. Whitehall officials insisted the U.K. had the right to revoke retaliatory tariffs.") [hereinafter, *U.S. Suspends Tariffs on U.K.*); *U.S. Suspends Tariffs* (reporting: "The U.K. is part of the dispute as a former EU member. Airbus makes wings and other parts in the U.K., but assembles its commercial aircraft in the EU. Since the U.K. left the EU, it has been lobbying Washington to drop the duties on its own goods as it seeks a wide-ranging trade deal with the U.S.").

184 *Quoted in U.S. Suspends Tariffs*.

185 *See* European Commission, Commission Implementing Regulation (EU) 2021/425 of 9 March 2021, *Suspending Commercial Policy Measures Concerning Certain Products from the United States of America Imposed by Implementing Regulation (EU) 2020/1646 Following the Adjudication of a Trade Dispute under the Dispute Settlement Understanding of the World Trade Organization*, OFFICIAL JOURNAL

which each faced 25% duties when exporting to the EU and U.S., respectively. It also boosted the fortunes of a diverse array of producer-exporters and merchandise: from the Continent, shipments of French wine and Spanish olives; from the U.S., shipments of fruit, nuts, and tractors. The motives for their truce were, of course, to end the Air Wars through disciplines on subsidies, monitoring and enforcement mechanisms for those disciplines, so they could jointly focus on NMEs, principally, China. On 10 April, the EU proposed the tariff suspension be extended for an additional six months.[186] By this point, the U.S. and EU were engaged in negotiations to resolve their dispute over DSTs (discussed in another Chapter), hence both sides had the incentive of not to poison the atmosphere of those negotiations with renewed Air Wars tariffs.

And, in June 2021, the U.S., U.K., and EU inched toward a comprehensive solution:

> The United States and Europe are closing in on a deal to end a 17-year-old dispute over aircraft subsidies and end tariffs, while seeking an elusive consensus on how to address competition from China….
>
> …
>
> Talks are converging towards a pair of separate but broadly aligned treaties – one between the United States and European Union, the original parties – and another between Washington and London following Britain's exit from the EU….
>
> …
>
> The dispute has dragged on since 2004 when the United States withdrew from a 1992 aircraft subsidy pact and took the EU to the WTO, claiming Airbus had managed to equal Boeing's share of the jet market thanks in part to subsidised government loans.
>
> …
>
> In a potentially key breakthrough, the United States has watered down opposition to the principle of future public loans for Airbus but insists they must be demonstrably market-based and notified in advance….
>
> But hurdles remain over the extent to which those conditions could

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OF THE EUROPEAN UNION, L 84/16 (11 March 2021), https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv%3AOJ.L_.2021.084.01.0016.01.ENG&toc=OJ%3AL%3A2021%3A084%3ATOC; European Commission, Press Release, 5 March 2021, https://ec.europa.eu/commission/presscorner/detail/en/IP_21_1047; Office of the United States Trade Representative, *Notice of Modification of Section 301 Action: Enforcement of U.S. WTO Rights in the Large Civil Aircraft Dispute* (11 March 2021), https://ustr.gov/sites/default/files/enforcement/301Investigations/Notice_of_Modification_Action_Enforcement_LCA_Dispute_March_2021.pdf (suspending the Section 301 duties imposed on EU products from 11 March to 11 July 2021); Bryce Baschuk, Eric Martin, Jenny Leonard & Alberto Nardelli, *U.S., EU Agree To Suspend Tariffs in Boeing-Airbus Dispute*, BLOOMBERG, 5 March 2021, www.bloomberg.com/news/articles/2021-03-05/u-s-eu-agree-to-suspend-11-5-billion-of-tariffs-in-plane-spat?sref=7sxw9Sxl.

[186] *EU Proposes Six-Month Tariff Freeze with United States – Der Spiegel*, REUTERS, 10 April 2021, www.reuters.com/article/us-usa-europe-tariffs/eu-proposes-six-month-tariff-freeze-with-united-states-der-spiegel-idUSKBN2BX070.

> effectively allow the United States to approve or block European projects, they added. The EU is vehemently opposed to any U.S. veto.
>
> Even more critical is the benchmark to be used when deciding whether the interest on any future loans is market-compatible.
>
> Under the 1992 subsidy pact, one third of a project could be financed by direct government support such as loans and cleared indirect R&D support up to 4% of a company's revenue.
>
> One option is to revisit that framework with market rules replacing subsidy quotas and a new cap on indirect R&D support.[187]

Manifestly, the settlement negotiations drew on the 1992 plurilateral *Civil Aircraft Agreement*, which was part of the Uruguay Round texts, but from which America subsequently withdrew, and the principle of market benchmarks for determining whether the U.K. and/or EU were providing off-market loans (that is, loans on terms more favorable than Airbus could obtain from commercial banks – a matter discussed in a separate Chapter). With progress in these negotiations, and initial agreements on limiting subsidies for LCA production, the USTR opted to suspend for five years any additional Section 301 duties on U.K. and EU goods in connection with the Air Wars.[188]

As intimated above, query what impact the Trans-Atlantic "Air Wars" might have on China? China's SOE, COMAC, sought to break the Boeing-Airbus LCA duopoly. The effective date for America's retaliation was 18 October 2019. That was just three days after the increase from 25% to 30% in Waves One, Two, and Three tariffs on $250 billion worth of Chinese merchandise in the Sino-American Trade War (discussed in a separate Chapter) were scheduled to take effect. Boeing and Airbus would weaken each other in their Air Wars, to the benefit of COMAC. Indeed:

> Brussels and Washington are keenly aware that the rules need to be set before China becomes a significant competitor to Boeing and Airbus.
>
> China is expected to be the fastest-growing market for commercial aircraft over the coming decades and Beijing has made it a strategic priority to break the global duopoly in an attempt to claim some of that market for Chinese industry. Later this year [2021], China's COMAC is expected to have fully certified its first major commercial aircraft, the C919 single aisle.[189]

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187 Tim Hepher, Andrea Shalal, David Shepardson & Philip Blenkinsop, *After 17 Years, Truce Nears in U.S.-Europe Jet Subsidy War*, REUTERS, 15 June 2021, www.reuters.com/business/aerospace-defense/europe-us-nearing-jet-subsidy-pact-under-chinas-shadow-2021-06-14/. [Hereinafter, *After 17 Years*.]

188 *See* Office of the United States Trade Representative, *Suspension of Action: Enforcement of U.S. WTO Rights in the Large Civil Aircraft Dispute*, 86 Federal Register number 129, 36313-36315 (9 July 2021), www.govinfo.gov/content/pkg/FR-2021-07-09/pdf/2021-14550.pdf.

189 *U.S. Suspends Tariffs on U.K.*

Thus, by June 2021, when the U.S., U.K. and EU considered a proposed settlement:

> The United States wants a common review of aerospace funding in non-market economies like China, two of the people said.
>
> Washington is reluctant to bear the burden alone of tackling a potential subsidy threat to the benefit of not just Boeing but also Airbus, which now outstrips Boeing by production volume.
>
> "There's no question that the rise of China's aircraft industry is … on everybody's proverbial radar," U.S. Chamber of Commerce Senior Vice-president Marjorie Chorlins said on Monday, noting what she described as China's "heavy subsidisation."
>
> "It's recognized on both sides of the Atlantic that it's in our interest to join together where we can in pushing back against unfair Chinese practices," she added.[190]

Surely, then, Trans-Atlantic interests aligned in confronting state-sponsored competition from China?

Consider, too, consider whether subsidy controversies involving major industries, such as LCA, and perhaps also steel, which entail huge fixed investment costs and implicate (directly and indirectly) millions of jobs in multiple countries, are best resolved through comprehensive negotiations, rather than case-by-case adjudication. Might the OECD be the better forum than the WTO for such talks?

- **June 2021 *Boeing-Airbus* Air Wars Settlement**

On 15 June 2021, the combatants announced they had reached a peace agreement to end the Air Wars. Immediately, the WTO Director General, Dr. Ngozi Okonjo-Iweala, congratulated them:

> I am delighted that the European Union and the United States have resolved their dispute over the production of large commercial aircraft. This has been one of the longest running and most taxing disputes in the history of the WTO and the two sides have shown that even the most seemingly intractable differences can be resolved. This agreement proves that with hard work and political will WTO members can achieve historic results.[191]

The USTR spelled out the nature of the eight-paragraph deal (below), formally entitled the *Understanding on a Cooperative Framework for Large Civil Aircraft*, plus a four-

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190 *After 17 Years*.

191 World Trade Organization, *DG Okonjo-Iweala Welcomes Resolution in U.S.-EU Aircraft Subsidy Disputes*, 15 June 2021, www.wto.org/english/news_e/news21_e/disp_15jun21_e.htm.

paragraph *Annex* concerning *Cooperation on Non-Market Economies*.

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *USTR ANNOUNCES JOINT U.S.-EU COOPERATIVE FRAMEWORK FOR LARGE CIVIL AIRCRAFT* (15 JUNE 2021)[192]

The United States and the European Union today announced a cooperative framework to address the large civil aircraft disputes. The *Agreement* moves away from past confrontation in pursuit of a cooperative future by suspending the tariffs related to this dispute for five years. The U.S. and the EU also agreed to clear principles, including their shared intent that any financing for the production or development of large civil aircraft on market terms.

"After years of bitter litigation and weeks of intense diplomacy, we have reached a deal on a set of high-level principles that resets U.S.-EU engagement in the large civil aircraft industry," said Ambassador Katherine Tai. "We are strongest when we work with our friends and allies, and the partnership with European Commission Executive Vice President Valdis Dombrovskis is a demonstration of that principle in action."

"Our goal was clear – to forge a new, cooperative relationship in this sector so that our companies and our workers can compete on a more level playing field. The *Agreement* includes a commitment for concrete, joint collaboration to confront the threat from China's non-market practices, and it creates a model we can build on for other challenges."

[Paragraphs 1-8 repeat the *Agreement*, and Paragraphs 8(a)-(d) encompass the *Annex on Cooperation on Non-Market Economies*.]

The following general principles will guide the cooperation between the United States and the European Union in this sector:

1. The two sides will establish a Working Group on large civil aircraft, to be led by each side's respective Minister responsible for trade. The Trade Ministers will consult at least yearly. The Working Group will meet on request or at least every 6 months.

2. The Working Group will seek to analyze and overcome any disagreements that may arise between the sides. The Working Group will collaborate on and continue discussing and developing these principles and appropriate actions.

3. Each side intends to provide any financing to its LCA producer for the production or development of large civil aircraft on market terms.

4. Each side intends to provide any funding for … R&D for large civil aircraft to its

[192] The full text of the *Agreement* and *Annex* is https://ustr.gov/sites/default/files/files/FINAL%20Understanding%20on%20Principles%20relating%20to%20Large%20Civil%20Aircraft.pdf.

LCA producer through an open and transparent process and intends to make the results of fully government funded R&D widely available, to the extent permitted by law. Each side intends not to provide R&D funding or other support that is specific, to its LCA producer in a way that would cause negative effects to the other side.

5. The two sides will continue discussions to further operationalize Paragraphs 3 and 4, which apply to all levels [*i.e.*, sub-central as well as central] of government.

6. Each side intends to collaborate on jointly analyzing and addressing non-market practices of third parties that may harm their respective large civil aircraft industries. The two sides will implement the annexed understanding on cooperation on non-market economies through the Working Group.

7. Each side intends to suspend application of its countermeasures for a period of 5 years, in the expectation that the other side will contribute to establishing a level playing field and to addressing shared challenges from non-market economies.

8. The two sides will continue to confer on addressing outstanding support measures. As part of the Agreement, the United States and the European Union also released an *Annex on Cooperation on Non-market Economies*. [In the opening sentence of the *chapeau* to the *Annex*, the Parties stated: "The European Union and the United States share a common interest in sustaining their large civil aircraft sectors – including large civil aircraft producers, large civil aircraft engine producers, and producers of other large civil aircraft components, parts, or systems – in the face of new state-financed competitors from non-market actors."] To more effectively address the challenge posed by non-market economies, the parties will explore concrete ways to intensify their cooperation in these areas:

a. **Information sharing.** The two sides will share information regarding cybersecurity concerns, the priorities described below, and other areas relevant to non-market practices in the large civil aircraft sector.

b. **Inward investments.** The two sides will coordinate and explore common approaches and enhanced cooperation regarding the screening of inward investments in the large civil aircraft sector, including those whose financing is supported by a non-market economy. Such inward investments can lead to the appropriation of critical technologies relevant to the sector by a non-market economy or a producer located in the territory of a non-market economy.

c. **Outward investments.** The two sides will coordinate and explore common approaches and enhanced cooperation regarding the screening of new outward investments in joint ventures and production facilities in non-market economies to ensure that such activities are not influenced by non-market forces, including conditioning the in-country purchases on the

location of production facilities or other actions, that lead to the transfer of technology or jobs to the detriment of market-oriented actors.

d. **Joint analysis of non-market practices.** Some economies do not report transparently all domestic subsidies and provide extensive support to their large civil aircraft sector through subsidized equity investment, state lending, and state-directed purchases. The two sides will share information about such subsidies, and identify points where joint work is needed to clarify the extent of state support, with the goal of establishing the basis for joint or parallel action in the future. Some economies also do not permit their airlines to make purchases in line with commercial considerations. The two sides will develop information and consider joint action to ensure purchases reflect those that private, market-oriented operators would undertake.

Note, however, the *Agreement* did not constitute a final settlement. Rather, it amounted to a five-year truce, during which the U.S., U.K., and EU would cease imposition of tariffs on one another. The *Agreement* did not spell out how the Parties would ensure LCA financing is on market terms, R&D funding is transparent, support is non-injurious, or address non-market practices. It was long on aspiration, short on details. In effect, the Agreement was a negotiating agenda.

Yet, liberated from mutually destructive tariffs, the Parties could focus on China, the challenges of which the *Annex* referred to in its reference to NMEs:

> The world has changed a great deal since 2004 – and this deal acknowledges that fact.
>
> Where once Airbus and Boeing had the large aircraft market to themselves, they now face a stern challenge from China.
>
> Chinese manufacturer Comac is already in the final stages of developing the C919 – a plane designed as a direct rival to Airbus' A320 neo and the Boeing 737 Max.
>
> Longer term, it has a partnership with Russia's United Aircraft Corporation, to develop a larger, wide-body jet.
>
> Airbus's Chief Executive Guillaume Faury has already suggested that the duopoly in the aircraft market could become a "triopoly" by the end of the decade.
>
> So it makes little sense for either side to waste energy fighting yesterday's battles when they now face a common rival.
>
> It's a microcosm of wider EU-US relations: faced with China's growing

> economic power and ever-frostier relations with Russia, there seems to be a realization that old alliances need to be rekindled.[193]

Thus, said USTR Ambassador Katherine Tai: "The deal … includes a commitment for concrete joint collaboration to confront the threat from China's ambitions to build an aircraft sector on non-market practices."[194]

- **Alternative Step: Arbitration**

There is a possibility of using arbitration as an alternative means of dispute resolution.[195] Why is this option offered? Under what circumstances can it be invoked? In what contexts should disputing parties consider it a viable procedure?

IV. Seven *DSU* Procedural "Common Law" Rules

Try as they might, the Uruguay Round negotiators could not anticipate all of the procedural issues that would arise in cases brought under the *DSU*. Thus, from the outset of its operation, the *DSU* could not possibly be an entirely-comprehensive, self-contained rule book. This fact led to an obvious question of immense practical importance: how would procedural questions not addressed in the *DSU* be resolved? The obvious answer was Panels and the Appellate Body would have to engage in interstitial rule-making.

And, so they did. By 2000, the Appellate Body issued a number of important rulings on procedural issues. Query whether these rulings are precedent – in the *stare decisis* sense of the word – for all WTO Members. (The same question can be asked of Panel and Appellate Body holdings on substantive issues.) In a practical, quotidian, the answer seems to be "yes," as several of the rulings are referred to over and over again in subsequent cases.

Among the many possible examples, the Appellate Body's cites and applies in many subsequent cases the burden of proof rule that it established in the May 1997 *Wool Shirts* case.[196] It uses the rule in its December 1997 Report in its *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, in its January 1998 Report in *EC Measures Concerning Meet and Meat Products (Hormones)*, and in its June 1998 Report in *European Communities – Customs Classifications of Certain Computer Equipment*. Likewise, the Appellate Body relies on its bright line rule on judicial economy, established in *Wool Shirts*, in the *India – Patent Protection* and July 1998 *European Communities – Measures Affecting the Importation of Certain Poultry Products* cases.

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193 Theo Leggett, *Boeing-Airbus Trade Row Set to End After 17 Years* (Analysis), BBC NEWS, 15 June 2021, www.bbc.com/news/business-57484209.

194 *Quoted in* Philip Blenkinsop, *U.S, EU Agree Truce in 17-year Airbus-Boeing Conflict*, REUTERS, 15 June 2021, www.reuters.com/business/aerospace-defense/eu-us-set-unveil-truce-17-year-aircraft-battle-2021-06-15/. *See also* Jim Brunsden & Sylvia Pfeifer, *Airbus/Boeing Deal Explained: What Is In It and What Happens Next*, FINANCIAL TIMES, 15 June 2021, www.ft.com/content/1e04dfe1-9651-4b9e-90d9-fdbd82b45253 (summarizing the history of the dispute and the terms and implications of the deal).

195 *See DSU* Article 25.

196 That is not to say Appellate Body jurisprudence is static on burdens of proof or any other issue (as discussed below in connection with "as such" versus "as applied" claims).

In sum, a corpus of procedural common law emerged within the first five years of *DSU* operation, and continues to evolve. Thus, for example, in the 2004 case of *Corrosion-Resistant Steel Sunset Review*, the Appellate Body explained what the term "measure" means. The term is vital, because *DSU* Articles 3:3, 4:4, and 6:2 state a "measure" may be challenged. In that case, the Appellate Body said a "measure" is any act or omission, whether written or unwritten, attributable to a WTO Member.[197]

Below are the prominent "black letter" rules.

- **Rule 1: Exhaustion of Domestic Remedies**

Must an injured private party exhaust all remedies available to it under domestic law before that party's government can bring an action to the WTO? Put differently, in terms of raising issues, rather than exhausting remedies: must a private party have raised an issue before the relevant domestic judicial and administrative bodies in order for the Member to raise that issue at the WTO? This problem is most likely to arise in trade remedy cases – AD, CVD, safeguards, and IPR protection actions, for example – where countries offer recourse under domestic law. The *DSU* does not address the problem.

Under pre-Uruguay Round GATT practice, Panels did not feel inhibited by the "local remedies rule," even though adjudicating a case before it had been aired fully under local law risked affronting the sovereignty of the contracting party in whose jurisdiction the case properly would be heard. However, Panels scrupulously limited their review to whatever facts already had been put in front of the relevant domestic court or administrative agency. Likewise, in the 1997 case of *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel, and Other Items*, the WTO Panel rejected the argument Argentina could not be held to have violated its tariff binding until importers of the goods in question had exhausted the remedies available to them under Argentine law. The Panel stated resolutely that WTO Members are expected to comply with their obligations, regardless of the availability, or lack thereof, of an appropriate remedial mechanism under domestic law. The supporting logic is consequentialist in nature. Demanding exhaustion of local remedies would result in delay (perhaps years) and uncertainty (as to the ultimate rules that will be held valid and enforceable). Those results are the antipodes of what the GATT-WTO regime is trying to promote.

However, the Appellate Body has yet to rule on the problem of raising an issue at the WTO that was not raised at the domestic level. How should the problem be resolved? On the one hand, in some cases, a matter might not be raised under local law simply because it is not an issue under that law. In such cases, what did not transpire at the domestic level should have no bearing on a subsequent WTO case. On the other hand, in other cases – those where local law does deal with the matter – failure to raise a matter ought to prejudice efforts to raise it at the WTO level. Suppose in a WTO case a complaint concerns the failure of a domestic court or administrative agency to provide a well-

[197] *See Corrosion-Resistant Steel Sunset Review*, ¶ 81. *See also China Targeted Dumping*, ¶ 5:122 (explaining a measure may be written or unwritten).

reasoned explanation for its action. The rebuttal would be the complainant never raised the issue, so the local adjudicator never felt a need to amplify its written discourse.

- **Rule 2: Standing to Bring Complaint**

In its 1997 Report on *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, the Appellate Body considered the plausible EC argument that the U.S. lacked standing to bring the case. The argument, articulated in the emotive EC cry "not one banana," was the U.S. has no actual or potential trade interest justifying its claim. Its banana production is minimal, it has never exported bananas, and this situation is unlikely to change due to climactic and economic conditions in the U.S.

The American rebuttal reflected the realities of global production. Whether bananas were imported by the EC from the customs territory of the U.S. was immaterial. What mattered was whether U.S. companies exported bananas to the EC, regardless of where they grew the bananas. In this case, America had a significant commercial interest because the ability of 2 American companies, Chiquita and Dole, to export bananas to the EC was adversely affected by the EC's anti-free market regime.

The American rebuttal was yet more plausible than the European argument. The GATT-WTO regime would be a very unhelpful one indeed if it could be invoked to fight protectionism only after satisfying a territorial test for the movement of goods (or, for that matter, services). The EC banana preference scheme, while directly impacting banana-growing countries, had a global reach because of the offshore corporate interests in those countries. The U.S. implied the EC exalted form over substance, whereas the U.S. demanded to be heard based on trading difficulties American firms faced as a result of the preference scheme. Not surprisingly, the Appellate Body agreed with the U.S.

The Appellate Body found that Article 3:3 of the *DSU* (concerning the importance of the prompt settlement of disputes) and Article 3:7 (cautioning Members to "exercise ... judgment" as to whether bringing a case would be "fruitful") do not establish a prerequisite that a complainant has a "legal interest" before requesting formation of a Panel. Such a prerequisite was not set forth expressly elsewhere in the *DSU* or the *WTO Agreement*, nor could it be implied in any other GATT-WTO agreement. The Appellate Body agreed that every WTO Member possesses a good deal of discretion as to whether to bring an action. The matter is self-regulating, with each Member responsible for deciding whether an action would be "fruitful" (the Appellate Body probably did not intend the pun).

The result is only fair, especially from a developing country vantage. To limit dispute settlement to countries with an actual trade interest would be to exclude countries that are potential exporters. Further, a liberal standing, keeping "court house doors" open, as it were, enhances fairness and legitimacy in the WTO adjudicatory system. Finally, there is a shared interest among WTO Members that rules are followed.

- **Rule 3: Ripeness and Mootness**

What sort of impact must a trade measure have on a complaining Member before a WTO Panel will rule on the legality of that measure? It is clear under both pre- and post-Uruguay Round practice a Panel will not consider an issue ripe before the measure actually has been enacted into law. After all, why should Panels get involved in theoretical or hypothetical abstractions? Are they not far too busy with "live" cases as it is? But, after enactment, must a Panel wait until some definite action has occurred as regards the complaining Member, *i.e.*, must it wait until the measure actually is applied against the complainant and begins to cause some adverse effect to the complainant?

The *DSU* is silent, but pre-Uruguay Round GATT jurisprudence provides guidance. Expectations of contracting parties, not just existing trade relations, must be protected. Why? Because importers and exporters develop expectations and make business decisions based thereon. Put differently, if their expectations are unreliable – more prayer than sound forecast – then they will not have the certain, predictable legal scaffolding on which to build their trade relations. Thus, for example, in the 1985 case of *Japanese Measures on Imports of Leather*, the Panel issued a ruling even though the trade measure at issue had not been applied against imports.[198] In the 1988 case of *United States – Taxes on Petroleum and Certain Imported Substances*, the Panel opined even though a domestic law had not yet taken effect.[199]

In the 1997 *Argentina – Footwear* case, the U.S. challenged Argentina's tariff regime for a range of imports, arguing it violated that country's tariff commitments bound under GATT Article II. Argentina's defense was the issue was not ripe. The U.S. had not proven Argentina actually had imposed a duty in excess of the bound rates, and a mere prospect a duty might exceed these rates did not rise to a violation. The U.S. countered with the argument Argentina's tariff regime was mandatory: the rates must be imposed by Argentine customs authorities – they have no discretion. In other words, said the U.S., it was only a question of time, of "when," not "if," a violation would occur.

The Appellate Body agreed. As long as it is possible to conclude with sufficient certainty a violation will occur, then a measure is actionable. The fact that the measure, while enacted, has not yet taken effect, or that it has not yet had a trade effect on the complainant, is immaterial. Simply adopting the measure changes the competitive relationship between the parties because it has the potential to create a violation, and that alone undermines the certainty and predictability cherished in the multilateral trading system. In brief, the test for ripeness in the GATT-WTO law is not particularly demanding: if the measure necessarily will result in a violation under some conditions, there is no need to wait for those conditions to occur. Put conversely, only if a Member retains discretion to interpret or apply its law in a manner consistent with its GATT-WTO obligations – *i.e.*, only if the measure is not mandatory – would the measure not be considered ripe for review.

What about the "mirror image" of ripeness – mootness? May a Panel issue a ruling in a case where the measure in dispute has been withdrawn, or has expired? Again, the *DSU* is silent. Ostensibly, as regards the disputing parties, the ruling would seem to be a

198 *See* GATT B.I.S.D. (31st Supp.) 94.
199 *See* GATT B.I.S.D. (34th Supp.) 136.

waste of time. However, as is observed in the 1998 case of *European Communities – Measures Affecting Importation of Certain Poultry Products*, a terminated measure may have lingering trade repercussions on the export performance of the complaining Member. Thus, the Panel in that case rejected the EC's argument that it could not rule on a measure challenged by Brazil. Moreover, consider the interests of non-disputants. If one of them were to consider adoption of a similar measure, then a ruling might be very instructive. In other words, if the dispute is capable of being repeated, why not go forward with the case?

Several pre-Uruguay Round GATT Panels took this approach. They tended to issue rulings even after the disputed measure had terminated, but only if the disputed measure was in effect when the terms of reference for the Panel were agreed upon, or if there was no objection from either party. WTO Panels and the Appellate Body continue this nuanced approach in *Argentina – Footwear* and the 1996 case of *United States – Standards for Reformulated and Conventional Gasoline*. They compare two dates: (1) the date on which the measure has been withdrawn or expired, and (2) the date on which the Panel's terms of reference were set by the DSB. If the measure terminated before the terms of reference were set, then the issue is considered moot, and the Panel will not rule on it. If the measure was still in effect when the terms were set, then it is "fair game."

Plainly, the date on which a complaining Member asks for a Panel is immaterial. The logic is some date must be selected as the formal commencement of the adjudication process, and the date on which a Panel's terms of reference is at least as good, if not better, then any other candidate. At that juncture, the imprimatur of the DSB on the settlement process is indelible. Accordingly, for example, in the 1996 case of *Indonesia – Certain Measures Affecting the Automobile Industry*, the Panel rejected Indonesia's defense its National Car Program was immune from scrutiny because it had expired. Indonesia failed to offer this defense until after the deadline for submitting information and arguments, and in any event the complainants disagreed that the Program had lapsed. However, beware of the possibility of strategic – or dare it be said, bad faith? – behavior on the part of a respondent. It could abolish the disputed measure the day before a Panel's terms are set, and reinstate it after the Panel's ruling.

- **Rule 4: Sufficiency of Complaint**

One of the important procedural issues the Appellate Body confronted in the *EC – Bananas* case concerned what in American civil procedure is known as "notice pleading" versus "fact pleading." What are the requirements for a complaining Member's complaint? *DSU* Article 6:2 provides only a sketchy answer, saying that the complainant's request for a Panel must be "in writing," "identify the specific measures [of the respondent] at issue," and "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly."[200]

[200] Is it permissible to make claims in footnotes in a request for establishment of a Panel? In the *Ukraine Ammonium Nitrate* Appellate Body Report (discussed in a separate Chapter), Ukraine challenged whether measures at issue may be delineated in footnotes. That was not the first time this argument was raised. Ukraine cited to the 2017 case, *Indonesia-Import Licensing Regimes*, Request for the Establishment of a Panel by New Zealand, WT/DS477/9, to support its arguments. The Appellate Body's reiterated that this

The EC argued the American complaint against it was "unacceptably vague," thus falling far short of meeting even these skeletal requirements. After all, the U.S. merely listed the provisions of the specific Uruguay Round agreements that the EC allegedly violated. The U.S. did not detail its arguments as to which European measures violated which provisions of which agreements. The Europeans demanded a linkage between particular features of its banana import quota and licensing regime and the relevant laws (an application of the law to the facts, as it were), whereas the Americans had done nothing more than refer to the "banana regime" as the source of all the purported problems. The U.S. offered two rebuttals. First, Article 6:2 did not require "a detailed exposition tying each specific measure to each provision of law to be claimed" as violated. Second, the EC had ample notice of the claims against it during the consultation phase, *i.e.*, information the U.S. had provided during this phase could in effect "cure" any missing pieces from its complaint.

The Appellate Body agreed with the U.S. The American list was enough, it met the "minimum standards" of Article 6:2, and the EC was confusing the fundamental distinction between a claim and an argument supporting a claim, and thus between a complaint and a brief. In the American civil procedure lingo, the Appellate Body was saying notice pleading suffices. A mere listing of the allegedly violated rules of international trade law, without detailed supporting arguments or an indication of which disputed measures relate to which legal provisions, suffices.

The Appellate Body observed the complaint-drafting requirements are kept minimal under *DSU* Article 6:2 for 2 good reasons. First, the complaint helps in setting the Panel's terms of reference. Second, it informs the respondent of the legal basis for the complainant. These purposes are easily met without intricate pleadings. The only caveat the Appellate Body added was that uncertainty as to whether a complaint satisfies Article 6:2 cannot be cleared up, or "cured," by a subsequent submission. The complainant must "get it right" in the complaint itself. But, assuming a complainant says enough to establish terms of reference and give notice, it need say no more.

- **Rule 5: Judicial Economy**

Must a Panel or the Appellate Body resolve all of the claims made in a case, or may it decide only those claims necessary to dispose of the case? That the Appellate Body stepped in to answer this question is not a surprise. Nothing in the *WTO Agreement* deals with the problem, and the nearest guidance in the *DSU* is set forth in Article 11:

> The function of Panels is to assist the DSB in discharging its responsibilities under this *Understandin*g and the covered agreements. Accordingly, a Panel should make *an objective assessment of the matter before it*, including an objective assessment of the facts of the case and the

question is evaluated on a case-by-case basis. *See Ukraine Ammonium Nitrate* Appellate Body Report, ¶ 6.33. By inference, identifying the measures at issue in the body of the request for a Panel as clearly and extensively as possible is the best way to ensure ambiguity does not arise.

> applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements. (Emphasis added.)

In 1997, the problem came to a head in *United States – Measure Affecting Imports of Woven Wool Shirts and Blouses from India*.

India inferred from Article 11 a right of a complainant to a ruling on each and every claim a complainant raises in a case. The Panel held otherwise.

> [W]e disagree and refer to the consistent GATT Panel practice of judicial economy. India is entitled to have the dispute over the contested "measure" resolved by the Panel, and if we judge that the specific matter in dispute can be resolved by addressing only some of the arguments raised by the complaining party, we can do so. We, therefore, decide to address only the legal issues we think are needed in order to make such findings as will assist the DSB in making recommendations or in giving rulings in respect of this dispute.

The Appellate Body agreed with the Panel and, in so doing, relied extensively on prior GATT practice.

That practice set out the circumstances in which a Panel, or the Appellate Body, may exercise judicial economy. As the Appellate Body stated in a 2004 case, *Canada Wheat Board Case*:[201]

> The practice of judicial economy, which was first employed by a number of GATT Panels, allows a Panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. Although the doctrine of judicial economy *allows* a Panel to refrain from addressing claims beyond those necessary to resolve the dispute, it does not *compel* a Panel to exercise such restraint. At the same time, if a Panel fails to make findings on claims where such findings are necessary to resolve the dispute, then this would constitute a false exercise of judicial economy and an error of law. (Original emphasis; footnotes omitted.)

In brief, as the Appellate Body indicated in its 1998 *Australia Salmon* Report, "judicial economy" means addressing only "those claims on which a finding is necessary in order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings," and thus

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[201] *See Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/AB/R (adopted 27 September 2004).

achieve an effective resolution of disputes to the benefit of all Members.[202]

Judicial economy is premised on more than the need to conserve judicial resources and dispose of matters efficiently. It is a principle of self-restraint. If WTO adjudicators were to decide every issue raised by a complainant, they would be "making" more law than they need to, rather than "finding" just enough law to settle a dispute. That is, they would blur the line between judicial and legislative functions that is drawn by Article 3:9 of the *DSU* and Article IX of the *WTO Agreement*. In turn, they would de-legitimize the dispute resolution process.

That said, appellants in WTO litigation sometimes ask the Appellate Body to "complete the legal analysis" that a Panel failed to finish, because the Panel exercised false judicial economy. The Appellate Body will do so, thereby examining an issue not specifically addressed by the Panel, in order to resolve the dispute between the parties. What constraints exist on the Appellate Body stepping in to "top up" the legal analysis? The Appellate Body summarized them in the 2005 *EC Sugar* case:

> [T]he Appellate Body has declined to complete the legal analysis where "the factual findings of the Panel and the undisputed facts in the Panel record" did not provide a sufficient basis for the legal analysis by the Appellate Body. [The Appellate Body cited *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 5 April 2001).] Moreover, as Article 17:6 of the *DSU* limits appeals to "issues of law covered in the Panel Report and legal interpretations developed by the Panel," the Appellate Body has also previously declined to complete the legal analysis of a Panel in circumstances where that would involve addressing claims "which the Panel had not examined at all". [The Appellate Body cited its *EC – Asbestos* Report, and also its Report in *European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R (adopted 23 July 1998).] In addition, the Appellate Body has indicated that it may complete the analysis only if the provision that a Panel has not examined is "*closely related*" to a provision that the Panel has examined, and that the two are "part of a *logical continuum*." [Here again, the Appellate Body cited to the *EC – Asbestos* case, as well as another one of its Reports, *Canada – Certain Measures Concerning Periodicals*, WT/DS31/AB/R (adopted 30 July 1997).]

Note the accretion of precedent resulting in the constraints.

- **Rule 6: Burden of Proof**

Does the complainant or respondent bear the burden of proof in WTO adjudication? This basic question is not addressed in the WTO Agreement or *DSU*. In retrospect,

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[202] *See Australia – Measures Affecting Importation of Salmon*, WT/DS18/AB/R (adopted 6 November 1998).

therefore, it could be only a matter of time before the Appellate Body would have to step in with an interstitial rule. The opportunity came in *United States – Wool Shirts*, in the context of Article 6:2 of the WTO *ATC*. This Article establishes the right of an importing Member to implement a safeguard action if its T&A producers are damaged by the phase-out of the *MFA*:

> Safeguard action may be taken under this Article when, on the basis of a determination by a Member, *it is demonstrated* that a particular product is being imported into its territory in such increased quantities as to cause serious damage, or actual threat thereof, to the domestic industry producing like and/or directly competitive products. Serious damage or actual threat thereof must *demonstrably* be caused by such increased quantities in total imports of that product and not by such other factors as technological changes or changes in consumer preference. (Emphasis added.)

The highlighted language obviously does not answer the question "who must demonstrate?" the elements set forth in Article 6:2.

In the case, India claimed the U.S. was unjustified in resorting to a transitional safeguard action. Was the burden then on India to prove its claim. Or, was it on the U.S. to justify its action?

India argued the burden ought to be on the Americans, because Article 6:1 of the *ATC* states transitional safeguards "should be applied as sparingly as possible." That is, they are exceptional, and the WTO Member invoking the exception should be required to prove it qualifies for the exception. The U.S. countered with a quasi-precedent argument. GATT practice had been for the complainant to present a *prima facie* case of violation. Hence, India had to show the Americans were unreasonable in determining increased woven wool shirt and blouse imports had caused serious damage or actual threat thereof to domestic producers. The Appellate Body provided the answer.

> [A] party claiming a violation of a provision of the WTO Agreement by another Member must assert and prove its claim. In this case, India claimed a violation by the United States of Article 6 of the *ATC*. We agree with the Panel that it, therefore, was up to India to put forward evidence and legal argument sufficient to demonstrate that the transitional safeguard action by the United States was inconsistent with the obligations assumed by the United States under Articles 2 and 6 of the ATC. India did so in this case. And, with India having done so, the onus then shifted to the United States to bring forward evidence and argument to disprove the claim. This, the United States was not able to do and, therefore, the Panel found that the transitional safeguard action by the United States "violated the provisions of Articles 2 and 6 of the *ATC*."
>
> In our view, the Panel did not err on this issue in the case.

Put succinctly, the Americans had won the battle, but lost the war. The Appellate Body stuck with GATT practice, as the U.S. had urged, yet still held India had met its burden.

Thus, the burden of proof rule has three steps to be followed *in seriatim*. First, a complainant Member must present a *prima facie* case. Second, if it does, then it creates a rebuttable presumption that the measure complained of is inconsistent with the applicable rule. Third, the burden shifts to the respondent Member to rebut the presumption. Concomitantly, the respondent bears the burden of proof of any affirmative defense.

- **Rule 7: Fact-finding by Panels**

A WTO Panel is ill-equipped to engage in fact-finding. Still, *DSU* Article 13:1 gives it "the right to seek information and technical advice from any individual or body which it deems appropriate," and says a Member "should respond promptly and fully to any request by a Panel...." In speaking of individuals and bodies, the first part of the provision is more aspirational than authoritative. The GATT-WTO agreements are among sovereign states, not individuals, international organizations, or NGOs. The second part of the provision, by using the term "should" rather than "shall," admits that no WTO Panel can compel compliance with a fact-finding request.

To be sure, "discovery" of documents, in the common law sense of the term, is unavailable under the *DSU*. The Panel Report in *Argentina – Footwear* makes this point. But, the Panel in that case took the occasion of Argentina's refusal to provide documents (specifically, additional customs invoices) to the U.S. to offer *dicta* on fact finding. The Panel said a "rule of collaboration" exists in *DSU* adjudication: parties must provide information necessary for the presentation of facts and evidence to the Panel. The rule means a respondent Member is obligated to provide a Panel with relevant documents in its sole possession. The obligation arises after the complaining Member has done its best to secure the evidence, and produced some *prima facie* evidence in support of its case.

V. "As Such" versus "As Applied" Claims

An especially important distinction in WTO litigation is that between "as such" and "as applied" claims. Like the aforementioned seven procedural common law rules, this distinction, and the burden of proof associated with each claim, has been the subject to procedural common law development.

An "as such" claim is one that a disputed measure is of general and prospective (*i.e.*, systematic and continued) application, and intrinsically violates a GATT-WTO provision, though no specific individual application of the measure is at issue. A measure aimed at one economic actor, with no certainty that the measure will continue to be imposed in the future, would be neither "general" nor "prospective." An "as such" *DSU* challenge is distinct from an "as applied" claim, whereby the claim is that the foul is in the way a WTO Member applied a measure in practice. A complainant faces a high burden of proof in making an "as such" claim. It may have to show the measure it contends is an "as such" violation of a GATT-WTO provision necessarily operates, at

least in certain circumstances, to preclude implementation of DSB recommendations and rulings.[203]

> Note the logic of allowing an "as such" challenge:
>
> > [T]he disciplines of the GATT and the WTO, as well as the dispute settlement system, are intended to protect not only existing trade but also the security and predictability needed to conduct future trade. [This goal] would be frustrated if instruments setting out rules or norms inconsistent with a Member's obligations could not be brought before a Panel … irrespective of any particular instance of application of such rules or norms.[204]

Note also measures may have attributes of both general and prospective norms, and individual instances of applications of a rule.[205]

VI. Estoppel and 2005 *EC Sugar* Case

WTO APPELLATE BODY REPORT, *EUROPEAN COMMUNITIES – EXPORT SUBSIDIES ON SUGAR*, WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R (ADOPTED 19 MAY 2005)

[The substantive issue concerned whether the EC provided an illegal export subsidy to sugar exports, in violation of the WTO *Agreement on Agriculture*.]

302. The Panel found that the Complaining Parties [Australia, Brazil, and Thailand] "ha[d] acted in good faith in the initiation and conduct of the present dispute proceedings." The Panel emphasized that the Complaining Parties "were entitled to initiate the present WTO proceedings as they did and at no point in time have they been estopped, through their actions or silence, from challenging the EC sugar regime which they consider WTO inconsistent." The Panel explained that:

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203 *See* WTO Appellate Body Report, *United States – Anti-Dumping Measures on Certain Shrimp from Vietnam*, WT/DS429/AB/R ¶ 4:24 (adopted 22 April 2015). [Hereinafter, *U.S. Vietnam Shrimp II* Appellate Body Report].

204 WTO Appellate Body Report, *United States – Sunset Review of Anti-Dumping Duties on Corrosion-Resistant Carbon Steel Flat Products from Japan*, WT/DS244/AB/R, ¶¶ 81-82 (adopted 9 January 2004). [Hereinafter, *Corrosion-Resistant Steel Sunset Review*.]

205 *See* WTO Appellate Body Report, *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/AB/R, ¶ 5:125 (adopted 22 May 2017). [Hereinafter, *China Targeted Dumping*.]

> ... it is not possible to identify any facts or statements made by the Complainants where they have admitted that the EC measure was WTO consistent or where they have promised that they would not take legal action against the European Communities. In the Panel's view the "silence" of some of the Complainants cannot be equated with their consent to the European Communities' violations, if any. Moreover, the Complainants' silence cannot be held against other WTO Members who, today, could decide to initiate WTO dispute settlement proceedings against the European Communities.

…

309. The Panel cautioned that "it is far from clear whether the principle of estoppel is applicable to disputes between WTO Members in relation to their WTO rights and obligations." The Panel added that "[t]he principle of estoppel has never been applied by any Panel or the Appellate Body." The Panel went on to opine that, assuming, for the sake of argument, that estoppel could be invoked in WTO dispute settlement:

> Brazil's and Thailand's silence concerning the European Communities' base quantity levels as well as with respect to the ACP/India sugar Footnote does not amount to a clear and unambiguous representation upon which the European Communities could rely, especially considering that, in the Panel's view, there was no legal duty upon the Complainants to alert the European Communities to its alleged violations. Furthermore, it is not possible to identify any facts or statements made by the Complainants where they have admitted that the EC measure was WTO consistent or where they have promised that they would not take legal action against the European Communities. In the Panel's view the "silence" of some of the Complainants cannot be equated with their consent to the European Communities' violations, if any.

310. We agree with the Panel that it is far from clear that the estoppel principle applies in the context of WTO dispute settlement. Indeed, on appeal, the participants and third participants have advanced highly divergent views on the concept itself and its applicability to WTO dispute settlement.

311. The European Communities argues that estoppel is a general principle of international law, which follows from the broader principle of good faith. As such, estoppel is "one of the principles which Members are bound to observe when engaging in dispute settlement procedures, in accordance with Article 3:10 of the *DSU*." Regarding the content of estoppel, the European Communities argues that "[e]stoppel may arise not only from express statements, but also from various forms of conduct, including silence, where, upon a reasonable construction, such conduct implies the recognition of a certain factual or juridical situation." Australia, in contrast, submits that the principle of estoppel is not applicable in WTO dispute settlement. With respect to the content of estoppel, Australia submits that estoppel cannot "apply as to a statement of a legal situation." Brazil agrees with the Panel that the European Communities' claims regarding estoppel were "without merit." Similarly, Thailand maintains that the Panel was correct in concluding that the

principle of "estoppel is not mentioned in the *WTO Agreement*, or the *DSU*, and that it has never been applied by any Panel or the Appellate Body." The United States emphasizes that "[n]owhere in the *DSU* or the other covered agreements is there a reference to 'estoppel.'" Moreover, according to the United States, "'[e]stoppel' is not a defense that Members have agreed on, and it therefore should not be considered by the Appellate Body."

312. The principle of estoppel has never been applied by the Appellate Body. Moreover, the notion of estoppel, as advanced by the European Communities, would appear to inhibit the ability of WTO Members to initiate a WTO dispute settlement proceeding. We see little in the *DSU* that explicitly limits the rights of WTO Members to bring an action; WTO Members must exercise their "judgment as to whether action under these procedures would be fruitful", by virtue of Article 3:7 of the *DSU*, and they must engage in dispute settlement procedures in good faith, by virtue of Article 3:10 of the *DSU*. This latter obligation covers, in our view, the entire spectrum of dispute settlement, from the point of initiation of a case through implementation. Thus, even assuming *arguendo* that the principle of estoppel could apply in the WTO, its application would fall within these narrow parameters set out in the *DSU*.

313. With these considerations in mind, we examine the arguments of the European Communities on this issue. Even assuming, for the sake of argument, that the principle of estoppel has the meaning that the European Communities ascribes to it, and that such a principle applies in WTO dispute settlement, we are not persuaded, in the circumstances of this case, that the Complaining Parties would be estopped from bringing claims against C sugar [*i.e.*, sugar produced in Europe above the thresholds established by the for "A" and "B" quotas, and exported pursuant to EC rules].

[On 30 September 2017, the EU abolished its sugar production quotas and price support mechanisms for producers, both of which dated back to 1968. They were part of the CAP'S CMO for sugar, and designed to help Europe achieve self-sufficiency in food:

> From that time [1968], EU sugar policy covered all aspects relevant to the industry, from production quotas and guaranteed prices, to exports subsidies and import restrictions. In 2004, in the ... case of *European Communities – Export Subsidies on Sugar* initiated by Brazil and Australia, a dispute settlement Panel and subsequently the WTO's Appellate Body, found that the EU sugar regime violated international trade rules, in particular through its export subsidies for sugar. More specifically, the Panel concluded that the EU, through its sugar regime, had acted inconsistently with its obligations under Articles 3:3 and 8 of the *Agreement on Agriculture* ... by providing export subsidies within the meaning of Article 9:1(a) and (c) of the *AoA* in excess of the quantity commitment level and the budgetary outlay commitment level specified in Section II, Part IV of Schedule CXL (*i.e.*, the EU's Schedule of Concessions within the WTO). The EU started to reform its sugar policy and to adapt the various policy elements. In 2006, the reform of the CAP included a number of measures leading to a transition

> period for the EU's sugar producers. EU Member States agreed to phase out the EU's sugar quotas by 2015. In 2013, the European Parliament and EU Member States agreed to postpone the end of EU sugar production quotas until the end of the 2016/2017 agricultural year ... on 30 September 2017.
>
> During the application of the sugar production quotas, a quota of 13.5 million metric tons was divided between 20 EU Member States. Out-quota production (*i.e.*, production above the 13.5 million metric tons), was only eligible for export up to the EU's annual WTO limit of 1.374 million metric tons and had to be destined for biofuel and other industrial non-food uses, or could be stored and counted against the following year's quota. There was also a 0.72 million metric tons quota for isoglucose (also known as glucose fructose syrup or high fructose corn syrup [HFCS]) and export of excess production was also restricted. Finally, inulin syrup was subject to a production quota of zero, thereby prohibiting the production within the EU. The end of production quotas now removed any limits on EU sugar, isoglucose and inulin syrup production.[206]

So, as of 1 October 2017, EU sugar beet growers determined their output levels, with no caps on production, and received no guaranteed minimum prices.]

314. The European Communities argues that the Complaining Parties are estopped from bringing their claims against C sugar because their "lack of reaction to the non-inclusion of C sugar in the base quantity, together with the other undisputed facts and circumstances ..., clearly represented to the EC that the Complainants shared the understanding that the C sugar regime did not provide export subsidies." Furthermore, according to the European Communities, it "could legitimately rely upon that shared understanding in order not to include exports of C sugar in the base levels."

315. We observe, first, that the Panel specifically found that "it is *not* possible to identify *any* facts or statements made by the Complainants where they have admitted that the EC measure was WTO consistent or where they have promised that they would not take legal action against the European Communities." We consider this finding to be based on the Panel's weighing and appreciation of the evidence.

316. Secondly, the European Communities suggests that it "could legitimately rely" upon an alleged "shared understanding" between "all the participants in the Uruguay Round" in deciding not to include exports of C sugar in the base quantity levels in its Schedule. We recall that the Panel found no evidence of any such "shared understanding" in this case. Thus, as we see it, the European Communities has no basis on which to now assert that it could have legitimately relied upon such alleged "shared understanding" in deciding not to include exports of C sugar in the base quantity levels in its Schedule.

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[206] FratiniVergano European Lawyers, Trade Perspectives, *A (Bitter) Sweet Future? The EU Abolishes Its Sugar Production Quotas*, issue number 18 (6 October 2017).

317. For these reasons, we reject, as did the Panel, the European Communities' allegation that the Complaining Parties were estopped from bringing their claims against C sugar.

VII. Is International Trade Law Really "Law" with *DSU*?

Happily for the multilateral trading system, and generally for those seeking to advance the international rule of law, the pre-Uruguay Round dispute settlement problems largely ended with the *DSU*. The *DSU* contains tight deadlines for virtually every stage of the dispute resolution process, and disputes generally are resolved within one year. Blockage of formation of a Panel is possible for only one meeting of the DSB (the one at which formation is requested); thereafter, a Panel must be formed. Blockage of adoption of Panel or Appellate Body Reports is impossible. The losing party must notify the DSB how it will comply. Failure to comply will trigger remedial action – blockage of authorization to retaliate is impossible.

In brief, there is "automaticity," and there are "teeth," built into the *DSU*. Put differently, the *DSU* reflects a triumph of lawyers over diplomats, *i.e.*, of a rules-based rather than power-based approach to resolving controversies.[207] And, Austinian Positivists no longer can look to International Trade Law to support their proposition that International Law is not "law." What might Natural Law theorists say?

A related, but more practical, question is how America has fared in *DSU* proceedings. What is the U.S. won-loss record? The Cato Institute offered an answer: between 1995 and March 2017, the U.S. won 91% of the cases it brought (*i.e.*, as complainant, in 114 of 522 disputes that were fully adjudicated). The U.S. lost 89% of the cases lodged against it (*i.e.*, as respondent, in 129 of the 522 disputes that were fully adjudicated).[208] Slightly different, but still impressive, figures were offered by Bloomberg in July 2018, based on its analysis of the 524 cases lodged since the *DSU* entered into force on 1 January 1995: "[t]he U.S. wins 87 percent of the cases it brings to the WTO against other countries and loses 75 percent of the cases other countries bring against Washington, and [b]oth figures are better than the average for all nations."[209]

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[207] *See* Michael K. Young, *Dispute Resolution in the Uruguay Round: Lawyers Triumph Over Diplomats*, 29 THE INTERNATIONAL LAWYER, number 2 (Summer 1995). *See also* Joseph H. H. Weiler, *The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement*, 35 JOURNAL OF WORLD TRADE 191-207 (2001) (questioning whether the triumph over diplomats reflects the rule of law or the rule of lawyers, and whether the fundamental goals of the WTO have been served by this triumph).

[208] *See* Dan Ikenson, Director, Herbert A. Stiefel Center for Trade Policy Studies, The Cato Institute, *U.S. Trade Laws And The Sovereignty Canard*, FORBES, 9 March 2017, www.forbes.com/sites/danikenson/2017/03/09/u-s-trade-laws-and-the-sovereignty-canard/#39654104203f.

[209] Jenny Leonard, *U.S. Hits Back at Allies, China on Metal Tariffs in WTO Move (2)*, 35 International Trade Reporter (BNA) 966 (19 July 2018).

Chapter 6

PARTICIPATION AND CAPACITY PROBLEMS[210]

I. Interconnected Imperfections

By most accounts, WTO dispute settlement is a remarkable success. The *DSU* is a, if not the, crowning achievement of the Uruguay Round. Pre-WTO dispute settlement under GATT Article XXIII was a diplomatic system, dominated by clubby insiders sometimes called "old GATT hands," who demographically (as is sometimes said indelicately of international commercial arbitrators) tended to be "pale, male, and stale." The results inclined toward political compromises translated into abstruse legal language. The *DSU* boasts three major gains over former procedures, which also are advantages over the operation of the ICJ.

First, there is compulsory jurisdiction. The single undertaking approach to Uruguay Round texts means all WTO Members must adhere to the *DSU*. Second, decisions rendered under the *DSU* are enforceable. To be sure, as the work of Professor Robert E. Hudec (1934-2003) shows, the record of compliance under the old GATT system was better than sometimes believed. Compromises were reached, after all, and contracting parties were repeat players with reputational interests. Still, that system lacked the rigorous enforcement mechanism characteristic of the *DSU*. Third, the *DSU* affords complainants and respondents a right of appeal. That innovation was strongly urged by the U.S. during the Uruguay Round.

Despite these gains, the *DSU* is not perfect – no human adjudicatory system is. Anticipating problems, Uruguay Round negotiators built in a future negotiating agenda into the *DSU*, and work on it began four years after the *DSU* entered into force (*i.e.*, 1 January 1999). To summarize the consensus of comments from WTO Members on this agenda: "We are happy, the *DSU* works reasonably well, but there are a few minor technical difficulties, on which we all agree." In 1997, Members commenced negotiations on *DSU* reform, and a myriad of substantial proposals followed. Unfortunately, work on the in-built agenda was unsuccessful because Members could not agree on which proposals to advance.

WTO Members then made what in retrospect was a colossal mistake: they moved the in-built agenda to the Doha Round. By creating a built-in agenda, the Uruguay Round negotiators clearly telegraphed their intent not to make *DSU* reform subject to the horse-trading endemic to multilateral trade talks (*e.g.*, agricultural market access and subsidy cuts in exchange for better NAMA and *GATS* offers). By inserting adjudication rule improvements into the DDA, the topic became part of the single undertaking approach of

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[210] Documents References:
(1) *Havana Charter* Articles 41, 47-48, 66, 92-97
(2) GATT Articles XXII-XXIII
(3) WTO *DSU*

the Doha Round – nothing could be agreed to on *DSU* changes unless and until all other issues were resolved. In effect, *DSU* reform became hostage to unrelated, politicized matters, and to vicissitudes of the Round. For its part, Taiwan tried to break the logjam on *DSU* reform by taking the topic out of the diplomatic processes of the Round and placing it in the jurisdiction of an *ad hoc* technical committee comprised of former members of the WTO Appellate Body. Taiwan's proposal was not adopted.

Accordingly, the Appellate Body itself has had to sift through a myriad of critical evaluations of its work, and the *DSU* in general. To be fair, it has done what it can. In May 2018, the Appellate Body Chair, India's Ujal Singh Bhatia, explained:

> I disagree with suggestions that weakening the WTO's dispute settlement arm would help revitalize its negotiating function. The prospect of agreeing on new multilateral trade rules would lose much of its traction if the negotiating Members were not confident as to the principled and effective enforcement of those rules. Hence, the paralysis of the Appellate Body would cast a long and deep shadow on the continued operation of the multilateral trading system as a whole.
>
> What is to be done? The answer lies firmly in the hands of WTO Members. For over 20 years, trading nations have shown an unfaltering commitment to independent and impartial dispute settlement. Aside from the sheer number of disputes that have been submitted to panels and the Appellate Body, it is worth mentioning the almost total absence of instances where Members have, upon losing a ruling, explicitly chosen not to implement it. While losing parties and sometimes other Members have criticized individual rulings, these critiques have rarely challenged the overall authority or legitimacy of the WTO dispute settlement mechanism. It is, therefore, incumbent on Members to evaluate whether that commitment continues to exist today, in a world that is witnessing the resurgence of sovereigntist tendencies in trade relations.
>
> Engagement and dialogue are also of the essence. As Chair of the Appellate Body, I have been holding consultations with a number of delegations that make frequent use of WTO dispute settlement. The vast majority of my interlocutors, while expressing deep concern about the current situation, reaffirmed their desire to preserve the system in its current configuration. The principles enshrined in the *DSU* continue to be acceptable to all Members. The present debate is about whether the Dispute Settlement System has been faithful to them. That is a debate certainly worth having.
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> As far as the Appellate Body is concerned, I am well aware that there remains room for improvement in our proceedings. A number of decisions, for instance, have been criticized for being excessively technical and therefore indecipherable for lay readers. Other rulings were accused of being too broad in scope and addressing issues that were not strictly

> necessary to provide a positive solution of the dispute at hand. Whatever one thinks of those critiques, they provide useful food for thought and offer guidance as to how to further enhance the functioning of the Appellate Body. In recent years, a number of initiatives have helped simplify and streamline the content of reports. In particular, the section devoted to conclusions now summarizes the key points of the reasoning for the benefit of readers who do not wish to go through the entire text. Moreover, except in some mammoth disputes such as the *Large Civil Aircraft* [the 2011 *Boeing* and 2012 *Airbus*] cases, the length of reports has been significantly reduced. None of the decisions issued in 2017, for example, exceeds 70 pages in length.[211]

Still, there were problems that, as Mr. Bhatia suggests, are insoluble without Membership engagement.

Their engagement is all the more necessary, because though the problems may be grouped into distinct categories (as they are in this and subsequent Chapters) – participation, capacity, resources, textual interpretation, and enforcement – in reality the problems are interconnected. For example, a lack of legal capacity in poor countries reflects a lack of resources, a lack of resources impinges on both the quality and rapidity of interpretations of GATT-WTO texts rendered by Panels and the Appellate Body, and broader, deeper participation can reinforce to participants the need for enforcement. Thus, in studying the individual problems associated with the operation of the *DSU*, consider reforms, not simply piecemeal changes, to WTO civil procedure that can address the challenges in a systemic manner.

II. Transparency and Open Court

Why must the WTO courtroom remain closed, preventing anyone from observe Panel and Appellate Body proceedings? Why must these meetings go on *in camera*? Why must all submissions (*e.g.*, briefs) of disputing Members and third parties be treated as "top secret"? Why is it necessary to rely on regurgitation of arguments in an adjudicatory report to understand which Member argued what claim or defense, and why it did so?

To an Anglo-American trained lawyer, the answers are obvious. There is no "downside" to being more transparent, particularly if it will quell criticism of the WTO. Thus, during his speech in Geneva at the occasion of the 50th anniversary of the GATT system, in 1997, President Bill Clinton (1946-, President, 1993-2001) not only asked these questions, but also called for an open courtroom door, and publication of submissions, and the acceptance of *amicus* briefs. But, the answer is not so obvious to all WTO Members. It is difficult for some Members, particularly ones that are politically autocratic or economically poor, to accept a level of transparency in WTO adjudication that is far greater than what they permit in their own domestic legal systems. What exists in America's

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[211] Address of Mr. Ujal Singh Bhatia, Chair, Appellate Body, 11th Annual Update on WTO Dispute Settlement, Graduate Institute, Geneva, 3 May 2018, www.wto.org/english/news_e/news18_e/ab_07may18_e.htm. [Hereinafter, May 2018 Bhatia Speech.]

Constitution or the *Administrative Procedures Act* often does not exist in other countries. As another example, the *Uruguay Round Agreements Act of 1994* obligates the USTR to solicit views of the public in any WTO case to which the U.S. is a party. But, this mandate – which brings a certain degree of democratic openness to the process, at least in terms of the formation of claims and defenses – is not found in the laws of many Members.

In other words, the objection to greater transparency from developing countries is based on more than just an adherence to the traditional secretive habits of international organizations or a view of the WTO as an inter-governmental entity. It is an objection grounded in jurisprudence, political philosophy, and legal culture. Why permit "cameras in the courtroom" in Geneva or access to Members' submissions, and why invite submissions from "outsiders," if there are no such rights permitted at home?

Moreover, greater transparency poses significant logistical questions that veil very different premises. If submissions are to be published, when – immediately upon filing, or after a case concludes? Private-sector lawyers observing the case might like immediate publication so that they can advise their clients better, but it may require a good deal more resources to provide such swift access. If there is to be access to hearings, what form should that access take? Would the publication of a hearing transcript suffice? Or, is physical presence necessary? What about CNN or COURT-TV coverage?

The opponents of greater transparency might be among its biggest beneficiaries. Developing countries are in desperate need of technical assistance that would enable them to participate more effectively in the adjudicatory system. To be sure, in the first few years of the operation of the *DSU*, a few developing countries won some impressive victories against the U.S. – Venezuela and Brazil in the 1996 *Reformulated Gasoline* case, and India and Costa Rica in cases involving textiles safeguards. But, by "showing up" in the WTO and bringing these cases, developing countries may have made themselves more visible as targets for suits. Frequently, they are respondents. Suppose a developing country could send representatives to observe hearings, study briefs, and file *amicus* briefs in cases in which that country was not involved. Surely that country would learn from this access how to be a better respondent, as well as a better complainant.

What about cameras in the courtroom? While *DSU* proceedings are held in secret, parties may waive secrecy and grant a degree of public access, should they unanimously agree to do so. For roughly the first decade of *DSU* operation, parties did not make use of this relative procedural flexibility, and thus did not address directly a principal criticism of the WTO. But, in September 2005, a shift occurred. In a proceeding concerning the *Beef Hormones* case, the U.S., Canada, and EU all agreed to waive their right to secrecy, and grant the public access to proceedings.

Just how much public access was permitted? The WTO Panel meetings were broadcast on closed circuit television into a viewing room at WTO headquarters in Geneva. Seats were made available to the first 400 members of the public who completed and returned a form made available on the WTO website. Third parties to the dispute did not consent to public viewing of their Panel meetings. Consequently, they were not broadcast.

Did this event prove transformational in public access to *DSU* proceedings?

No, if the expectation is an open courtroom, or for cameras therein. The pattern of making hearings accessible, with the agreement of the complainant and respondent, to those fortunate enough to have the means to be in or travel to Geneva remains the same.

III. Participation, *Amicus* Briefs, and 1998 *Turtle-Shrimp* Case

"Transparency" is about who gets to see what. "Participation" is about who gets to do what. *Amicus curiae* briefs are a device familiar to Anglo-American lawyers to ensure participation in litigation. Such briefs give voice to many beyond the immediate parties to a case.

Why are *amicus* briefs not accepted routinely in WTO adjudication? Why must NGOs and other stakeholders in the multilateral trading system face the prospect of their briefs ignored? As for *amicus* briefs, which NGOs ought to be recognized? There are a large number of entities claiming to represent civil society. In reality, many of them are from western countries, and lobby for western concerns. How, if at all, is the WTO to decide which voices are worth hearing? And, what about *stare decisis*, or some notion of *de facto* precedent? Is it appropriate to speak of an emerging body of common law produced by a system of dubious transparency? The sun shines far more brightly on real precedent setters, the common law courts, than on panels or the Appellate Body.

Can an NGO submit a brief in a WTO adjudicatory proceeding? The *DSU* does not explicitly grant WTO Members the right to submit expert testimony. But, there are no provisions that bar a Member from including this sort of information in written submissions to a panel or the Appellate Body. Moreover, to say NGOs clamor at the WTO gates seeking to be heard is an understatement. Listening sincerely could bolster the legitimacy and credibility of the dispute settlement process. But, listening to everything from everyone would cause the dispute settlement mechanism to collapse in the cacophony – or perhaps more accurately, under the weight of legal briefs submitted.

In its 1998 decision, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, the Appellate Body held panels should treat a brief of an NGO appended to the brief of a Member involved in a dispute as part of its submission. In other words, NGO briefs attached to party submissions are admissible. Of course, to take advantage of this holding, an NGO must obtain the consent of the Member government involved. That will require negotiation between the NGO and government. No government will affix an NGO brief to its submission that in any way undermines its position. In turn, the NGO seeking to be heard may feel its freedom of speech – specifically, its ability to stake out an independent legal position – is compromised.

WTO APPELLATE BODY REPORT, *UNITED STATES – IMPORT PROHIBITION OF CERTAIN SHRIMP AND SHRIMP PRODUCTS*, WT/DS58/AB/R (ADOPTED 6 NOVEMBER 1998)

V. PANEL PROCEEDINGS AND NON-REQUESTED INFORMATION

99. In the course of the proceedings before the Panel, … the Panel received a [joint] brief from the Center for Marine Conservation ("CMC") and the Center for International Environmental Law ("CIEL"). Both are non-governmental organizations. … [T]he Panel received another brief … from the World Wide Fund for Nature [also an NGO]. The Panel acknowledged receipt of the two briefs, which the non-governmental organizations also sent directly to the parties to this dispute. The complaining parties – India, Malaysia, Pakistan and Thailand – requested the Panel not to consider the contents of the briefs in dealing with the dispute. In contrast, the United States urged the Panel to avail itself of any relevant information in the two briefs…. …

100. … [T]he Panel did two things. First, the Panel declared a legal interpretation of certain provisions of the *DSU*: *i.e.*, that accepting non-requested information from non-governmental sources would be "incompatible with the provisions of the *DSU* as currently applied." Evidently as a result of this legal interpretation, the Panel announced that it would not take the briefs submitted by non-governmental organizations into consideration. Second, the Panel nevertheless allowed any party to the dispute to put forward the briefs, or any part thereof, as part of its own submissions to the Panel, giving the other party or parties, in such case, two additional weeks to respond to the additional material. The United States appeals from this legal interpretation of the Panel.

101. … [A]ccess to the dispute settlement process of the WTO is limited to Members of the WTO. This access is not available, under the *WTO Agreement* and the covered agreements as they currently exist, to individuals or international organizations, whether governmental or non-governmental. Only Members may become parties to a dispute of which a panel may be seized, and only Members "having a substantial interest in a matter before a panel" may become third parties in the proceedings before that panel. [*DSU* Articles 4, 6, 9-10.] Thus, under the *DSU*, only Members who are parties to a dispute, or who have notified their interest in becoming third parties in such a dispute to the DSB, have a *legal right* to make submissions to, and have a *legal right* to have those submissions considered by, a panel. [*See DSU* Articles 10, 12, and Appendix 3.] Correlatively, a panel is *obliged* in law to accept and give due consideration only to submissions made by the parties and the third parties in a panel proceeding. These are basic legal propositions; they do not, however, dispose of the issue here presented by the appellant's first claim of error. We believe this interpretative issue is most appropriately addressed by examining what a panel is *authorized* to do under the *DSU*.

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103. In *EC Measures Affecting Meat and Meat Products (Hormones)*, we observed that Article 13 of the *DSU* "enable[s] panels to seek information and advice as they deem appropriate in a particular case." Also, in *Argentina – Measures Affecting Imports of Footwear, Textiles, Apparel and Other Items*, we ruled that:

> Pursuant to Article 13:2 of the *DSU*, a panel may seek information from any relevant source and may consult experts to obtain their opinions on certain aspects of the matter at issue. *This is a grant of discretionary authority: a*

> *panel is not duty-bound to seek information in each and every case or to consult particular experts under this provision*. We recall our statement in *EC Measures Concerning Meat and Meat Products (Hormones)* that Article 13 of the *DSU* enables a panel to seek information and technical advice as it deems appropriate in a particular case, and that the DSU leaves "to the sound discretion of a panel the determination of whether the establishment of an expert review group is necessary or appropriate." *Just as a panel has the discretion to determine how to seek expert advice, so also does a panel have the discretion to determine whether to seek information or expert advice at all.*
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> In this case, we find that the *Panel acted within the bounds of its discretionary authority under Articles 11 and 13 of the DSU in deciding not to seek information from, nor to consult with, the IMF*. (Emphasis added.)

104. The comprehensive nature of the authority of a panel to "seek" information and technical advice from "any individual or body" it may consider appropriate, or from "any relevant source," should be underscored. This authority embraces more than merely the choice and evaluation of the *source* of the information or advice which it may seek. A panel's authority includes the authority to decide *not to seek* such information or advice at all. We consider that a Panel also has the authority to *accept or reject* any information or advice which it may have sought and received, or to *make some other appropriate disposition* thereof. It is particularly within the province and the authority of a panel to determine *the need for information and advice* in a specific case, to ascertain the *acceptability* and *relevancy* of information or advice received, and to decide *what weight to ascribe to that information or advice* or to conclude that no weight at all should be given to what has been received.

105. It is also pertinent to note that Article 12:1 of the *DSU* authorizes Panels to depart from, or to add to, the *Working Procedures* set forth in Appendix 3 of the *DSU*, and in effect to develop their own *Working Procedures*, after consultation with the parties to the dispute. Article 12:2 goes on to direct that "Panel procedures should provide *sufficient flexibility* so as to *ensure high-quality Panel reports* while *not unduly delaying the panel process*." (Emphasis added.)

106. The thrust of Articles 12 and 13, taken together, is that the *DSU* accords to a Panel established by the DSB, and engaged in a dispute settlement proceeding, ample and extensive authority to undertake and to control the process by which it informs itself both of the relevant facts of the dispute and of the legal norms and principles applicable to such facts. That authority, and the breadth thereof, is indispensably necessary to enable a Panel to discharge its duty imposed by Article 11 of the *DSU* to "make an objective assessment of the matter before it, including an *objective assessment of the facts of the case* and the *applicability of and conformity with the relevant covered agreements*…." (Emphasis added.)

107. Against this context of broad authority vested in panels by the *DSU*, and given the

object and purpose of the Panel's mandate as revealed in Article 11, we do not believe that the word "seek" must necessarily be read, as apparently the Panel read it, in too literal a manner. That the Panel's reading of the word "seek" is unnecessarily formal and technical in nature becomes clear should an "individual or body" first ask a Panel for permission to file a statement or a brief. In such an event, a panel may decline to grant the leave requested. If, in the exercise of its sound discretion in a particular case, a panel concludes *inter alia* that it could do so without "unduly delaying the panel process," it could grant permission to file a statement or a brief, subject to such conditions as it deems appropriate. The exercise of the panel's discretion could, of course, and perhaps should, include consultation with the parties to the dispute. In this kind of situation, for all practical and pertinent purposes, the distinction between "requested" and "non-requested" information vanishes.

108. … [A]uthority to *seek* information is not properly equated with a *prohibition* on accepting information which has been submitted without having been requested by a panel. A Panel has the discretionary authority either to accept and consider or to reject information and advice submitted to it, *whether requested by a Panel or not*. The fact that a panel may *motu proprio* [by its own force] have initiated the request for information does not, by itself, bind the panel to accept and consider the information which is actually submitted. The amplitude of the authority vested in panels to shape the processes of fact-finding and legal interpretation makes clear that a panel will *not* be deluged, as it were, with non-requested material, *unless that panel allows itself to be so deluged*.

109. Moreover, acceptance and rejection of the information and advice of the kind here submitted to the Panel need not exhaust the universe of possible appropriate dispositions thereof. In the present case, the Panel did not reject the information outright. The Panel suggested instead, that, if any of the parties wanted "to put forward these documents, or parts of them, as part of their own submissions to the Panel, they were free to do so." In response, the United States then designated Section III of the document submitted by CIEL/CMC as an annex to its second submission to the Panel, and the Panel gave the appellees two weeks to respond. We believe that this practical disposition of the matter by the Panel in this dispute may be detached, as it were, from the legal interpretation adopted by the Panel of the word "seek" in Article 13:1 of the *DSU*. When so viewed, we conclude that the actual disposition of these briefs by the Panel does not constitute either legal error or abuse of its discretionary authority in respect of this matter. The Panel was, accordingly, entitled to treat and take into consideration the section of the brief that the United States appended to its second submission to the Panel, just like any other part of the United States pleading.

110. We find, and so hold, that the Panel erred in its legal interpretation that accepting non-requested information from non-governmental sources is incompatible with the provisions of the *DSU*. At the same time, … the Panel acted within the scope of its authority under Articles 12 and 13 of the *DSU* in allowing any party to the dispute to attach the briefs by non-governmental organizations, or any portion thereof, to its own submissions.

IV. Private Counsel

Can a private legal advisor to a WTO Member participate in a WTO Panel or Appellate Body hearing? The *DSU* is silent on this question, and no pre-Uruguay Round GATT panel had addressed it. As on the other issues, on this matter procedural common law from the Appellate Body was needed. However, this issue – more than the others – went to the heart of participation in the *DSU*. Many developing country Members are too poor to maintain a standing army of trade lawyers ready to do battle at the WTO. Resource constraints compel them to hire from the private sectors lawyers as consultants for specific cases as the need arises. These lawyers clearly are not government officials, thus their presence alters the inter-governmental character of the WTO.

The USTR opined private attorneys should not be able to attend panel hearings, much less present arguments to a panel. The USTR fretted over confidentiality and conflicts of interest, saying the presence of outside counsel somehow might lead to problems involving keeping matters confidential or dealing with representation of multiple governments. However, it never quite explained why private lawyers were less able to keep secrets or adhere to the attorney-client privilege rule, or why they were less able to resolve ethical issues, than government counsel. The USTR's other argument, that if it became common practice to hire private counsel, then developing countries would be priced out of the dispute settlement business because they could not afford the legal fees, seemed paternalistic. The USTR also neglected the fact many private attorneys (not to mention law professors) might enjoy taking LDC cases on a *pro bono* basis.

In its 1997 *EC Bananas* Report, the Appellate Body held a private legal adviser to the government of St. Lucia – which was a third party in the case – is allowed to participate in an oral hearing of the Appellate Body. (The panel ruled St. Lucia's two private sector attorneys could not be allowed in the hearing room to present St. Lucia's views. The Panel wanted to follow pre-Uruguay Round GATT practice, which forbade private attorneys from participation if there were any objections, and in the case the U.S. objected. Also, the Panel feared St. Lucia somehow might gain an unfair advantage if its private counsel were recognized.) The Appellate Body reasoned nothing in the WTO *Agreement* or *DSU* specified who can represent a Member in making presentations at an oral hearing. In so doing, the Appellate Body took a pragmatic approach that was consistent with normal practice in public international law, namely, that each country can decide for itself the composition of its delegation. Thus, a Member is free to employ private sector attorneys to represent it. Moreover, said the Appellate Body, if developing countries are to participate fully and effectively, then they might need private counsel. (The fact the other 3rd parties in the case backing St. Lucia's argument were all less developed countries illustrated the point: Belize, Cameroon, Cote d'Ivoire, Dominica, Dominican Republic, Ghana, Grenada, Jamaica, St. Vincent and the Grenadines, Senegal, and Surinam.) Finally, the Appellate Body highlighted the systemic interest in the best possible counsel representing Members in *DSU* proceedings.

What about oral hearings of WTO Panels? The question of private counsel representing Members at the panel stage was not raised in *Bananas*. However, in the *Indonesia Automobile Industry* case, the panel rejected an attempt by the U.S. to exclude two private lawyers representing Indonesia from the first substantive meeting of the panel

with the parties. The *Indonesia* panel essentially followed the decision and logic of the Appellate Body in *Bananas*.

The strongest argument against allowing private counsel to represent Members probably is they might tend to view a case as a "one shot deal." A government presumably considers its long-term interests when it shapes its legal arguments in a case at bar. It might avoid taking an extreme position in that case for fear the arguments it deploys today will come back to haunt it in a future case. Private counsel, it could be argued, are less inclined to consider the long-term ramifications of positions they argue because they think in a client-by-client, not sustainable policy, terms. However, the problem with this argument is it assumes WTO Members would not monitor – indeed, approve – the positions taken by their private counsel. The lawyer is not the client, rather the Member is, and thus the Member is supposed to approve legal strategy. As a practical matter, it is not uncommon for the real underlying party in interest in a case – for example, an MNC – to fund the cost of private outside counsel. Often a WTO Member will work with outside counsel paid for by interested private parties.

V. Legal Capacity in Some Poor Countries

Developing countries and LDCs account for roughly 80% of the WTO Membership. Yet, most of them are dreadfully ill-prepared for the rigors of WTO adjudication.[212] Precious few officials on the staff of the Secretariat are devoted to providing technical legal assistance to poor countries. To be sure, legal capacity is growing in poor countries, particularly in major emerging ones such as Brazil and India, but at an uneven pace across them.

In June 2012, to mark the 30th anniversary of the GATT-WTO Legal Affairs Division, WTO Director General Pascal Lamy boasted of "very broad confidence" among WTO Members in the dispute settlement system.[213] He pointed out that since the WTO dispute settlement system commenced operation on 1 January 1995, 98 of the 155 Members, representing 63% of the Membership, had participated in a *DSU* case. Yet, that statistic failed to differentiate between participation as a third party versus as a complainant or respondent. Manifestly, participation as a third party, while significant, and while potentially useful a way to build legal capacity, is of a lower order than as a complainant or respondent.

Overall, between January 1995 and June 2011, developing countries were just as

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[212] For a study of India's engagement with the WTO, based on over 150 interviews with officials in India and Geneva, discussing the transformation in the global context of the Indian bar "toward a new developmental state model involving a stronger emphasis on trade, greater government transparency, and ... public-private coordination mechanisms in which the government plays a steering role," with the concomitant building of "legal capacity to ... shape the construction, interpretation, and practice of the trade legal order," pointing out that "Indian private lawyers play increasing roles, although they remain on tap, not on top," see Gregory Shaffer, James J. Nedumpara & Aseema Sinha, *State Transformation and the Role of Lawyers: The WTO, India, and Transnational Legal Ordering*, 49 LAW & SOCIETY REVIEW number 3, 595-629 (2015).

[213] World Trade Organization, *Lamy Cites "Very Broad Confidence" in WTO Dispute Settlement*, 28 June 2012, www.wto.org.

active in *DSU* matters as developed ones. Six of the most frequent complainants – Argentina, Brazil, India, Korea, Mexico, and Thailand – were developing countries. (This statistic is inflated by one, as Korea hardly qualifies as a "developing" country anymore.) That was not always so. In the vast majority of cases from 1995-2000, developed countries were the complainants. Few *DSU* cases were initiated by developing countries. But, since 2005, developing countries have launched the majority of *DSU* cases. By 2010, they were the complainant in the majority of cases. The same trend reversal is true with respect to respondents. Developed countries accounted for the majority of respondents between 1995 and 2009, but developing countries took that position after 2009. Notably, in recent years, developing countries have challenged trade barriers in other developing countries.

Nonetheless, the *DSU* playing field is not yet level, and sway in WTO governance does not reflect the true nature of the Membership. For example, data on participation in *DSU* cases do not evince any meaningful engagement by LDCs. To the contrary, they suggest a bunching of expertise among a few major developing countries, along with developed ones. How might the asymmetry be rectified?

One possibility would be to increase significantly the Secretariat's resources for technical legal assistance. Any developing country could go to the Secretariat's dedicated division for legal help, whether that country is in the capacity of a complainant, respondent, third party, or observer. In some ways, the Secretariat staff would function like a Legal Aid Bureau. However, the ultimate goal would be to train less developed Members to help themselves, so in the longer term they would not need legal assistance. Note that both China and Saudi Arabia gained expertise in WTO adjudication by participating as a third party in a variety of cases.

Were the Secretariat to take on this sort of function in a serious way, it would face an enormous challenge. Could it render zealous advocacy on behalf of less developed Members, but at the same time avoid undermining the reputation of the Secretariat as a neutral, unbiased party? Woe unto the WTO if the Secretariat's reputation deteriorates to that of the U.N. Secretariat. Relative to the U.N. (and, perhaps, other international organizations), at any rate, the WTO has been blissfully free of politicization, and hiring decisions tend to be based largely on merit. If that perception changes, then the WTO may face a credibility crisis, which could translate into a funding crisis as legislatures around the world – particularly Congress – will question their contributions.

To avoid unsettling the fragile equilibrium the WTO has struck, might it be better to create an inter-governmental legal aid society for less developed Members? That organization could be funded by developed country Members, directly or through their contributions to the WTO, and provide needed technical assistance for specific cases, plus training programs to create a cadre of knowledgeable trade lawyers in the trade ministries of developing countries. Perhaps a new inter-governmental organization is not needed. Could an NGO, or even the World Bank, provide the facility on a "sub-contract" basis? Perhaps the legal academy might have a role in long-term human capital development. The WTO could provide scholarships for lawyers to earn J.D. degrees in accredited U.S. law schools. Whatever the mechanics, there is one hurdle to overcome: why should developed

Members fund a program that helps developing Members sue, or respond to suits brought by, developing countries?

Significantly, in 1964, in conjunction with the addition of Part IV to GATT on Trade and Development, the Trade Advisory Center was created. The mission of the Center is to help expand legal capacity in developing countries. Additionally, in 2001, the Advisory Center on WTO Law (ACWL) was founded and funded by several developed countries to help developing and least developed countries bring and defend *DSU* cases.[214] The ACWL assists them for free, functioning essentially as a legal aid clinic to poor countries. For support in *DSU* cases, it charges a fee that covers only 8% of its costs, hence the need for sponsorship from rich countries. The ACWL also helps poor countries on matters pertaining to WTO negotiations and decision-making, and to understand the complexities of multilateral trade agreements.

Institutional mechanisms like the ACWL are not the darling of all WTO Members, and not all Members contribute financially to it. Some Members, such as the U.S., are loath to finance an entity that helps other Members, even poor ones, bring cases against them. In any event, consider the importance of inclusion at the highest level of the WTO "judicial branch" – membership on the WTO. One way to build capacity in a poor country is for officials from that country to gain on-the-job experience as adjudicators, and transfer their knowledge and insights to budding trade lawyers in developing and least developed countries.

Table 6-1 lists by country the total number of years that Appellate Body members have served since 1995, when the Appellate Body was created, through 2018.[215] The maximum possible figure is 24 years, which only the U.S. achieved. That is, there was an American on the Appellate Body for every year of its existence. What inferences may be drawn from this Table?

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[214] For a 20-year retrospective assessment of the impact of the ACWL, see Leah Buencamino & Niall Meagher, *The Advisory Center on WTO Law (ACWL): 20 Years of Assistance to Developing and Least-Developed Countries*, 29 INTERNATIONAL TRADE LAW AND REGULATION issue 4, 167-180 (2023).

[215] The data are drawn from the WTO and reformulated from a Chart in Kim Darrah, *EU and Canada Agree on Interim Alternative to WTO Appeal Court*, FINANCIAL TIMES, 25 July 2019, www.ft.com/content/8714fb22-ae1b-11e9-8030-530adfa879c2.

Table 6-1
Years of Service on Appellate Body, by Country

Country	***Total Number of Years Served by Judge from that Country***
U.S.	24
India	16
Japan	15
Egypt	12
China	11
Philippines	10
Belgium	8
Italy	8
Mexico	8
Brazil	7
South Africa	7
Germany	6
Uruguay	6
Korea	5
Australia	4
Mauritius	4
New Zealand	4

Chapter 7

RESOURCE PROBLEMS[216]

I. Consultation Phase

Only a view of WTO adjudication through rose-colored lenses would lead to the conclusion the *DSU*, in its practical implementation, has been free from serious problems. To be sure, the system handles a large volume of cases, and in general produces results consistent in terms of jurisprudence and expectations. For the most part, losing Members comply with recommendations within the usual 15-month implementation period.

Perhaps the most significant effect of WTO adjudication is Panels and the Appellate Body have the same impact as a police officer on the street: deterrence. In the end, it is not so much which cases are won or lost that matters, but rather Members formulate and modify their trade measures in accordance with GATT-WTO obligations because they know the operation of the *DSU* is a "cop" watching over their behavior.

Still, several difficulties – in addition to interstitial law-making on procedural issues and the problem of compliance – are apparent. These problems have yet to be resolved. Arguably, they are sufficiently serious as to threaten the very operation of the *DSU*, and thereby its ability to deter wrongful conduct.

First, consider the consultation phase. Consultations must be requested, and the disputing WTO Members must meet at least once, before a Panel can be convened. Only if a result is not achieved within the prescribed time period does the case move forward to the Panel phase. During the first five years of operation, there were on average about 40 consultations per year. About half of these cases did not go beyond the consultation phase for one of two reasons: they were settled, or the complainants abandoned their claims.

The existence of a consultation phase highlights the fact the WTO is not just a court. That initial phase is important and, indeed, is inherited from the pre-Uruguay Round era. It is the phase in which diplomacy – that curious mixture of negotiations and politics – plays a pre-eminent role with the hope of a mutually agreeable solution. As the Appellate Body stated in its 2001 *Mexico HFCS Compliance Report*:[217]

> We agree ... on the importance of consultations. Through consultations, parties exchange information, assess the strengths and weaknesses of their respective cases, narrow the scope of the differences between them and, in

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[216] Documents References:
(1) *Havana Charter* Articles 41, 47-48, 66, 92-97
(2) GATT Articles XXII-XXIII
(3) WTO *DSU*

[217] *See Mexico – Anti-Dumping Investigation of High Fructose Corn Syrup (HFCS) from the United States – Recourse to Article 21:5 of the DSU by the United States* WT/DS132/AB/RW, ¶ 58 (adopted 21 November 2001).

> many cases, reach a mutually agreed solution in accordance with the explicit preference expressed in Article 3:7 of the *DSU*. Moreover, even where no such agreed solution is reached, consultations provide the parties an opportunity to define and delimit the scope of the dispute between them. Clearly, consultations afford many benefits to complaining and responding parties, as well as to third parties and to the dispute settlement system as a whole.

(The Appellate Body quoted this language in a major agricultural case, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R, ¶ 284 (adopted 21 March 2005)). However, in some cases the disputing Members treat the consultation phase as a mere formality, entering the phase with a view it is a useless exercise.

Should, therefore, a more legalistic, pre-trial discovery process replace consultations? The Appellate Body thinks not. In its *Cotton* Report (¶ 287), it appeared content with the *status quo* in which consultations are off limits to WTO adjudication:

> [W]e are inclined to agree with the Panel in *Korea – Alcoholic Beverages*, which stated that "[t]he only requirement under the *DSU* is that consultations were in fact held … [w]hat takes place in those consultations is not the concern of a Panel." [Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R, WT/DS84/R, ¶ 10.19 (adopted as modified by the Appellate Body 17 February 1999).] Examining what took place in the consultations would seem contrary to Article 4:6 of the *DSU*, which provides that "[c]onsultations shall be confidential, and without prejudice to the rights of any Member in any further proceedings." Moreover, it would seem at odds with the requirements in Article 4:4 of the *DSU* that the request for consultations be made in writing and that it be notified to the DSB. In addition, there is no public record of what actually transpires during consultations and parties will often disagree about what, precisely, was discussed.

What factors counsel against replacing GATT-style consultations with American-style pre-trial discovery? Might it be the virtues of discovery would be offset by its vices, and not routinely encourage parties toward settlement, but rather harden both their position and demeanor, and push them to litigation?

Good faith is a critical problem plaguing the consultation phase. As indicated, the consultation phase is an inheritance from the GATT era, with the idea that the best solution is one that is mutually acceptable and achieved diplomatically – in effect, it is better to agree than to sue. Under the *DSU*, consultations are compulsory. Yet, overall, only about 25% of cases are solved through them. Most consultations fail because the complainant and respondent must notify the DSB of their case. That notification generates publicity, and triggers mandatory, formal *DSU* procedures. Not infrequently, publicity is adverse to a settlement. Parties prefer secret talks.

Hence, in the WTO, they have taken to circumventing the *DSU* by entering into consultations before lodging a *DSU* notice. That behavior has spawned a pre-filing consultation system. Indeed, some Members view formal consultations as a waste of time. Once they give the requisite notification, they wait the prescribed eight-week period, and then begin litigation. Essentially, the complainant and respondent have a gentleman's agreement they will meet for consultations once, as the *DSU* requires, and then let the two-month period tick away, all the while preparing for adversarial proceedings. That conduct seems to violate the good faith obligation in the *DSU*.

Two proposals have been floated in the context of *DSU* reform discussions to change the formal consultation phase.

(1) Why not force consultations between parties and create a written record of the talks for a *DSU* Panel to use, should it be necessary? A Panel would have the right to send a case back to the complainant and respondent for consultations, if it decides they have not bargained in good faith. The problem with this proposal is it undermines the presumption that consultations occur without prejudice to the positions of the parties. Consultations are not supposed to be civil discovery.

(2) Why not use consultations to find a common factual predicate for a Panel, should a case go that far? At least the complainant and respondent will have made some progress through consultations, namely, they can stipulate to the facts. This proposal suffers from the same defect as the first one – consultations are not discovery.

Given the common shortcoming, a third proposal might be to shorten the time frame for consultations to just one month. Though it would not solve the underlying difficulty, at least it would reduce time wasted.

A final important question about the consultation phase intersects with the problem of the right to counsel of choice. As discussed earlier, the *EC – Bananas* and *Indonesia – Automobile Industry* cases clarified the right to counsel, finding if a WTO Member wants to "deputize" certain private sector attorneys, it can. But, what about the use of private sector attorneys in the consultation phase? The evolving practice is if a Member insists strongly enough (as have, for example, Brazil and India), then those lawyers will be allowed in the negotiating room. However, they do not yet seem to be given the privilege of speaking in the consultation sessions.

II. Panel Selection and Composition

Panels are an inheritance from GATT Articles XXII-XXIII, provisions which, in turn, came from the *Havana* (*ITO*) *Charter*. These provisions linked GATT dispute settlement to the ICJ. Through GATT history, Panels evolved from two earlier conceptual states. Initially, Working Groups consisting of the disputing contracting parties and neutral contracting parties met around a negotiating table to resolve a contested matter.

Subsequently, Working Groups split the complainant and respondent, putting them across opposite sides of a table, thus symbolically indicating an adversarial aspect to the otherwise diplomatic procedure. Today, as in pre-*DSU* practice, Panel can consist of three or five members, though in practice Panels have always been the smaller of these figures.

Ideally, disputing Members are supposed to agree on Panelists to hear their case. Often, they do not. That is, the complainant, respondent, and WTO Secretariat – specifically, the Legal Affairs Division therein – do not always agree on the Panelists. The result is the Director General must pick Panelists. It may be dreadfully unhealthy for the WTO adjudicatory system to have the Director General involved personally in a large number of cases. Panelists – like arbitrators – are supposed to be selected by the parties, not by the Director General, except in unusual circumstances. Of course, that conclusion depends on one's view of the system and the role of the Director General.

Perhaps even more troubling than disagreements on Panelists is their dependence on the Secretariat, especially the Legal Affairs Division. Panelists are not nearly so independent as they may appear. In many, if not most, cases, the Legal Affairs Division writes the Report – not the Panelists. That Division provides legal assistance and research for the Panel. Is there, then, a need for greater "professionalization" of Panels?

Usually, Panelists are government officials, and occasionally, they are academics. Invariably, being a Panelist is not a full-time job. Rather, it is a secondary pursuit to which no Panelist possibly can devote full attention. Yet, cases are becoming increasingly complex, involving multiple GATT provisions and Uruguay Round agreements, demanding more of each Panelist – as evidenced by the extraordinary length of most panel Reports. Would the adjudicatory mechanism be better served by a standing Panel (or Panels), akin to the fixed Appellate Body?

The EU (among others) thinks so. It proposed creation of a standing, or permanent, roster of Panelists. This registry would consist of 15-20 persons, would be maintained by an independent entity, and three persons would be allocated to a Panel. The Director General would not be involved in selecting Panelists on a case-by-case basis. There would be an elite cadre of international trade professionals who are full-time Panelists. The idea is tempting, but then who would pick the permanent Panelists? How would they be selected? Exactly what criteria would be used?

Undoubtedly, a standing Panel would have to be equipped to handle the massive caseload that faces – and sometimes buries – current *ad hoc* Panels. The ICJ was called upon to adjudicate less than 100 cases in its first 50 years of operation. (The CIT, which has nine judges, issues as many as 200-250 decisions a year.) Within the first few years of the operation of the *DSU*, the case volume surpassed the 100 mark. The volume had increased significantly over the pre-Uruguay Round era.

III. Case Overload

In the post-Uruguay Round era, by 2015, *i.e.*, during the first 20 years of the life of

the WTO, over 480 cases had been filed under the *DSU*, and in November 2015 the 500th dispute was lodged. Between 1995-2011, the cases covered about $1 trillion in trade flows.[218] The U.S. was especially active, as complainant in over 100 cases, respondent in 120, and a third-party participant in over 115. As the preeminent world power, that was not a surprise. As other countries gained familiarity with the *DSU* and enhanced their capacity to engage in it, the aggregate numbers rose, as did their breadth and depth of involvement.

So, as the Appellate Body Chairman, India's Ujal Singh Bhatia, pointed out in June 2018:

> Since its [the Appellate Body's] inception, 551 disputes have been initiated by WTO Members, resulting in 230 circulated Panel Reports and 136 circulated AB Reports. More than 65% of WTO Members have engaged in dispute settlement as complainant, respondent, or third party.
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> The high rate of compliance with DSB decisions testifies to the system's success. Aside from the sheer number of disputes that Members have submitted to dispute settlement – which is a sign of empirical legitimacy – it is worth mentioning the almost total absence of instances where Members have chosen not to implement a ruling upon losing it. ...
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> The workload of the AB over the years calls into question the basic premise of its establishment. Being an Appellate Body Member is no longer a part-time job. It requires full-time commitment to the WTO. Given the number, size, and complexity of appeals, coupled with the resources provided to it, the AB cannot be realistically expected to deliver high-quality Reports within the timeframes prescribed in the *DSU*. Long delays in filling vacancies in the AB obviously do not help either.
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> ...
>
> WTO Members are entitled to initiate as many disputes as they wish. They are also entitled to make as many claims and to submit as many pages, arguments, and exhibits as they deem necessary. WTO Members expect – as they should – a modern, efficient, and effective dispute settlement system. But such expectations can be realised only if the resources allocated to it, and the procedures governing WTO dispute settlement, are aligned to the workload that WTO Members bring to the system. ...
>
> Overall, the growing incongruence between the disputes being referred to the WTO dispute settlement system, the resources allocated to it, and the rules and procedures governing it are together leading to very significant delays. The increase in compliance disputes over the past years is further adding to the problem. For example, the number of compliance Panels circulated over the last five years [2013-2017] has doubled compared to the previous five-year period.

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[218] *See* Christina L. Lyons, *Outlook 2015 – WTO Dispute Resolutions Lay Path for Members' Trade Rules, Behavior*, 32 International Trade Reporter (BNA) 140 (15 January 2015). [Hereinafter, *Outlook 2015*.]

> It is also no longer uncommon to see several years pass before a dispute is settled. This situation should ring alarm bells in a system that prides itself on its efficiency and business-like conduct, particularly in light of the prospective nature of WTO remedies. To the extent that delays in dispute resolution involve delays in the assertion of the rule of law, they provide an incentive to those who benefit from those delays.[219]

And yet, as the Chair indicated, this crown jewel of the WTO is at risk of being a victim of its own success.

Resources for dispute resolution remain woefully inadequate for this volume, and to deal with the many tasks that must be performed aside from adjudication *per se*. Translation is a prime example. Each page of each Panel and Appellate Body Report (and Annexes thereto) must be translated into the official WTO languages, English, French, and Spanish, at a cost of $400 per page. Not surprisingly, as part of the informal, *ad hoc DSU* reforms agreed upon by WTO Members in 2010-2012, the WTO Members authorized Panels to cease attaching as an Annex to their Reports a translated transcript of every meeting with every expert. Posting them on the WTO website would suffice.

Perhaps the WTO mechanism as presently constituted and funded can handle 20-25 cases annually from start to finish. Asked to do deal with a considerably larger number, the system may not be able to meet its own deadlines. Some cases take up to three years for resolution, and in a few, such as the 2011 *Airbus* and 2012 *Boeing* cases, 5½ years, respectively, passed before the Appellate Body issued its Reports. By then, the harm of the disputed subsidies had long-continued, and the monstrous complexity of the Reports and inevitable compliance disputes assured it would go on yet longer.

Data from an August 2012 external auditor Report bear out these concerns. The *DSU* calls for a Panel to issue a ruling within six-to-nine months of filing a case, for an appeal not to exceed 12 months (and normally concluded within 60-90 days of filing an appeal) and for the full length of adjudication (and translation), if there is an appeal, to be on average 18 months. Between 1995 and 2006, Panel proceedings averaged 12 months. After 2006, the cases took even longer: 14 months for the period 1995-2011. As for appeals, in 1995-2006, they averaged 86 days, barely within the 90-day cap, and in 1995-2011, they exceeded the cap, averaging 95 days. (In October 2018, Dennis Shea, the Deputy USTR and U.S. Ambassador to the WTO, pointed out the Appellate Body had not met the 90-day deadline since 2014, and characterized its compliance with that deadline before 2014 as "spotty."[220]) The appeal figures would have been considerably worse had the Appellate Body not implored certain WTO Members to postpone initiation of an appeal by several weeks, telling them its docket was overloaded.

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[219] World Trade Organization, "Unprecedented Challenges" Confront Appellate Body, Chair Warns, Speech, 22 June 2018, www.wto.org/english/news_e/news18_e/ab_22jun18_e.htm. [Hereinafter, June 2018 Bhatia Speech.]

[220] *Quoted in* Len Bracken, *Proposals to Shake Up WTO Advancing, U.S. Official Says*, 35 International Trade Reporter (BNA) 1340 (18 October 2018).

Why the delays? First, it takes too long to appoint a Panel. Rustling up three people took 62 days in 2006, and 74 days in 2011. This problem could be resolved by (*inter alia*) use of the good offices of the WTO Director General to appoint Panelists (who must do so under the *DSU* within 10 days), and by higher pay for Panel service (which would require the necessary budget). Second, Panels fell into the practice of asking permission of the complainant and respondent before consulting outside experts for advice. Their permission takes time, but not mandated by the *DSU*. Third, Panels hold two hearings with the parties, when one could suffice. Fourth, translation into the WTO languages (English, French, and Spanish) wastes time. Most Members, Panelists, and the Appellate Body operate in English, the international business language. Time could be saved by translating only a final Panel or Appellate Body ruling, rather than waiting for it plus annexes (which often are lengthy) to be translated, too.

There is a fifth problem, which also exacerbates the first four problems: complexity.[221] Between 1996 and early 1998, there were about eight issues per Appellate Body case. Between 2011 and year-end 2012, that number had risen to 13 issues, *i.e.*, cases have become 160% more complex than they used to be. Concomitantly, the average number of total pages of submissions (in effect, briefs) submitted to the Appellate Body per case doubled to 450. To add to the burden, the Appellate Body is asked with increasing frequency to consider whether the underlying Panel made an objective assessment of the facts under *DSU* Article 11. In the early years of *DSU* operation, only about 40% of appeals argued the Panel violated the *DSU*. By 2013, that was an issue in 90% of appeals, thus compelling the Appellate to scrutinize whether and how the Panel checked the facts. And, third party participants have trebled in number, to an average of eight per appeal.

Complexity means (*inter alia*) a larger volume of more difficult text must be translated. Complexity also relates to transparency: complexity is a cause of delay, and any delay should be reported to, and agreed with, the Parties. That did not happen in the 2015 *Argentina Import Restrictions* case (discussed in a separate Chapter).[222] The Appellate Body could not meet its 90-day time limit to circulate a Report as mandated by *DSU* Article 17:5. But, it failed to let the parties know of the delay.

When delays occur at the Panel stage, and Panels are overloaded with work, those problems cascade to the Appellate Body. Presenting in March 2014 the 2013 *Annual Report* of the Appellate Body, Chairman Ricardo Ramirez-Hernandez stated in opening remarks that the "overall trend since 1995 has been a significant increase in the work of the Appellate Body." As the Appellate Body reported to WTO Members in May 2013, that increase was because of (1) "significant growth" in the average size of disputes appealed, (2) a considerable increase in the number of issues raised on appeal (such as claims a Panel filed to make an objective factual assessment), (3) a jump in the number of parties (including third parties) involved in appeals, and (4) a "significant increase" in the volume

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221 *See Outlook 2015*; Daniel Pruzin, *WTO Appellate Body Warns Of Severe Workload Crunch*, 30 International Trade Reporter (BNA) 829 (6 June 2013) [hereinafter, *WTO Appellate Body Warns*].

222 *See* Bryce Baschuk, *WTO Members Frustrated with "Systemic" Delays of Dispute Settlement Body Reports*, 32 International Trade Reporter (BNA) 227 (29 January 2015).

of submissions to the Appellate Body and, in turn, the size of its Reports. The resources of the Appellate Body to cope with these trends are limited: one Director, 10 lawyers, and four support staff (as of April 2014).

Matters worsened by 2017, when the Appellate Body was called on to adjudicate roughly 20 appeals, yet was diminished in numbers. Hyun Chong Kim resigned effective 1 August, because Korea's President appointed him to lead the Korean team in *KORUS* renegotiations demanded by President Donald J. Trump (1946-, President, 2017-). WTO Members fought over replacements for two other Appellate Body judges, whose terms expired in 2017 – Ricardo Ramírez-Hernández (30 June) and Peter Van den Bossche (11 December). Thus, in June 2017, Chairman Bhatia rightly warned:

> When delays in WTO dispute resolution become the norm, *they cast doubt on the value of the WTO's rules-oriented system itself*. An erosion of trust in this system *can lead to the re-emergence of power orientation in international trade policy*. Delays compel WTO Members to look for other solutions, potentially elsewhere. And in this, it is the *weaker countries that stand to lose the most*.[223]

And, again in May 2018, with three Appellate Body seats still vacant, he spoke of the "consequences of the ongoing stalemate" over selecting their replacements:

> First, the fact that the Appellate Body is now operating at half-capacity, *i.e.*, with only four active Members, is seriously undermining the collegiality of our deliberations, reflected in Rule 4 of the Working Procedures for Appellate Review. Second, the lack of a proper geographical representation threatens to dilute the legitimacy of the Appellate Body. Finally, the decrease in serving Members is likely to cause further delays in appellate proceedings. Unless WTO Members take swift and robust action to remedy this situation, there may soon come a time when Divisions of three Appellate Body members can no longer be formed, thereby effectively paralyzing appellate proceedings.
>
> Such a paralysis would not concern only the Appellate Body, but [also] would have profound implications on *Panel* proceedings as well. Indeed, the Appellate Body and Panels are part of one dispute settlement mechanism, and one cannot properly function without the other. Imagine, for instance, a scenario where a Panel Report is appealed, but no Appellate Division can be formed to hear that appeal. Under current *DSU* rules, the adoption of the Panel Report has to be suspended pending the appeal, but the Appellate Body itself would not be in a position to complete its proceedings. Such a scenario would entail the *de facto* demise

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[223] *The Problems of Plenty: Challenging Times for the WTO's Dispute Settlement System*, Address by Ujal Singh Bhatia Chairman of the Appellate Body, Release of the Appellate Body Annual Report 2016 (8 June 2017), at 5, www.wto.org/english/news_e/news17_e/ab_08jun17_e.pdf. (Emphasis added.) [Hereinafter, June 2017 Bhatia Speech.]

> of the negative consensus rule that has characterized the WTO dispute settlement system since 1995. While the negative consensus rule would remain on the *DSU* books, any losing party could prevent the adoption of the Panel Report by appealing it to a paralyzed Appellate Body. The consequences of such a scenario working out are obvious. Circumventing the disciplines of the *DSU* would not automatically time-warp us back to the GATT era: the more likely result is the spread of the paralysis to the Panel process.[224]

But, is the Appellate Body partly to blame? Judges are supposed to be able to control their courtrooms and dockets. That is as true in India (whereas of March 2014 the estimated backlog of cases was 30 million across all courts) as the U.S. Could the Appellate Body improve its case management system, perhaps by (*inter alia*) writing curt, crisp opinions?

IV. Appellate Body Remand Authority

Technical *DSU* reform issues in the appellate phase not only concern sequencing, but also remand authority – or, rather, the lack thereof. The Appellate Body is a distinguishing feature of the *DSU*, in part because it adds a legal veneer over what otherwise might be (and in some cases is) a diplomatic compromise. The Appellate Body is supposed to ensure the soundness of Panel holdings and rationale. So, giving the Appellate Body remand authority would increase its options from either upholding or rejecting Panel conclusions and reasoning. The Appellate Body could send a dispute back to the underlying Panel, in the hopes of a stronger and more cogent result.

The most likely reason for the Appellate Body to do so would be it lacks sufficient facts from the Panel Report, or the undisputed facts in that Report are insufficient. To be sure, under *DSU* Article 17:6, appeals are of "issues of law covered in the Panel Report and legal interpretations developed by the Panel." But, the job of the Panel under Article 11 is to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements." With a dearth of facts, the Appellate Body is hard pressed to know whether the Panel discharged its responsibility. That is all the truer in technically complex cases, such as trade remedy disputes.

There also is in *DSU* reform discussions a concern about the role of the Appellate Body. In practice, the Appellate Body increasingly has a view of itself as an international court, and as a contributor to the development of WTO law. That is not out of arrogance, but necessity. When the WTO Ministerial Conference and General Council fail in their legislative functions update multilateral trade law, then what organ is left? As Judge Unterhalter stated:

> The Appellate Body was said to be too powerful, it was making decisions beyond its proper remit. I don't think this is so. But, these voices reflect the inability to move forward the treaty commitments of the [WTO]

[224] May 2018 Bhatia Speech. (Emphasis original.)

> Membership, important among them being the competence to change the interpretations of the Appellate Body.[225]

So, to some degree, the Appellate Body shapes judicial policy, and engages in interstitial law-making, given the void of decision-making at the WTO.

Moreover, like it or not, the Appellate Body is part of an integrated, albeit not perfectly harmonious, international adjudicatory system in which its charge is to ensure the consistency of WTO Law with Public International Law. Symbolically indicative of the growing independence of the Appellate Body is the fact it has a building in Geneva (near WIPO) entirely separate from the WTO Secretariat. In the first several years of the life of the WTO, the Appellate Division was a separate, secure location within the Secretariat.

[225] *Quoted in* Daniel Pruzin, *Former WTO Judge Says Failure to Advance Trade Agenda Threatens to Fragment System*, 31 International Trade Reporter (BNA) 264 (6 February 2014).

Chapter 8

INTERPRETATION PROBLEMS[226]

I. Textual Interpretation and Judicial Activism

● Agency Theory

In domestic judicial systems, potential candidates for judgeships are screened, overtly or not, in part on the extent to which their views on legal controversies accord with the nominating authority. "What does the candidate think about so and so, and how might she rule on such and such?" are questions asked of most judicial nominees. So, it would be naïve to think WTO Members nominate or support Appellate Body candidates looking only at the quality of the legal minds of prospective nominees.

Conceptually, some WTO Members regard themselves as "Principals," and Appellate Body candidates as their prospective "Agents." The Principals care about ideology over expertise, and pliability over independence. Thus, the Principals do not regard those candidates as "Trustees" for the GATT-WTO system, nor do they regard themselves as common beneficiaries in the system subject to an impartial rule of law. Empirical testing of Principal-Agent hypotheses suggests Members exercise their power to nominate and appoint judges in a way that influences the preferences of judges. One study, surveying the record of all Appellate Body Members "present[s] a view of an Appellate Body appointment process that, far from representing a pure search for expertise, is deeply politicized and offers member-state principals opportunities to influence Appellate Body members *ex ante* and possibly *ex post*."[227] The same study also shows "the Appellate Body nomination process has become progressively more politicized over time as member states, responding to earlier and controversial Appellate Body decisions, became far more concerned about judicial activism and more interested in the substantive opinions of Appellate Body candidates, systematically championing candidates whose views on key issues most closely approached their own...."[228]

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[226] Documents References:
(1) *Havana Charter* Articles 41, 47-48, 66, 92-97
(2) GATT Articles XXII-XXIII
(3) WTO *DSU*

[227] Manfred Elsig & Mark A. Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, 20 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS issue 2, 391-415 (June 2014). [Hereinafter, *Agents, Trustees, and International Courts*.] *See also* Karen J. Alter, *Agents or Trustees? International Courts in their Political Context*, 14 EUROPEAN JOURNAL OF INTERNATIONAL RELATIONS issue 1, 33-63 (March 2008) (noting that "Trustees are (1) selected because of their personal reputation or professional norms, (2) given independent authority to make decisions according to their best judgment or professional criteria, and (3) empowered to act on behalf of a beneficiary," and arguing the threat of "re-contracting" by a Principal to influence an international organization is not central to the Principal-Trustee relationship, *i.e.*, Trustees are beyond such threats).

[228] *Agents, Trustees, and International Courts*. *See also* Richard H. Steinberg, *Judicial Law Making at the WTO: Discursive, Constitutional, and Political Constraints*, 98 AMERICAN JOURNAL OF INTERNATIONAL LAW issue 2, 247-275 (April 2004) (discussing the dangers of Appellate Body judicial activism).

- **Gathii Case**

An illustrative example is the case of Professor James Thuo Gathii, a Kenyan citizen and chaired Professor at Loyola Law School in Chicago. He was nominated in May 2013 to fill a vacancy on the Appellate Body. Despite support from many WTO Members, he faced strong, and ultimately insurmountable, opposition from the U.S. The irony of this opposition was the Administration had professed on various occasions support for developing and least developed countries, especially in Africa, and the President – Barack H. Obama – had Kenyan roots. Why, then, the opposition?

The academic publications of Professor Gathii on International Trade Law "raised alarm bells in Washington." He had:

> written in the past about the need to incorporate social justice concerns in the WTO agenda and … criticized the WTO "bias" toward the interest of its rich members in areas such as trade in goods, services, and protection of intellectual property rights.
>
> In a 2005 paper for the *Emory International Law Review*, "International Justice and the Trading Regime," Gathii said the global trading system is "rigged and distorted" in favor of developed countries and that the WTO dispute settlement system "has largely helped entrench the trading benefits of rich countries that can afford to participate as repeat players that in turn shape the WTO's jurisprudence."[229]

Perhaps it is not America's responsibility to ensure Appellate Body candidates care about poor countries, yet such disregard would depart from the attitude in the era of President John F. Kennedy (1961-1963). That responsibility may be for poor countries themselves.

Yet, if the responsibility of an academic is to speak the truth to power, as Palestinian intellectual and Columbia University English Professor Edward W. Said (1935-2003) explained in *Representations of the Intellectual* (1996), then scholars who aspire to the Appellate Body should take note of the Gathii case. That power is formidable and corporate in nature. The Transnational Institute, while agreeing the *DSU* is the "crown jewel" of the WTO, also observed "the reality is that almost no government goes into the DSM [Dispute

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[229] Daniel Pruzin, *WTO Selection Panel to Recommence Search For Appellate Body Judge Following Deadlock*, 31 International Trade Reporter (BNA) 150 (23 January 2014). *See also* Daniel Pruzin, *WTO DSB Chairman Proposes Process For Filling Contested Appellate Vacancy*, 31 International Trade Reporter (BNA) 793 (1 May 2014) (reporting "[t]he U.S. has objected to Kenya's Gathii based on his writings in legal journals claiming that the WTO's dispute settlement system is biased in favor of rich countries").

The deadlock among Members over four candidates, one of whom was Professor Gathii, persisted, with the option of starting the search from scratch floated, and then withdrawn. *See* Daniel Pruzin, *WTO Dispute Chairman Postpones Restart Of Search for New Appellate Body Judge*, 31 International Trade Reporter (BNA) 198 (30 January 2014). One candidate (Joan Fitzhenry, an Australian AD lawyer) dropped out in March 2014.

Settlement Mechanism] without the pressure of their corporations."[230] The same interests lobbying the USTR or its counterpart in another WTO Member to lodge a WTO complaint have a stake in the individual composition of the Appellate Body. Why not push for judges in Geneva be pliant?

- **2017 Trump *Trade Policy Agenda* and Candidate Blockage**

The pushing by America did not stop with the failed Gathii nomination. In March 2017, the Administration of President Donald J. Trump suggested it might ignore WTO Panel or Appellate Body decisions with which it disagreed, in particular, those that infringed on American sovereignty. The 336-page *President's Trade Policy Agenda*, submitted to Congress, intoned:[231]

> It is time for a more aggressive approach. The Trump Administration will use all possible leverage to encourage other countries to give U.S. producers fair, reciprocal access to their markets....[232]

Among the top priorities the *Agenda* listed were:

> resisting efforts by other countries or Members of international bodies like the World Trade Organization – to advance interpretations that would weaken the right and benefits of, or increase the obligations under, the various trade agreements to which the United States is a party.[233]

Then, in Summer 2017, the U.S. launched a strategy of blocking new appointments to the Appellate Body until its demand – an end to what it saw as judicial activism – was met.[234]

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230 Mary Louise F. Malig, The Transnational Institute, *Big Corporations, The Bali Package, and Beyond – Deepening TNCs Gains from the WTO*, 6 (November 2014), www.tni.org/sites/www.tni.org/files/download/wto-big_business_bali_0.pdf.

231 *See* Office of the United States Trade Representative, *2017 Trade Policy Agenda and 2016 Annual Report of the President of the United States on the Trade Agreements Program* (March 2017), https://ustr.gov/sites/default/files/files/reports/2017/AnnualReport/AnnualReport2017.pdf. [Hereinafter, 2017 TRADE POLICY AGENDA.]

232 *2017 Trade Policy Agenda*, 5.

233 *2017 Trade Policy Agenda*, 2.

234 *See* Robert McDougall, *The Search for Solutions to Save the WTO Appellate Body*, European Centre for International Political Economy (ECIPE), December 2017, http://ecipe.org/publications/the-search-for-solutions-to-save-the-wto-appellate-body/ (hereinafter, *The Search for Solutions*); Manfred Elsig, Mark Pollack & Gregory Shaffer, *Trump is Fighting An Open War On Trade. His Stealth War On Trade May Be Even More Important.*, THE WASHINGTON POST MONKEY CAGE, 27 September 2017, www.washingtonpost.com/news/monkey-cage/wp/2017/09/27/trump-is-fighting-an-open-war-on-trade-his-stealth-war-on-trade-may-be-even-more-important/?utm_term=.61c43149aadc (hereinafter, *Trump is Fighting*); Damian Paletta & Ana Swanson, *Trump Suggests Ignoring World Trade Organization In Major Policy Shift*, 1 March 2017, THE WASHINGTON POST, www.washingtonpost.com/news/wonk/wp/2017/03/01/trump-may-ignore-wto-in-major-shift-of-u-s-trade-policy/?utm_term=.219bb71bffcc. *See also* Gregory Shaffer, Manfred Elsig & Sergio Puig, *The Law and Politics of WTO Dispute Settlement*, *in* THE POLITICS OF INTERNATIONAL LAW (Wayne Sandholtz & Christopher Whytock, eds., 2016) (University of California Irvine School of Law Research Paper Number 2016-10, https://ssrn.com/abstract=2748883) (evaluating "the selection process of those who interpret the

That strategy indeed was more aggressive than before.

In the past, unhappy with their decisions against American trade measures, the U.S. opted not to reappoint two Americans to the Appellate Body (Jennifer Hillman in 2011, and Merit E. Janow in 2007), and in 2016 the U.S. went further by blocking the reappointment of an Appellate Body judge from another Member (South Korea's Seung Wha Chang). To be sure, reappointment to a second four-year term is not automatic under the *DSU*. But, the less certain reappointment is, the greater the potential for erosion of judicial independence.

For the U.S., that independence should be challenged if judicial activism erodes the carefully crafted balance of rights and obligations achieved through Uruguay Round negotiations. So, blocking reappointment of American and non-American judges alike proved America would take revenge against any judge it did not like, based on the Reports that judge had co-written during her first four-year term, and on the nature an pattern of her questioning during oral arguments (because, as the USTR put it, "... it is not difficult to ascertain from the questions posed by a[n] [Appellate Body] member ... at an oral hearing that the member is associated with the views expressed in an Appellate Body Report related to those questions"[235]). Chang's sin was issuing "wrong" decisions, "wrong" because he "overstep[ed] the boundaries" to which WTO Members agreed under the *DSU*.[236] The USTR said those decisions "went beyond what was needed to settle an individual dispute based on the parties' specific arguments." The USTR cited (1) 46 pages (amounting to two-thirds of the Report) of *obiter dicta* in the *Panama-Argentina GATS* dispute (DS 453), (2) a dilated discussion of the SPS agreement (in DS 430, Closing Statement of the United States at the Oral Hearing in *India – Measures Concerning the Importation of Certain Agricultural Products from the United States* (AB-2015-2/DS430) (20 March 2015) that had nothing to do with the issues on appeal, (3) overturning a Panel holding on the basis of an argument not raised on appeal, and (4) an intrusion (in D S449)into domestic law in which the Appellate Body substituted its judgment as to what is lawful in the legal system of that of the Member. The USTR challenged other WTO Members with this question:

> If a candidate for appointment to the Appellate Body were to say openly that he or she would issue Appellate Body Reports that do what the Reports we have discussed did – that is, the candidate would issue Reports where more than 2/3 of the Report were *obiter dicta* on issues not necessary to resolve the dispute, the candidate would issue Reports engaging in abstract

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rules; ... the context and politics of rule interpretation; and ... compliance with WTO dispute settlement rulings," and arguing "the selection of Appellate Body members, Panelists, and Secretariat members affects the interpretation of WTO rules," [c]ertain interpretations, in turn, encounter stark resistance, leading to compliance challenges," "[t]he compliance challenges threaten the authority of Panels and the Appellate Body, and can, in turn, inform subsequent interpretive choices, as well as the selection process of Appellate Body members and Panellists," hence "[l]aw and politics ... continuously interact, shaping the WTO's dispute settlement process).

235 Statement by the United States at the Meeting of the WTO Dispute Settlement Body, 23 May 2016, 5, www.wto.org/english/news_e/news16_e/us_statment_dsbmay16_e.pdf. [Hereinafter, May 2016 U.S. DSB Statement.]

236 May 2016 U.S. DSB Statement, 5; *Trump is Fighting*.

> interpretation and raise concerns on matters not under appeal, the candidate would reject an appeal by a party but then reverse a Panel and find a breach on a basis not argued by that party, and the candidate would issue Reports substituting the Appellate Body's judgment for what is lawful under a Member's domestic law for the view of that legal system itself – would your government support that candidate for appointment?[237]

With that question, the U.S. sank the reappointment of Mr. Chang, but got a strong letter in reply.

- **Appellate Body Rebuttal**

Six of the Appellate Body members, including America's Thomas Graham and India's Ujal Singh Bhatia, wrote to DSB Chairman (South Africa's WTO Ambassador, Xavier Carim) to counter the American attack:

> "With regard to accuracy, no case is the result of a decision by one Appellate Body Member, nor should interpretations or outcomes be attributed to a single Member," the six AB members maintained.
>
> ...
>
> "Appeals are heard and decided by three Members who are chosen randomly to constitute the Division for each case," the AB members maintained.
>
> "During a Division's consideration of a case, there is always a formal, intensive exchange of views, in person in Geneva, between the three Division Members and the Appellate Body Members who are not on the Division," the six members argued.
>
> In short, "Our Reports are Reports of the Appellate Body," they asserted.
>
> ...
>
> ... [T]he AB members said that they are guided by Articles 3:2, 17, and 19:2 of the *Dispute Settlement Understanding* in adjudicating appeals and clarifying existing provisions of the covered agreements "without adding to or diminishing the rights and obligations provided in those [covered] agreements."
>
> "We strive to adhere to that mandate when deciding complex issues that arise in a variety of circumstances, frequently on matters of first impression," the AB members said.
>
> "Whether we have always succeeded is a subject we leave to the WTO Membership to discuss," the six members suggested, maintaining that the WTO Members are well within their rights to comment on the AB Reports as set out in Article 17:14 of the *Dispute Settlement Understanding*. The AB

[237] May 2016 U.S. DSB Statement, 9.

> members said they are open to "other informed and constructive comments."
>
> As regards the "trust that WTO Members place in the independence and impartiality of AB Members," the six members said, "*we are concerned about the tying of an Appellate Body Member's reappointment to interpretations on specific cases and even doing so publicly*."
>
> "The dispute settlement system depends upon WTO Members trusting the independence and impartiality of Appellate Body Members," the six members emphasized.
>
> "*Linking the reappointment of a Member to specific cases could affect that trust*," they lamented.[238]

All 13 living former Appellate Body members (three of whom were American, James Bacchus, Jennifer Hillman, and Merit E. Janow) reinforced this letter with another one (also to Ambassador Carim), explaining:

> if, now, the fact that a Member of the Appellate Body joined in the consensus on the outcome on a particular legal issue or on a particular dispute becomes for the first time a factor in a decision on that Member's reappointment, all of the accomplishments of the past generation in establishing the credibility of the WTO dispute settlement system can be put in jeopardy. This raises the possibility of inappropriate pressures by participants in the WTO trading system. There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgments in the WTO's rule-based system of adjudication.
>
> ... The unquestioned impartiality and independence of the Members of the Appellate Body has been central to the success of the WTO dispute settlement system, which has in turn been central to the overall success of the WTO. Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the very future of the entire WTO trading system at risk.[239]

Taking aim at the American argument that Mr. Chang and the Appellate Body were guilty of overreach:

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[238] D. Ravi Kanth, *AB Members Challenge U.S. Over Reappointment of Seung Wha Chang*, Third World Network, TWN Info Service on WTO and Trade Issues, 24 May 2016, www.twn.my/title2/wto.info/2016/ti160516.htm. (Emphasis added.)

[239] Letter to Ambassador Xavier Carim of South Africa, Chairman, Dispute Settlement Body, World Trade Organization, from Georges Abi-Saab, *et al.*, 31 May 2016, http://worldtradelaw.typepad.com/files/ableter.pdf. [Hereinafter, May 2016 Former Appellate Body Member Letter.]

> From time to time, one or more of the Members of the WTO may differ with a decision reached by the Appellate Body, but this does not necessarily mean that the Appellate Body has acted outside its mandate in reaching that decision. Such differences are unavoidable in a rule- based system that seeks to resolve international disputes between disputing parties that maintain conflicting views of the meaning of the rules. Indeed, such differences are intrinsic to the very process of legal interpretation – the core competency of the Appellate Body.[240]

The Appellate Body members had a constructive – and obvious – solution for the U.S., namely, change the rules through the Ministerial Conference:

> Should WTO Members ever conclude that the Appellate Body has erred when clarifying a WTO obligation in WTO dispute settlement, the Marrakesh Agreement establishing the World Trade Organization spells out the appropriate remedial act. Article IX:2 of the Marrakesh Agreement, on "Decision-Making," provides, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by a "three-fourths majority of the Members." Any such legal interpretation would, of course, be binding in WTO dispute settlement. We observe that, to date, the Members of the WTO have not seen the need to take any such action.[241]

Of course, the criticism did not stop with present and former Appellate Body members. Dozens of WTO Members – including Argentina, Australia, Brazil, Canada, China, Colombia, Egypt, EU, Guatemala, Honduras, Hong Kong, Iceland, India, Japan, Korea, Mexico, New Zealand, Nigeria, Oman, Paraguay, Russia Singapore, Taiwan, Thailand, Uruguay, and Vietnam – made the same points: America's blockage of Appellate Body candidates had serious adverse systemic effects and undermined the rule of law.[242] India, for example, "emphasized that the reappointment process must not compromise the independence and impartiality of the Appellate Body."[243]

- **Depleted Ranks**

The American blockage strategy meant that by December 2017, the Appellate Body ranks dropped to just four members, and by September 2018, just three were left – India's Bhatia (whose term ended 10 December 2019), plus the members from U.S. (whose term ended the same as Chairman Bhatia's), and China (Hong Zhao). With the *DSU* requirement that three members must hear a case, the Appellate Body was in crisis.[244] Indeed, the

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240 May 2016 Former Appellate Body Member Letter.

241 May 2016 Former Appellate Body Member Letter.

242 World Trade Organization, *WTO Members Debate Appointment/Reappointment of Appellate Body Members*, 23 May 2016, www.wto.org/english/news_e/news16_e/dsb_23may16_e.htm. [Hereinafter, *WTO Members Debate*.]

243 *Quoted in WTO Members Debate*.

244 *See* Tom Embury-Dennis, *Trump Could Cause World Trade System To Freeze Up After Vetoing Appointment Of Judges, Diplomats Fear*, INDEPENDENT, 28 November 2017,

Appellate Body ceased to function as of 10 December.[245] (Recall that *DSU* Article 17(1), second sentence, states the Appellate Body is to be "be composed of seven persons, three of whom shall serve on any one case," and "persons serving on the Appellate Body shall serve in rotation," and Article 17(2) "the DSB shall appoint persons to serve on the Appellate Body for a four-year term, and each person may be reappointed once.") There was a risk of the Appellate Body being asphyxiated.[246] Mindful of the crisis, the Appellate Body invoked Rule 15 of its *Working Procedures*, entitled "Transition:"

> A person who ceases to be a Member of the Appellate Body may, with the authorization of the Appellate Body and upon notification to the DSB,

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www.independent.co.uk/news/world/americas/donald-trump-world-trade-dispute-system-veto-judges-appointments-global-freeze-us-diplomats-warning-a8079876.html.

[245] *See* World Trade Organization, *DG Azevêdo to Launch Intensive Consultations on Resolving Appellate Body Impasse*, 9 December 2019, www.wto.org/english/news_e/news19_e/gc_09dec19_e.htm. (reporting the statement of WTO Director General, Roberto Azevêdo, "[o]bviously the paralysis of the Appellate Body does not mean that rules-based dispute settlement has stopped at the WTO," and "Members will continue to resolve WTO disputes through consultations, panels, and other means envisaged in the WTO agreements such as arbitration or good offices of the DG … but we cannot abandon what must be our priority, namely finding a permanent solution for the Appellate Body.") In the meantime, the largest contributor to the SWF 197.2 ($200 million) WTO budget, the U.S., reduced its 2020 allotment, including an 87% reduction to the Appellate Body. *See* Bryce Baschuk, *WTO Members Agree on a 2020 Budget, Averting Jan. 1 Shutdown*, Bloomberg, 5 December 2019, www.bloomberg.com/news/articles/2019-12-05/wto-members-agree-on-a-2020-budget-averting-jan-1-shutdown (reporting "[t]he deal limits annual spending for Appellate Body members to no more than 100,000 francs, an 87% reduction from the full allotment, and caps spending by the Body's operating fund to 100,000 francs, a 95% reduction," and also showing the U.S. and China are the top two contributors, at approximately 12% and 10%, respectively). The U.S. expressed opposition to the SWF 3000,000 annual salary paid to Appellate Body members, which it said incentivizes them to drag out disputes.

[246] The first term of Shree Baboo Chekitan Servansing (Mauritius) ended on 30 September 2018. The U.S. refused to support his re-appointment, citing its complaints against the functioning of the Appellate Body. *See* World Trade Organization, *Statements by the United States at the Meeting of the WTO Dispute Settlement Body*, Geneva, 27 August 2018. U.S. blockage of his re-appointment, coupled with its blockage of new candidates to replace Peter Van den Bossche (EU) and Ricardo Ramírez-Hernández (Mexico), dropped the number to four. The U.S. rejected a May 2018 proposal by China, the EU, and Russia to appoint three Panellists to fill the three Appellate Body seats. Even with four members, some cases might not be able to proceed to the appellate stage (because a Panellist is barred from hearing a case on appeal, if that Panellist heard the same case while a Panellist), hence the asphyxiation metaphor. *See* Bryce Baschuk, *U.S. Rejects New WTO Appellate Body Appointments – Again*, 35 International Trade Reporter (BNA) 719 (31 May 2018). Mr. Ramírez- Hernández drew this metaphor: "This institution does not deserve to die through asphyxiation. You have an obligation to decide whether you want to kill it or keep it alive." Farewell Speech by Ricardo Ramírez-Hernández, 28 May 2018, http://src.bna.com.www2.lib.ku.edu/zbu.

WTO Deputy Director General Alan Wolff argued the blockage posed a "systemic risk" to the Organization, which could lead to a trade war:

> WTO Member A brings a case against WTO Member B. Member A wins a decision of a dispute settlement panel. It asks Member B to adjust its measures to bring them into conformity with B's WTO obligations as determined by the Panel. B says it will not do so as it is appealing the Panel decision. But no appeal is possible as a practical matter. Member A then states that it will retaliate. Member B then states that it will counter-retaliate. A trade war ensues.

Quoted in Bryce Baschuk, *U.S. Will Not Support Reappointment of WTO Panel Member*, 35 International Trade Reporter (BNA) 1147 (6 September 2018).

> *complete the disposition of any appeal to which that person was assigned while a Member*, and that person shall, for that purpose only, be deemed to continue to be a Member of the Appellate Body.[247]

In other words, departing judges would continue to work on appeals filed before their terms had ended or resignations took effect, even if the appellate process was not complete before those terms ended or resignations effective.

Given delays in many cases, at the Panel and Appellate Body stages, this Transition rule seemed like a rule of necessity, if cases were to be fully adjudicated. But, its use could mean long extensions, because the extant appeals often were complex (as in the *Boeing-Airbus* disputes). And, they could not work on new appeals, which were piling up.

America objected to that practice, too. The U.S. pointed to Rule 14(2) of the *Working Procedures*:

> The resignation [of an Appellate Body member] shall take effect 90 days after the notification has been made pursuant to paragraph 1, unless the DSB, in consultation with the Appellate Body, decides otherwise.

With complex issues in many appeals, there was a risk that Appellate Body members would be staying on long past the 90-day period. That, America indicated, undermined the basic composition and operation of a permanent seven-member group. So, the U.S. was adamantly opposed to the scenario in which former members are "continuing to act as though they are still members of the Appellate Body."[248]

The U.S. also suggested Reports issued after the end of a member's term violated the *DSU* rules and were ineligible for DSB adoption by the reverse consensus rule. That objection came up in August 2017, in the context of the Appellate Body Report in *EU – Antidumping Measures on Imports of Certain Fatty Alcohols from Indonesia* (DS442).[249] One of the members, Hyun Chong Kim of Korea, resigned from the Appellate Body, effective 1 August 2017. Ironically, he did so to become the Minister of Trade for Korea, in response to demands from the Trump Administration to renegotiate *KORUS*. However, the Appellate Body scheduled circulation of that Report for 5 September – after the effective date of Mr. Kim's resignation. Consequently, said the U.S., this was issued by two, not three, members, in violation of *DSU* rules, so it would have to be adopted by the regular normal consensus rule.[250] That raised the spectre America would block adoption of

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247 Emphasis added.

248 *Quoted in* Bryce Baschuk, *U.S. Block on Appellate Body Could Unravel WTO, Official Says*, 35 International Trade Reporter (BNA) 460 (5 April 2018).

249 *See* Statement by the United States at the Meeting of the WTO Dispute Settlement Body, Geneva, 31 August 2017, https://geneva.usmission.gov/wp-content/uploads/2017/08/Aug31.DSB_.Stmt_.as-delivered.fin_.public.pdf.

250 The problem was even worse: the second four-year term of another member, Ricardo Ramírez-Hernández, ended 30 June 2017, hence the Report arguably had just one signatory who was a *bona fide* member. But, the U.S. welcomed the continued service of Mr. Ramirez in the appeals he had been adjudicating prior to 30 June.

Reports it did not like, as occurred in the pre-Uruguay Round era.

- **Activist, Precedent-Setting Judges**

In January 2018, the U.S. rejected a proposal by 58 other WTO Members to begin forthwith the process of selecting three new Appellate Body members. Instead, in a broad-side attack in February, President Trump called the WTO a "catastrophe."[251] And, in March the USTR slammed the *DSU*:

> ... [T]he WTO has not always worked as expected. Instead of serving as a negotiating forum where countries can develop new and better rules, it has sometimes been dominated by a dispute settlement system where activist "judges" try to impose their own policy preferences on Member States. Instead of constraining market distorting countries like China, the WTO has in some cases given them an unfair advantage over the United States and other market-based economies. Instead of promoting more efficient markets, the WTO has been used by some Members as a bulwark in defense of market access barriers, dumping, subsidies, and other market distorting practices. The United States will not allow the WTO – or any other multilateral organization – to prevent us from taking actions that are essential to the economic well-being of the American people.[252]

Essentially, the USTR said the Appellate Body malfunctioned in six areas: it (1) takes an "activist approach" to textual interpretation; (2) makes "unnecessary findings" and "advisory opinions," (3) allows former members to adjudicate cases beyond the length of their terms; (4) misses its 90-day deadline to decide appeals; (5) encroaches on the sovereignty of Members by rendering unnecessary legal interpretations of domestic regulations; and (6) asserts that its previous Reports are precedent to be followed in future cases.[253]

Of these areas, the USTR declared "[t]he most significant area of concern has been Panels and the Appellate Body adding to or diminishing rights and obligations under the

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[251] *Trump Calls WTO A "Catastrophe," Says U.S. Losing Out And Needs New Deal*, RT, 27 February 2018, www.rt.com/usa/419874-trump-wto-catastrophe-world-trade-organization/. His Secretary of Commerce, Wilbur Ross, followed up in May 2018:

> Any dispute mechanism that takes multiple years is no good. The people who have been hurt should have much quicker redress than five years. Look at the Airbus situation – how long that's been going on – it's a joke.

Quoted in Bryce Baschuk, *Ross Says WTO Dispute System Delays are "No Good," "a Joke,"* 35 International Trade Reporter (BNA) 755 (7 June 2018).

[252] Office of the United States Trade Representative, *2018 Trade Policy Agenda and 2017 Annual Report of the President of the United States on the Trade Agreements Program*, March 2018, at 3 https://ustr.gov/sites/default/files/files/Press/Reports/2018/AR/2018%20Annual%20Report%20FINAL.PDF. [Hereinafter, *2018 Trade Policy Agenda*.]

[253] *See* Bryce Baschuk, *Dispute Settlement Flaws Put WTO in "Grave Jeopardy," U.S. Says*, 35 International Trade Reporter (BNA) 627 (10 May 2018).

WTO Agreement:

> ... Concerns abound that dispute Reports have added to or diminished rights or obligations in varied areas, such as subsidies, antidumping duties, and countervailing duties; standards (under the *TBT Agreement*); and safeguards. For example:
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> - The United States and several other Members have expressed significant concerns with a number of Appellate Body interpretations that would significantly restrict the ability of WTO Members to counteract trade-distorting subsidies provided through SOEs, posing a significant threat to the interests of all market-oriented actors.
>
> - In a number of disputes, the United States has expressed concerns with the Appellate Body's interpretation of the non-discrimination obligation under the *TBT Agreement* which calls for reviewing factors unrelated to any difference in treatment due to national origin. The United States has pointed out that this approach could find that identical treatment of domestic and imported products could nonetheless be found to discriminate against imported products due to differences in market impact. There is nothing in the text or negotiating history of the *TBT Agreement* to support that Members had ever negotiated or agreed to such an approach.
>
> - The United States disagreed with Panel and Appellate Body Reports in the [2000] *U.S.–FSC* [*Foreign Sales Corporation*] dispute [discussed in a separate Chapter], which resulted in an interpretation under which WTO rules do not treat different (worldwide vs. territorial) tax systems fairly. This dispute disregarded the broader perspective that, in the GATT, Members had agreed to an understanding that a country did not need to tax foreign income, and there was no evidence that the U.S. FSC distorted trade or was more distortive than the territorial tax system used by most other WTO Members.
>
> - In a number of disputes, the United States has expressed concerns that the Appellate Body's non-text-based interpretation of Article XIX of the GATT 1994 and the *Safeguards Agreement* has seriously undermined the ability of Members to use safeguards measures. The Appellate Body has disregarded the agreed WTO text and read text into the Agreement, applying standards of its own devising.
>
> - Another area of concern is that the Appellate Body in effect created a new category of prohibited subsidies that was neither negotiated nor agreed by WTO Members (*U.S. – CDSOA, i.e.*, the 2003 *Byrd*

> *Amendment* case, WT/DS217/AB/R, WT/DS234/AB/R (adopted 27 January 2003)). The U.S. Congress had made a policy decision to assist industries harmed by illegal dumping and subsidization, and no provision in the *WTO Agreement* limits how a WTO Member might choose to make use of the funds collected through antidumping and countervailing duties.

> It has been the longstanding position of the United States that Panels and the Appellate Body are required to apply the rules of the WTO agreements in a manner that adheres strictly to the text of those agreements, as negotiated and agreed by its Members. Over time, U.S. concerns have increasingly focused on the Appellate Body's disregard for the rules as set by WTO Members. ... ...[T]he problem has been growing worse, and not better.[254]

In February 2024, at MC 13 in Abu Dhabi, the USTR doubled-down on its criticism, with Ambassador Katharine Tai alleging the Appellate Body had been "extremely activist, extremely powerful, more powerful than even the Members, where Members could secure new rules through litigation and not have to rely on the very hard work of negotiating with each other."[255] India's Commerce Minister, Piyush Goyal, pushed back, saying until the Appellate Body was resurrected, agreements on all other topics (such as agriculture and fishing subsidies, and e-commerce, discussed in other Chapters) were in jeopardy. Not surprisingly, therefore, at MC 13: "Members adopted a *Ministerial Decision* recognizing the progress made with the view to having a fully and well-functioning dispute settlement system accessible to all Members by 2024," and "Ministers instructed officials to accelerate discussions, build on the progress already made, and work on unresolved issues."[256] In other words, the page Decision was a testimonial to continued – bitter – disagreements over *DSU* reform generally, and Appellate Body nominations in particular.

The USTR also attacked the Appellate Body for not following the *DSU* and its own rules. For example, the USTR accused the Appellate Body of "[d]isregard for the 90-day deadline for appeals, "[c]ontinued service by persons who are no longer AB members," and "[i]ssuing advisory opinions on issues not necessary to resolve an appeal:"

> Since at least 2011, the United States and other Members have been expressing concern regarding the Appellate Body's decision to ignore the mandatory 90-day deadline for deciding appeals set out in WTO rules.

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254 *2018 Trade Policy Agenda*, 23-24.

255 *Quoted in India, U.S. at Loggerheads over WTO Reform at Abu Dhabi Talks*, FRANCE 24, 28 February 2024, www.france24.com/en/live-news/20240228-india-us-at-loggerheads-over-wto-reform-at-abu-dhabi-talks.

256 World Trade Organization, *MC13 Ends with Decisions on Dispute Reform, Development; Commitment to Continue Ongoing Talks* (1 March 2024), www.wto.org/english/news_e/news24_e/mc13_01mar24_e.htm. The *Decision* is World Trade Organization, Ministerial Conference, Thirteenth Session, Abu Dhabi, 26-29 February 2024, *Draft Ministerial Decision on Dispute Settlement Reform*, WT/MIN(24)/W22 (1 March 2024), https://docs.wto.org/dol2fe/Pages/SS/directdoc.aspx?filename=q:/WT/MIN24/W22.pdf&Open=True.

Instead, the Appellate Body has assumed the authority to take whatever time it considers appropriate for individual appeals. However, WTO Members agreed in the *DSU* that for each appeal "[i]n no case shall the proceedings exceed 90 days." The 90-day deadline helps ensure that the Appellate Body focuses its Report on the issue on appeal. The Appellate Body has never explained on what legal basis it could choose to breach a clear and categorical rule set by WTO Members.

...

Another example of a failure by the WTO to follow the rules that apply to it arises from continued service deciding appeals by persons who are not Appellate Body members. Recent decisions by the Appellate Body to, in its words, "authorize" a person who is no longer a member of the Appellate Body to continue hearing appeals created a number of very serious concerns, which the United States has expressed.

First, and foremost, the Appellate Body simply does not have the authority to deem someone who is not an Appellate Body member to be a member. The Appellate Body purports to find in Rule 15 of its *Working Procedures* the authority to "deem" as an Appellate Body member one of its own members whose term has expired. However, under the *WTO Agreement*, it is the Dispute Settlement Body, not the Appellate Body, that has the authority and responsibility to decide whether a person whose term of appointment has expired should continue serving. Indeed, Rule 15 itself acknowledges that it applies to "a person who [has] cease[d] to be a member of the Appellate Body."

...

The United States has been increasingly concerned by the tendency of WTO Reports to make findings unnecessary to resolve a dispute or on issues not presented in the dispute. Article 3:4 of the *DSU* provides that: "Recommendations and rulings made by the DSB shall be aimed at achieving a satisfactory settlement of the matter in accordance with the rights and obligations under this *Understanding* and under the covered agreements." Similarly, Article 3:7 provides that "the aim of the dispute settlement mechanism is to secure a positive solution to a dispute." And pursuant to Articles 7:1 and 11 of the *DSU*, Panels and the Appellate Body are charged with making those findings "as will assist in making" the DSB in making a recommendation, pursuant to Article 19:1, to a Member to bring a measure that has been found to be WTO-inconsistent into conformity with WTO rules. ... WTO Panels and the Appellate Body are not to make findings that cannot "assist the DSB in making [its] recommendations."

The purpose of the dispute settlement system is not to produce Reports or to "make law," but rather to help Members resolve trade disputes among them. WTO Members have not given Panels or the Appellate Body the power to give "advisory opinions" as some national or international tribunals have. Indeed, both the *Dispute Settlement Understanding* and the

> *WTO Agreement* expressly provide that WTO Members, acting in the Ministerial Conference or General Council, have the "exclusive authority" to render an authoritative interpretation of the WTO agreements.[257]

However, to what extent is the U.S. to blame for these problems by blocking appointment of replacement Appellate Body members?

Finally, the USTR castigated the Appellate Body for its treatment of its Reports as precedent:

> Without basis in the *DSU*, the Appellate Body has asserted its Reports effectively serve as precedent and that Panels are to follow prior Appellate Body Reports absent "cogent reasons." However, this is not consistent with WTO rules. WTO Members established one and only one means for adopting binding interpretations of the obligations that they agreed to: Article IX: 2 of the *WTO Agreement*. While Appellate Body Reports can provide valuable clarification of the covered agreements, Appellate Body Reports are not themselves agreed text nor are they a substitute for the text that was actually negotiated and agreed. Indeed, the Appellate Body's approach means that Panels are simply to abdicate their responsibility to conduct an objective assessment of the matters before them and just follow prior Appellate Body Reports.[258]

In its 2019 *Trade Policy Agenda*, the USTR poignantly summarized its concerns, casting them as a matter of sovereignty: "the United States remains an independent nation, and our trade policy will be made here – not in Geneva. We will not allow the WTO Appellate Body and dispute settlement system to force the United States into a straitjacket of

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257 *2018 Trade Policy Agenda*, 24-26.

Likewise, the USTR castigated the Appellate Body for its *de novo* review of facts and domestic laws:

> Another significant concern is the Appellate Body's approach to reviewing facts. Article 17:6 of the *DSU* limits an appeal to "issues of law covered in the Panel Report and legal interpretations developed by the Panel." Yet the Appellate Body has consistently reviewed Panel fact-finding under different legal standards, and has reached conclusions that are not based on Panel factual findings or undisputed facts.
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> The United States has also noted with concern the Appellate Body's review of the meaning of Member's domestic law that is being challenged. In a WTO dispute, the key fact to be proven is what a Member's challenged measure does (or means), and the law to be interpreted and applied are the provisions of the WTO agreements. But the Appellate Body consistently asserts that it can review the meaning of a Member's domestic measure as a matter of law rather than acknowledging that it is a matter of fact and thus not a subject for Appellate Body review. Furthermore, when the Appellate Body reviews the meaning of a Member's domestic measure, it does not provide any deference to a Panel's findings of fact.

2018 Trade Policy Agenda, 27-28.

258 *2018 Trade Policy Agenda*, 28.

obligations to which we never agreed."[259] Note that this point is enshrined in the *SAA* to the 1994 *URAA* (discussed in a separate Chapter), namely, that America cannot be forced to change its laws as a result of a Panel or Appellate Body Report that the DSB adopts – only Congress can do so.

In November 2019, the U.S. increased pressure on the WTO in pursuit of its desired Appellate Body, wielding its monetary influence.[260] America threatened to withhold funding to the WTO, and thereby block consensus on the 2020-2021 biennial WTO budget. Though only U.S. $22.8 million were at stake, that figure represented the largest contribution among Members to the WTO budget. (The 2019 consolidated budget of the WTO Secretariat and Appellate Body Secretariat was Swiss Francs (*CHF*) 197.2 million, of which the U.S. contributed *CHF* 22.7 million, *i.e.*, 11.5%. China, Germany, Japan, France, Korea, Netherlands, Hong Kong, and Italy rounded out the top 10 contributors, respectively). The USTR expressly linked its reservations to funding the Appellate Division in particular, to what it perceived as over-reaching by the Appellate Body of its mandate under the *DSU* that, in turn, posed a threat to American sovereignty. The threat posed a serious challenge to the WTO: "If the U.S. unilaterally kills off funding, it could imperil the future of the WTO's work and force countries to fundamentally rethink their reliance on it to negotiate trade deals and settle the surging number of disputes."[261]

II. Precedent, Pre-Uruguay Round GATT Panel Reports, and 1996 *Japan Alcoholic Beverages* Case

What role, if any, should pre-*DSU* Panel Reports play in cases brought under the *DSU*? This question is narrower than asking whether GATT or WTO Reports are "precedent" in the Anglo-American sense of the word, or whether the doctrine of *stare decisis* operates in a *de facto* or *de jure* manner. The focus is whether any use can be made of the earlier Reports and, if so, what sort of use.

In the 1996 *Japan Alcoholic Beverages* case (excerpted below), the Appellate Body considered the matter, and drew a distinction between adopted and unadopted GATT Panel Reports. The Appellate Body concluded adopted Panel Reports are not binding in a strict sense in a subsequent case, even if the subsequent case involves the same parties and basically the same facts. A holding in an adopted Panel Report is neither a definitive interpretation of the GATT nor an agreement by the CONTRACTING PARTIES on the legal reasoning contained in that Report. After all, Article IX:2 of the WTO *Agreement* states only the Ministerial Conference and General Council are empowered to adopt definitive interpretations of GATT-WTO texts.

Similarly, a prior holding in an adopted GATT Panel Report could not be

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[259] Office of the United States Trade Representative, 2019 Trade Policy Agenda and 2018 Annual Report, 27, https://ustr.gov/sites/default/files/2019_Trade_Policy_Agenda_and_2018_Annual_Report.pdf.

[260] *See* Bryce Baschuk, *U.S. Raises Prospect of Blocking Passage of WTO Budget*, BLOOMBERG, 12 November 2019, www.bloomberg.com/news/articles/2019-11-12/u-s-is-said-to-raise-prospect-of-blocking-passage-of-wto-budget. [Hereinafter, *U.S. Raises Prospect*.]

[261] *U.S. Raises Prospect*. The deadline for forging consensus among the 164 Members on a WTO budget was 31 December 2019.

considered "subsequent practice" for the parties to the case by virtue of the decision of the CONTRACTING PARTIES to adopt the Report. Article 31 of the *Vienna Convention on the Law of Treaties* indicates "subsequent practice" is a tool for treaty interpretation. Article 31 of the *Vienna Convention* says "[t]here shall be taken into account, together with the context … any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation."

Why does this Article, indeed the *Convention*, matter in WTO adjudication? As the Appellate Body explained in its 1996 Report in *Reformulated Gas*:[262]

> [The] general rule of interpretation [as set out in Article 31(1) of the *Vienna Convention on the Law of Treaties*] has attained the status of a rule of customary or general international law. As such, it forms part of the "customary rules of interpretation of public international law" which the Appellate Body has been directed, by Article 3(2) of the *DSU*, to apply in seeking to clarify the provisions of the *General Agreement* and the other "covered agreements" of the *Marrakesh Agreement Establishing the World Trade Organization* (the *WTO Agreement*).

In brief, the *Vienna Convention* is rendered relevant to WTO cases by *DSU* Article 3:2, which calls for interpretation of GATT-WTO texts in light of the customary rules of interpretation of public international law. But, the Appellate Body apparently feels just one pre-Uruguay Round Panel Report hardly constitutes "practice."

As for unadopted GATT Panel Reports, the Appellate Body in *Japan – Alcoholic Beverages* made clear they have no legal status. These Reports lack the imprimatur of the CONTRACTING PARTIES. However, the Appellate Body did not shut the door on their use. Unadopted, pre-*DSU* Reports may be guidance for a WTO Panel or the Appellate Body.

WTO APPELLATE BODY REPORT, *JAPAN – TAXES ON ALCOHOLIC BEVERAGES*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (ADOPTED 1 NOVEMBER 1996)

E. STATUS OF ADOPTED PANEL REPORTS

In this case, the Panel concluded that:

> … Panel Reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case by virtue of the decision to adopt them. Article 1(b)(iv) of GATT 1994 provides institutional recognition that adopted Panel Reports constitute subsequent practice. Such Reports are an integral part of GATT 1994, since they constitute "other decisions of the CONTRACTING PARTIES to GATT 1947."

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[262] *See United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996).

Article 31(3)(b) of the *Vienna Convention* states that "any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation" is to be "taken into account together with the context" in interpreting the terms of the treaty. Generally, in international law, the essence of subsequent practice in interpreting a treaty has been recognized as a "concordant, common and consistent" sequence of acts or pronouncements which is sufficient to establish a discernable pattern implying the agreement of the parties regarding its interpretation. An isolated act is generally not sufficient to establish subsequent practice; it is a sequence of acts establishing the agreement of the parties that is relevant.

Although GATT 1947 Panel Reports were adopted by decisions of the CONTRACTING PARTIES, a decision to adopt a Panel Report did not under GATT 1947 constitute agreement by the CONTRACTING PARTIES on the legal reasoning in that Panel Report. The generally-accepted view under GATT 1947 was that the conclusions and recommendations in an adopted Panel Report bound the parties to the dispute in that particular case, but subsequent Panels did not feel legally bound by the details and reasoning of a previous Panel Report. [The Appellate Body cited support for this proposition: *European Economic Community – Restrictions on Imports of Dessert Apples*, B.I.S.D. (36th Supp.) 93 at ¶ 12.1 (1990) (adopted 22 June 1989).]

We do not believe that the CONTRACTING PARTIES, in deciding to adopt a Panel Report, intended that their decision would constitute a definitive interpretation of the relevant provisions of GATT 1947. Nor do we believe that this is contemplated under GATT 1994. There is specific cause for this conclusion in the *WTO Agreement*. Article IX:2 of the *WTO Agreement* provides: "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements." Article IX:2 provides further that such decisions "shall be taken by a three-fourths majority of the Members." The fact that such an "exclusive authority" in interpreting the treaty has been established so specifically in the *WTO Agreement* is reason enough to conclude that such authority does not exist by implication or by inadvertence elsewhere.

Historically, the decisions to adopt Panel Reports under Article XXIII of the GATT 1947 were different from joint action by the CONTRACTING PARTIES under Article XXV of the GATT 1947. Today, their nature continues to differ from interpretations of the GATT 1994 and the other Multilateral Trade Agreements under the *WTO Agreement* by the WTO Ministerial Conference or the General Council. This is clear from a reading of Article 3:9 of the *DSU*, which states:

> The provisions of this *Understanding* are without prejudice to the rights of Members to seek authoritative interpretation of provisions of a covered agreement through decision-making under the *WTO Agreement* or a covered agreement which is a Plurilateral Trade Agreement.

Article XVI:1 of the *WTO Agreement* and paragraph 1(b)(iv) of the language of Annex 1A

incorporating the GATT 1994 into the *WTO Agreement* bring the legal history and experience under the GATT 1947 into the new realm of the WTO in a way that ensures continuity and consistency in a smooth transition from the GATT 1947 system. This affirms the importance to the Members of the WTO of the experience acquired by the CONTRACTING PARTIES to the GATT 1947 – and acknowledges the continuing relevance of that experience to the new trading system served by the WTO. Adopted Panel Reports are an important part of the GATT *acquis*. They are often considered by subsequent Panels. They create legitimate expectations among WTO Members, and, therefore, should be taken into account where they are relevant to any dispute. However, they are not binding, except with respect to resolving the particular dispute between the parties to that dispute. [In a footnote, the Appellate Body added: "It is worth noting that the Statute of the International Court of Justice has an explicit provision, Article 59, to the same effect. This has not inhibited the development by that Court (and its predecessor) of a body of case law in which considerable reliance on the value of previous decisions is readily discernible."] In short, their character and their legal status have not been changed by the coming into force of the *WTO Agreement*.

For these reasons, we do not agree with the Panel's conclusion … that "Panel Reports adopted by the GATT CONTRACTING PARTIES and the WTO Dispute Settlement Body constitute subsequent practice in a specific case" [by virtue of the decision to adopt them] as the phrase "subsequent practice" is used in Article 31 of the *Vienna Convention*. Further, we do not agree with the Panel's conclusion … that adopted Panel Reports in themselves constitute "other decisions of the CONTRACTING PARTIES to GATT 1947" for the purposes of paragraph 1(b)(iv) of the language of Annex 1A incorporating the GATT 1994 into the *WTO Agreement*.

However, we agree with the Panel's conclusion … that *unadopted* Panel Reports "have no legal status in the GATT or WTO system since they have not been endorsed through decisions by the CONTRACTING PARTIES to GATT or WTO Members." Likewise, we agree that "a Panel could nevertheless find useful guidance in the reasoning of an unadopted Panel Report that it considered to be relevant."

III. *De Facto Stare Decisis* in *DSU* Era?

Just how persuaded is the WTO Appellate Body of its own reasoning in the *Japan Alcoholic Beverages* case?[263] The *Financial Times* aptly summarized the conventional

[263] For an analysis of how and why precedent operates in WTO adjudication, and the distinction between "*de facto*" and "*de jure*" *stare decisis*, see *The Stare Decisis Trilogy* by your *E-Textbook* author:

(1) *The Myth About Stare Decisis and International Trade Law (Part One of a Trilogy)*, 14 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 845-956 (1999) (lead article).

(2) *The Precedent Setters: De Facto Stare Decisis in WTO Adjudication (Part Two of a Trilogy)*, 9 FLORIDA STATE UNIVERSITY JOURNAL OF TRANSNATIONAL LAW AND POLICY 1-151 (Fall 1999) (lead article, publication of the Edward Ball Chair Distinguished Lecture, cited in *Corus Staal BV v. United States DOC*, 259 F. Supp. 2d 1253 (CIT 2003).

(3) *The Power of the Past: Towards De Jure Stare Decisis in WTO Adjudication (Part Three of a Trilogy)*, 33 GEORGE WASHINGTON INTERNATIONAL LAW REVIEW 873-978 (2001) (symposium on "Global Trade Issues in the New Millennium").

wisdom about precedent in the international legal system:

> …[M]ore and more of the work of trade relations has shifted away from negotiations and towards litigation and arbitration. To its defenders, this trend represents rule and reason constraining power politics. To its critics, it means runaway jurists subverting democracy.
>
> …
>
> Public International Law is based on the Roman civil law of continental Europe rather than the English common law tradition. Accordingly, although they [WTO Panels and the Appellate Body] take account of decisions in previous cases, rulings are not bound to follow precedent. There is considerable potential for Panels to interpret – critics would say make up – the law themselves, particularly under a new system such as the WTO, whose Panel[s] and the legal texts [save for GATT] it interprets date only from 1994.[264]

Yet, in actual practice, the extent of its reliance on prior cases is considerable. That fact is evident in many Appellate Body Reports, which – bluntly put – apply prior holdings on the same or similar issues in new cases involving different parties.

Consider the account of remarks by the former Director of the WTO Legal Affairs Division (Bruce Wilson), in summing up his eight-year tenure in that position:

> When asked if the increased time [it took for a WTO Panel proceeding, with a lengthening of three-to-four months in the period 2002–2007 vis-à-vis the 1995–2001 period] could be traced to the *growing body of law from previous cases* [as well as to the increased complexity of cases, more claims made per case, larger documentary records, and the problem of vetting experts, often from a pool of 60-80 candidates down to four-to-eight who are acceptable to both sides], Wilson said that the WTO does not operate on the principle of judicial precedent, *stare decisis*, *but on a de facto basis, the parties must take precedent into consideration or they will face reversals on appeals*.[265]

South African Judge David Unterhalter echoed this observation. In his January 2014 farewell address upon completing his tenure on the Appellate Body, he said a "palimpsest of legal regimes" was emerging thanks to an increasing number of decisions under multilateral, regional, and bilateral treaties, and investment arbitrations.[266]

Likewise, essentially responding to USTR Ambassador Robert Lighthizer, who

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264 Alan Beattie, *From a Trickle to a Flood – How Lawsuits Are Coming to Dictate the Terms of Trade*, FINANCIAL TIMES, 20 March 2007, at 11.

265 *Quoted in* Len Bracken, *WTO Dispute System at Record Level of Activity, Wilson Says, Predicts AB Surge*, 27 International Trade Reporter (BNA) 660 (6 May 2010).

266 *Quoted in* Daniel Pruzin, *Former WTO Judge Says Failure to Advance Trade Agenda Threatens to Fragment System*, 31 International Trade Reporter (BNA) 264 (6 February 2014).

alleged in meetings with WTO officials that Panels and the Appellate Body "sometimes go[] too far to the point of legislating, instead of finding outcomes for that particular dispute," the Appellate Body Chairman, India's Ujal Singh Bhatia, explained in June 2017:

> the allegations of "overreach" by the Appellate Body involve issues regarding the depth, as well as the breadth, of its analysis. We are well aware that Panels and the Appellate Body cannot add to or diminish the rights or obligations provided for in the covered agreements. As is also well known, the Appellate Body's mandate requires it to address all issues raised on appeal. Moreover, the Appellate Body has to bear in mind that, while adoption by the DSB makes its rulings binding on the parties to the dispute, *they also serve the purpose of providing guidance to other WTO Members, and thereby aid in avoiding future disputes*. *Dispute settlement practice demonstrates that WTO Members attach significance to the reasoning provided in previous Panel and Appellate Body Reports. Adopted Panel and Appellate Body Reports are almost always cited by parties in support of their legal arguments in dispute settlement proceedings, and are relied upon by Panels and the Appellate Body in subsequent disputes*. … [W]hen enacting or modifying laws and national regulations pertaining to international trade matters, *WTO Members take into account the legal interpretation of the covered agreements developed by Panels and the Appellate Body*.
>
> … [T]he clarifications of provisions of the covered agreements, as envisaged by Article 3:2 of the *DSU*, elucidate the scope and meaning of the provisions that are at issue in a dispute. They are an essential part of the mandate of the WTO dispute settlement system and the Appellate Body. *While the application of a provision may be regarded as confined to the context in which it takes place, the relevance of clarifications contained in adopted Panel and Appellate Body Reports is not limited to the application of a particular provision in a specific case*. As the *DSU* stipulates, the Appellate Body has to discharge this mandate "in accordance with the customary rules of interpretation of Public International Law." The Appellate Body is constantly aware of the need to ensure that each and every of its clarifications of WTO provisions meets this standard.[267]

A year later, Chairman Bhatia elaborated at length:

> Article 3:2 of the *DSU* envisages the WTO dispute settlement system to be "a central element in providing security and predictability to the multilateral trading system." Article 3:2 further provides that the system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in

[267] June 2017 Bhatia Speech, *supra*. Ambassador Lightihizer is quoted in Bryce Baschuk, *Boeing, Airbus Appeals May Face Delays After WTO Panelist Resigns*, 34 International Trade Reporter (BNA) 1078 (3 August 2017).

accordance with customary rules of interpretation of Public International Law." It adds for good measure that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."

It is against this backdrop that we need to reflect on the mandate that the WTO dispute settlement system enjoys. In this connection, I would like to offer a few comments and raise a few questions on two issues arising from recent debates:

(1) how the system should deal with ambiguity while clarifying the provisions of the WTO Agreements; and

(2) how it should address the issue of consistency of rulings in the context of the mandated need to provide security and predictability to the multilateral trading system.

Dealing with Ambiguity

First, a general comment on the issue of ambiguity in international agreements. While many provisions of international treaties are agreed upon in clear and detailed language, certain provisions may be couched in what international lawyers call "constructive ambiguity," where consensus on precise language could not be reached during negotiations. In the WTO context, when a dispute arises in relation to such an unclear or ambiguous provision, adjudicators are to examine that provision in accordance with customary rules of interpretation and to apply them to the particular case. Some argue that where adjudicators encounter such ambiguity or lack of clarity, they should refrain from examining it and instead leave it for WTO Members to deal with. Others support the need for resolving the interpretative issue so as to make sure that disputes are not left unresolved.

Second, existing treaty language that is vague or ambiguous is distinct from lacunae in international law, that is, where no international law obligation exists. For us, the "customary rules of interpretation of public international law" mean those codified in the *Vienna Convention on the Law of Treaties*. They say we must begin with the plain text of the treaty provision, but it does not end there. Adjudicators have to discern the "ordinary meaning" to be given to treaty terms in their context and in light of the object and purpose of the instrument in which they appear, and they may have recourse to supplementary means. This interpretative exercise is meant to "clarify," within the meaning of Article 3:2, the content, scope, and limits of treaty obligations even if they are somewhat unclear on the face of the text.

When adjudicators, having applied these interpretative tools, conclude that

certain conduct is outside the scope of application of the treaty obligation invoked, they should have no hesitation in ending their analysis there. If an issue is not regulated in WTO law, WTO Members are entitled to act as they please. For instance, the Appellate Body in *U.S. – Section 211 Appropriations Act* [WT/DS176/AB/R, ¶ 189 (adopted 1 February 2002)] noted the absence of explicit provisions and of an implicit definition of trademark "ownership" in the *TRIPs Agreement*. The Appellate Body agreed with the Panel that this definition "has been left to the legislative discretion of individual countries."

Third, the question arises whether there is a legal basis in the *DSU* for not deciding on claims, when the matter before the DSB would remain unresolved. Article 3:2 provides that the dispute settlement system serves to clarify WTO provisions in accordance with customary rules of interpretation. So how far should the dispute settlement system go in "clarifying" ambiguous provisions, and where are the limits? There appears to be a tension between the minimalistic approaches favored by some and the requirements under Article 11 of the *DSU* for Panels to make "an objective assessment of ... the applicability of and conformity with the relevant covered agreements" and under Article 17:2 for the Appellate Body to "address" each issue of law and legal interpretation covered in the Panel Report that is raised during an appellate proceeding.

When we sit in judgement of specific cases, these issues are not always easy to resolve. It is true that the requirement to "address each claim" does not necessarily mean that we need to do so at length. But do these *DSU* provisions provide WTO adjudicators with the discretion to deny clarifying WTO provisions where such clarification is necessary to resolve the dispute? Do they permit adjudicators to deny exercising jurisdiction to resolve the dispute when it has been properly established?

In this connection it is important to note that a decision not to fully address an issue could, in effect, be a decision in favor of one of the participants, possibly altering the rights and obligations of WTO Members.

There are also cases in which Members raise an issue on appeal concerning "legal interpretations developed by the Panel," as contemplated by Article 17:6, without challenging the ultimate conclusion that the Panel reached. In raising such issues, Members typically state that they are motivated by systemic concerns. Members may also be concerned about the effect that an interpretation by a Panel may have on how they implement a different finding against them. And thus, if left unclarified, an ambiguous or incorrect interpretation may affect the rights and obligations of a WTO Member. In each scenario, the Appellate Body carefully decides, on a case-by-case basis, how to "address" the issue raised on appeal, including whether findings concerning the interpretation of WTO provisions are necessary in

order to facilitate the prompt settlement and effective resolution of the specific dispute.

Consistency

The issue of consistency of rulings in WTO dispute settlement is closely connected to the mandated requirement for "security and predictability." As is well known, one reason for creating the Appellate Body was to provide greater guarantees to WTO Members that Panel Reports would be subject to review, in the context of the adoption of the reverse consensus principle. The Appellate Body has taken the view that ensuring "security and predictability" implies that, absent cogent reasons, an adjudicator will resolve the same legal question in the same way in a subsequent case. At the same time, it needs to be emphasized that the Appellate Body's approach does not call for a mechanistic or rigid application of this principle. Appellate Body interpretations of certain provisions have evolved over time, as evidenced by the number of AB Reports interpreting Article XX of the GATT. Each case has to be considered on its own merits, and cases or issues that appear to be similar may be decided differently when they can be distinguished from earlier cases or when factual scenarios are different.

It is possible that there could be other judicial approaches to "security and predictability" that could emerge from reasoned debate among WTO Members. The AB would consider them when raised by participants in a dispute. But surely it is no one's case that a tabula rasa approach, which consciously sweeps aside the past, could meet the requirements of "security and predictability" as outlined in the *DSU*. Those who are not enamoured of the need for "security and predictability" in the WTO need only to look at international investment arbitration, and the difficulties caused by the lack of consistency in first-instance arbitration rulings, as an immediate counterfactual of a system without a review mechanism for ensuring coherence and predictability.

Preserving the Legitimacy of the WTO's Dispute Settlement System

My point is that a dispute resolution mechanism acquires its legitimacy, or indeed its wisdom, not from the statute that established it, but from the way it continues to meet the changing needs of its users. The global trading system has changed enormously since the WTO's dispute settlement mechanism was designed and operationalised. The dynamics of global trading relationships have also evolved significantly. The rules and procedures of the system have clearly not kept pace with these developments. It is not for adjudicators to make law by their rulings. That is the job of WTO Members. But sustained inactivity on the legislative front puts more pressure on adjudicators, with attendant risks for the legitimacy of their rulings and their institutions.

> ...
> ***New Challenges to Multilateralism***
> ...
> I would like to conclude by stating the obvious – the institution of a standing body tasked with reviewing Panel decisions is widely considered as the crowning achievement of the Uruguay Round of negotiations. Impairing that achievement would deprive the WTO of ensuring the principled and consistent application of multilateral trade rules.[268]

Note the Chair's linkage of his points to the concept of legitimacy, and his observation that "legitimacy is a fragile virtue, and its longevity cannot be taken for granted."

The Chair is not alone in explaining why past decisions matter in dealing with ambiguity and providing consistency. American practitioners, too, have taken note of the importance of precedent, even from the perspective of the USTR:

> The U.S. has historically argued that … WTO rulings have only limited effect beyond the particular dispute being litigated. [That argument is based (*inter alia*) on *DSU* Article 3:2, and the exclamation of the Appellate Body in its 1996 *Japan Alcoholic Beverages* Report that adopted Panel Reports "create legitimate expectations among WTO Members, but are not binding "except with respect to resolving the particular dispute between the parties to that dispute."[269]] Recent U.S. litigation strategy, however, appears to rely on WTO rulings to attempt to induce systemic changes to the trade remedy procedures and practices of its trade partners.
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> Such trends are particularly visible in U.S. challenges to Chinese trade remedy measures. For instance, the U.S. brought three similar disputes against China under the WTO's *Anti-Dumping Agreement* … and *SCM Agreement* in close succession. Each of these disputes challenged aspects of China's trade remedy procedures and practices. There would appear to be some tension between the U.S. "systemic" approach in these recent cases and its historical position that DSB rulings have only limited effect beyond the specific dispute.[270]

Implicit in this passage is a key point about *stare decisis*: if that doctrine is understood as shackles to bind, leading to the ossification of a legal system, then it is misunderstood. In truth, *stare decisis* provides not only certainty and predictability in a legal regime, but also is a quiet engine for efficient evolution to ensure, in Aristotelian terms, fairness in the sense of treating like cases alike, and unlike cases differently.

Accordingly, in everyday practice, when dispensing advice to clients, drafting legal

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268 June 2018 Bhatia Speech.

269 WT/DS8/AB/R at 14.

270 Spencer Griffith, Alan Yanovich & Yujin McNamara, *The WTO Dispute Settlement System as a Forum for "Systemic" Changes?*, 31 International Trade Reporter (BNA) 1817 (9 October 2014).

memos, and writing briefs and other litigation submissions, international trade lawyers treat prior Appellate Body decisions with great care. Depending on the facts and arguments, those decisions are supporting or distinguishable precedents. The problem (discussed earlier) of work overload that Panels and the Appellate Body faces reinforces the need to rely on past decisional law:

> With the growing number of rulings issued by Panels and the Appellate Body, countries are increasingly citing the findings of these rulings in support of their arguments. This, in turn, means that Panels and the Appellate Body are having to closely scrutinize [*sic*] these earlier rulings to ensure consistency and coherence of WTO jurisprudence.[271]

Note that *stare decisis* is justified not only on grounds of justice (it is fair to treat like cases alike), but also efficiency (it is less time consuming and costly to re-litigate and re-decide the same issues over and over).

In sum, arguably, it is malpractice to neglect WTO case law, or not to treat it as, in fact, "law." Suppose, then, in a *de facto* sense, *stare decisis* operates in Appellate Body jurisprudence. How does that jurisprudence relate to the emerging body of opinions from dispute settlement tribunals under FTAs?

IV. February 2020 USTR Summary of Criticisms of Appellate Body

In February 2020, the USTR increased yet further the pressure on the WTO to make fundamental changes to the Appellate Body. Its 174-page *Report on the Appellate Body of the World Trade Organization* summarized all of the aforementioned criticisms. The underlying tone of the *Report* was that of an angry brief against the Appellate Body, and some other WTO Members. The USTR included neither contrasting views to its own nor constructive suggestions for reform. Consider, then, the internal consistency of the USTR's arguments against the Appellate Body. Does the USTR call upon the Appellate Body to do less, and sometimes more, with less time and resources than humanely possible? Consider, too, what the world trading system would look like without a *de facto* Supreme Court for GATT-WTO rules. The Melian Dialogue? (All of the substantive topics (*e.g.*, AD-CVD and safeguard law and NME rules) raised in the *Report* are dealt with in separate Chapters.)

OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, *REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION*, EXECUTIVE SUMMARY, 1-14 (FEBRUARY 2020)[272]

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271 *WTO Appellate Body Warns*.

272 *See* https://ustr.gov/about-us/policy-offices/press-office/press-releases/2020/february/ustr-issues-report-wto-appellate-body. (Footnotes omitted, minor formatting changes inserted, emphasis original.)

For an article that rejects criticism of the USTR for allegedly using hardball tactics to penalize the Appellate Body for adverse rulings, such as those in the AD zeroing disputes, and argues the Appellate Body has rendered several deeply disturbing rulings with egregious errors, suggesting it is judicially deficient, and has developed a *de facto* stare decisis doctrine that is even more rigid than its de jure form, and thus which overall tracks the arguments of the USTR, see Jorge Miranda & Manuel Sánchez-Miranda, *How the WTO*

The United States and other free-market nations established the … WTO in 1995 as a forum for negotiating and implementing trade agreements. The dispute settlement mechanism of the WTO was designed to help Members resolve trade disputes arising under those agreements, without adding to or diminishing the rights and obligations to which Members had agreed. When the WTO dispute settlement system functions according to the agreed rules, it provides a vital tool to enforce Members' WTO rights and obligations. For more than 20 years, however, the United States and other WTO Members have expressed serious concerns with the Appellate Body's disregard for those rules.

… [T]he Appellate Body has repeatedly failed to apply the rules of the WTO agreements in a manner that adheres to the text of those agreements, as negotiated and agreed by WTO Members. The Appellate Body has strayed far from the limited role that WTO Members assigned to it, ignoring the text of the WTO agreements. Through this persistent overreaching, the Appellate Body has increased its own power and seized from sovereign nations and other WTO Members authority that it was not provided. For example:

- The Appellate Body consistently ignores the mandatory deadline for deciding appeals;
- The Appellate Body allows individuals who have ceased to serve on the Appellate Body to continue deciding appeals as if their term had been extended by WTO Members in the Dispute Settlement Body;
- The Appellate Body has made findings on issues of fact, including issues of fact relating to WTO Members' domestic law, although Members authorized it to address only legal issues;
- The Appellate Body has issued advisory opinions and otherwise opined on issues not necessary to assist the WTO Dispute Settlement Body in resolving the dispute before it;
- The Appellate Body has insisted that dispute settlement panels treat prior Appellate Body interpretations as binding precedent;
- The Appellate Body has asserted that it may ignore WTO rules that explicitly mandate it recommend a WTO Member to bring a WTO-inconsistent measure into compliance with WTO rules; and
- The Appellate Body has overstepped its authority and opined on matters within the authority of WTO Members acting through the Ministerial Conference, General Council, and Dispute Settlement Body.

The Appellate Body's persistent overreaching has also taken away rights and imposed new obligations through erroneous interpretations of WTO agreements. The Appellate Body has attempted to fill in "gaps" in those agreements, reading into them rights or obligations to which the United States and other WTO Members never agreed. These errors have favored non-market economies at the expense of market economies, rendered trade remedy laws ineffective, and infringed on Members' legitimate policy space. For example:

Appellate Body Drove Itself into a Corner, JOURNAL OF INTERNATIONAL ECONOMIC LAW, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3596217.

- The Appellate Body's erroneous interpretation of the term "public body" threatens the ability of Members to counteract trade-distorting subsidies provided through SOEs, undermining the interests of all market-oriented actors;
- The Appellate Body has intruded on Members' legitimate policy space by essentially converting a non-discrimination obligation for regulations into a "detrimental impact" test;
- The Appellate Body has prevented WTO Members from fully addressing injurious dumping by prohibiting a common-sense method of calculating the extent of dumping that is injuring a domestic industry ("zeroing");
- The Appellate Body's stringent and unrealistic test for using out-of-country benchmarks to measure subsidies has weakened the effectiveness of trade remedy laws in addressing distortions caused by state-owned enterprises in non-market economies;
- The Appellate Body's creation of an "unforeseen developments" test and severe causation analysis prevents the effective use of safeguards by WTO Members to protect their industries from import surges; and
- The Appellate Body has limited WTO Members' ability to impose countervailing duties and antidumping duties calculated using a non-market economy methodology to address simultaneous dumping and trade-distorting subsidization by non-market economies like China.

For many years, successive Administrations and the U.S. Congress have voiced significant concerns about the Appellate Body's disregard for the rules agreed to by WTO Members. …
Unfortunately, U.S. efforts were ignored, and the problem has worsened as too many WTO Members remain unwilling to do anything to rein in this conduct. The proper functioning of the WTO Appellate Body has a disproportionate impact on the United States because more than one quarter of all disputes at the WTO have been challenges to U.S. laws or other measures. Specifically, 155 disputes have been filed against the United States, and no other Member has faced even a hundred disputes. … [U]p to approximately 90 percent of the disputes pursued against the U.S. have led to a report finding that the U.S. law or other measure was inconsistent with WTO agreements. This means that, on average, over the past 25 years, the WTO has found a U.S. law or measure WTO-inconsistent between five and six times per year, every year.

But these failings have dire consequences for U.S. interests in the WTO, and for all WTO Members, as well. The negotiating function of the WTO has atrophied as the Appellate Body has facilitated efforts by some Members to obtain through litigation what they have not achieved through negotiation; the effectiveness of WTO tools designed to address distortions by nonmarket economies has been greatly diminished; and the WTO dispute settlement system continues to lose the credibility necessary to maintain public support for the system.

In short, the Appellate Body's failure to follow the agreed rules has undermined not only WTO dispute settlement, but the effectiveness and functioning of the WTO more generally. Furthermore, by encouraging behavior that distorts markets, the Appellate Body has helped

to make the global economy less efficient. Lasting and effective reform of the WTO dispute settlement system requires all WTO Members to come to terms with the failings of the Appellate Body.

Background

To appreciate the degree to which the Appellate Body has strayed from the agreed upon rules, it is necessary to consider the context in which it was created. The WTO was established as a forum for Member governments to address issues affecting their international trade relations and to monitor the implementation of the trade agreements negotiated during the Uruguay Round trade negotiations. WTO Members agreed that the WTO would also function as a forum for further negotiations among WTO Members and serve as a framework for the implementation of the results of such negotiations.

To ensure that the United States enjoyed the full benefits it bargained for in the Uruguay Round negotiations, the United States insisted on the inclusion of a fair and effective mechanism to settle trade disputes arising under the WTO agreements. The WTO dispute settlement mechanism as agreed by WTO Members is reflected in the … *DSU*, which is itself one of the WTO agreements. The United States and other WTO Members agreed that the aim of the WTO dispute settlement system would be the prompt resolution of trade disputes; the particular processes for achieving this aim were set out in the *Dispute Settlement Understanding*.

WTO Members also established the Dispute Settlement Body, consisting of the representatives of the entire WTO membership, to administer the WTO dispute settlement system in accordance with the *Dispute Settlement Understanding*. The Dispute Settlement Body was empowered by WTO Members to establish dispute settlement panels, adopt panel and Appellate Body Reports, oversee the implementation of adopted recommendations, and to authorize the suspension of concessions under the covered agreements.

The *Dispute Settlement Understanding* reflects WTO Members' agreement on the limited roles assigned to dispute settlement panels and the Appellate Body within that system. It provides that a Panel's function is to assist the Dispute Settlement Body in discharging its responsibilities. WTO Members agreed that panels would be limited to making only those factual and legal findings that would assist the Dispute Settlement Body in making a recommendation for a WTO Member to bring a WTO-inconsistent measure into conformity with that Member's WTO obligations.

The United States and other WTO Members also agreed to the creation of an Appellate Body, comprised of seven individuals, selected by the Members, to hear cases in three-member panels. The WTO provided a specific and limited role to the Appellate Body: the expeditious review of a dispute settlement panel's legal findings and to "uphold, modify, or reverse the legal findings and conclusions of the Panel." WTO Members agreed to a number of explicit limitations in the *Dispute Settlement Understanding* aimed at preventing the Appellate Body from exceeding this limited authority.

… [D]espite the rules set by WTO Members, the Appellate Body has ignored these constraints and has exceeded its limited role, thereby transferring authority over important issues of international trade from WTO Members to themselves.

Ultra Vires Actions and Failure to Follow WTO Rules

The Appellate Body has exceeded its authority and breached the limitations explicitly agreed and imposed by WTO Members. Individuals on the Appellate Body have repeatedly attempted to assume for themselves authority not granted to them by WTO Members – and certain WTO Members have allowed or even encouraged them to do so – thereby adding to Members' obligations, diminishing their rights, and ultimately undermining the WTO's authority and effectiveness.

1. Contrary to the principle of prompt settlement of disputes, the Appellate Body has consistently breached the mandatory deadline for the completion of appeals. The prompt settlement of disputes is a cornerstone of WTO dispute settlement. In Article 3 of the *Dispute Settlement Understanding*, WTO Members agreed that the prompt settlement of disputes "is essential to the effective functioning of the WTO and the maintenance of a proper balance between rights and obligations." This principle of prompt settlement is also enshrined in numerous other provisions of the *Dispute Settlement Understanding*, including in Article 17:5, which limits the length of appellate proceedings.

The text of Article 17:5 is clear in its mandatory requirement that the Appellate Body complete appeals "as a general rule" within 60 days, and that "[i]n no case shall the proceedings exceed 90 days." The 90-day limit is categorical and without exception, and Article 17:5 therefore does not accord discretion to the Appellate Body to issue reports beyond the 90-day deadline. Since 2011, however, the Appellate Body has routinely violated Article 17:5 and ignored the deadline mandated by WTO Members, and it has done so without even consulting the parties to an appeal. This conduct has grown worse over time, with some appeals taking more than one year to complete.

The blatant violation of this clear, mandatory rule by the Appellate Body diminishes the rights of Members and undermines their confidence in the WTO's rules-based trading system. Unfair trade practices continue during the pendency of disputes, which now typically take several years to resolve. This delay is particularly harmful for a system like the WTO where the remedy is prospective only. The increasing delays in appeals lessen the benefit of the dispute settlement system for a complainant and decrease the deterrent effect for Members who do not respect their WTO obligations.

The Appellate Body's failure to comply with Article 17:5 leads to further systemic problems. For example, a short deadline for appeals encourages the Appellate Body to address only the issues presented and discourages overreaching. By not considering itself bound by any deadline, the Appellate Body has freed itself to address issues not necessary to resolve a dispute, resulting in impermissible advisory opinions. Indeed, long-delayed Appellate Body reports that address issues not necessary to assist the Dispute Settlement

Body in resolving a dispute have been cited in subsequent disputes brought against the United States and other Members, including disputes challenging the imposition of antidumping and countervailing duties legitimately imposed to address dumped or subsidized imports that injure a Member's domestic industry. Thus, the Appellate Body's breach of this rule raises substantive, and not just procedural problems for Members.

2. Contrary to WTO rules, the Appellate Body has unilaterally declared that it has the authority to allow individuals formerly serving on the Appellate Body, whose terms have expired, to continue to participate in and decide appeals. Although the Appellate Body has inserted a provision in its Working Procedures ("Rule 15") that purportedly authorizes this conduct, the WTO rules agreed to by WTO Members do not give the Appellate Body any such authority. Rather, the *Dispute Settlement Understanding* is clear that only WTO Members, sitting as the Dispute Settlement Body, have the authority to appoint individuals to serve on the Appellate Body. The *Dispute Settlement Understanding* is also clear that an individual may be appointed by the Dispute Settlement Body to serve on the Appellate Body for a maximum of two, four-year terms. The Appellate Body acts contrary to this agreement text by arrogating to itself the authority to "deem" former Appellate Body Members as continuing Appellate Body Members for the purpose of issuing reports in appeals that began before their terms expired.

Through the Appellate Body's breach of the *Dispute Settlement Understanding*, persons formerly serving on the Appellate Body have continued to participate in appeals for more than a year after their terms have expired. These individuals continue to be paid hundreds of thousands of dollars, without any authorization by WTO Members, to continue working on an appeal long after the term set by WTO Members has ended. This practice presents a clear conflict of interest: a former Appellate Body member can continue to receive a monthly stipend and a daily fee (in addition to food and lodging) after his or her official term as set by WTO Members has ended, but only for so long as one of his or her appeals remains unresolved.

3. The Appellate Body has exceeded its limited authority to review legal issues by reviewing panel findings of fact, including factual findings relating to the meaning of WTO Members' domestic law. The *Dispute Settlement Understanding* provides that a function of panels is to make an objective assessment of the facts of a case and the relevant WTO law. By contrast, Article 17:6 of the *Dispute Settlement Understanding*, which applies to the Appellate Body, provides that appeals "shall be limited to issues of law covered in the panel report and legal interpretations developed by the Panel." Thus, WTO Members decided that panels would make factual findings and legal conclusions, but the Appellate Body would be limited to the latter.

In violation of this limitation, and contrary to Article 17:6, the Appellate Body routinely reviews panel findings of fact. The Appellate Body has also reviewed the meaning of a Member's domestic law *de novo* as a legal issue, even though WTO Members have agreed the meaning of domestic law is an issue of fact not subject to appellate review. The Appellate Body's flouting of Article 17.6 has adverse consequences for the WTO dispute settlement system and for Members. It demonstrates again the Appellate Body's disregard

for WTO rules and its attempt to expand its authority and scope of review. Second-guessing panel fact-finding also adds to the length and complexity of appeals.

More fundamentally, Members simply have not authorized the Appellate Body to make "definitive" interpretations of a Member's laws. The Appellate Body's violation of the WTO rules in this regard could subject WTO Members to incorrect fact-finding by a body not authorized or even equipped to find facts at all, and in a context where the parties to a dispute are unable to submit new factual evidence. Indeed, Appellate Body reports misinterpreting U.S. domestic law (as well as the laws of other WTO Members) have resulted in erroneous WTO findings that pressure the United States and other WTO Members to repeal or modify their laws unnecessarily.

4. The Appellate Body has overstepped its role under the Dispute Settlement Understanding by rendering advisory opinions on issues not necessary to assist the Dispute Settlement Body in resolving a dispute. Issuing advisory opinions is contrary to the purpose of the dispute settlement system, which the *Dispute Settlement Understanding* defines as "to secure a positive solution to a dispute." Through the issuance of advisory opinions, the Appellate Body has attempted to produce interpretations or "make law" in the abstract. The Appellate Body's proper role, in reviewing an appeal of a Panel Report, is limited to making only those legal determinations that would assist the Dispute Settlement Body in making a recommendation to a Member to bring a WTO-inconsistent measure into conformity with WTO rules, in order to help resolve the dispute between the parties. Neither the United States nor any other WTO Member has agreed to allow the Appellate Body to resolve abstract questions or make law.

The issuance of advisory opinions is another example of the Appellate Body's disregard for WTO rules intended to limit its role. The time and resources devoted to drafting advisory opinions contributes to delays in the appeals process, allowing WTO-inconsistent measures to persist and further delaying the ability of WTO Members to enforce their rights under the WTO Agreements. Advisory opinions can affect the rights of WTO Members without giving them an opportunity to participate in the proceeding, especially if those advisory opinions are then (impermissibly) treated as binding "precedent."

5. The Appellate Body wrongly claims that its reports are entitled to be treated as binding precedent and must be followed by panels, absent "cogent reasons." Fundamental to the decision of a WTO Member to join the WTO is the commitment that the dispute settlement process, including panels and the Appellate Body, "cannot add to or diminish the rights and obligations provided" in the WTO agreements. Rather, the WTO agreements reserve for WTO Members, through the Ministerial Conference and General Council, the "exclusive authority to adopt interpretations" of these agreements. Despite this clear text, the Appellate Body has asserted that to ensure "security and predictability," dispute settlement panels must treat prior legal interpretations in Appellate Body reports as binding precedent, absent undefined "cogent reasons" for departing from them. The term "cogent reasons" appears in no WTO agreement; nor does any requirement that panels follow Appellate Body interpretations.

Allowing the Appellate Body to create binding precedent has profound implications for the WTO system and the rights of WTO Members. Panels and the Appellate Body increasingly resolve disputes not by reference to the carefully negotiated and agreed-upon texts, but by reference to interpretations found in prior Appellate Body reports. As such, WTO Members are increasingly constrained by prior Appellate Body reports, including reports in disputes in which they did not even participate. This practice leaves a WTO Member stuck with an erroneous interpretation of a WTO agreement, having had no opportunity to present arguments on the correct interpretation.

The Appellate Body's insistence that panels follow its reports as binding precedent also has entrenched incorrect legal interpretations that contradict the text of the WTO agreements and intention of the parties. In effect, this approach changes WTO Members' rights and obligations without their consent, with potentially important implications for WTO Members' economies.

Moreover, allowing the Appellate Body to create precedent takes away the incentive for Members to negotiate new trade agreements. Some Members seek to obtain through a "binding" Appellate Body interpretation what they could not achieve through negotiation; others may have no desire to negotiate new agreements without confidence that WTO adjudicators will respect what has actually been agreed to.

6. The Appellate Body has asserted that it may ignore the text of the Dispute Settlement Understanding explicitly mandating it recommend a WTO Member to bring a WTO inconsistent measure into compliance with WTO rules. The *Dispute Settlement Understanding* states categorically that "[w]here a panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement." Despite this unambiguous text, the Appellate Body has simply declared it has the authority to ignore this rule if it considers a recommendation unnecessary. For example, in *China – Raw Materials* (AB), the Appellate Body stated that: "In general, in cases where the measure at issue consists of a law or regulation that has been repealed during the Panel proceedings, it would seem there would be no need for a Panel to make a recommendation in order to resolve the dispute." But no such exception is provided for in the *Dispute Settlement Understanding*, and no such authority has been given to the Appellate Body.

The Appellate Body's finding of "discretion" for panels or the Appellate Body to disregard the mandatory text agreed to by WTO Members is another example of the Appellate Body overreaching, and by overstepping its authority the Appellate Body creates negative systemic consequences. The failure to make the recommendation mandated by the *Dispute Settlement Understanding* may leave a complaining WTO Member with no further recourse in a proceeding, as that recommendation is necessary to initiate subsequent compliance proceedings or request authorization from the Dispute Settlement Body to take countermeasures. The Appellate Body's breach also could encourage gamesmanship by WTO Members – withdrawing a measure during a proceeding to avoid a recommendation and later reinstituting it – and thereby preventing WTO Members from using WTO rules effectively to resolve a dispute. WTO Members may also be forced to bring unnecessary,

additional disputes in an attempt to obtain the recommendation to which they have a right under the *Dispute Settlement Understanding*.

7. The Appellate Body has overstepped its authority and opined on matters within the authority of other WTO bodies, including the Ministerial Conference, the General Council, and the Dispute Settlement Body. Appellate Body overreaching has extended to WTO institutional issues too, contrary to the limited role Members assigned to the Appellate Body. Whereas an Appellate Body panel is comprised of three unelected and unaccountable persons, the Dispute Settlement Body, General Council, and Ministerial Conference are comprised of all WTO Members. Members limited the role of the Appellate Body to helping determine if a WTO Member's measure is inconsistent with WTO rules so that the Dispute Settlement Body can make a recommendation to a Member to bring a WTO-inconsistent measure into conformity with WTO rules.

The Appellate Body has exceeded this limited role by seeking to direct how other WTO bodies should perform their responsibilities under the WTO agreements. For example, the Appellate Body has attempted to dictate how the Dispute Settlement Body is to administer its responsibilities under Annex V of the *Subsidies Agreement*. The Appellate Body has inappropriately expressed its views on the procedure to be followed by the Dispute Settlement Body to adopt a particular Report. The Appellate Body also has intruded on the authority of the Dispute Settlement Body on the appointment of Appellate Body members. Exacerbating this problem, on occasions where the Appellate Body has opined on matters within the authority of other WTO bodies, it has made a number of legal errors and ignored the text of the provisions agreed to by WTO Members.

By opining on matters within the authority of other WTO bodies, the Appellate Body exhibits disregard for WTO Members acting through those WTO bodies and its disregard for the limits WTO Members assigned to it in the *Dispute Settlement Understanding*. Any disagreement among WTO Members on how the Dispute Settlement Body or any other WTO body should carry out its functions must be resolved by WTO Members acting in those other bodies, and it is not a matter for the Appellate Body to decide. Appellate Body interference can also lead to confusion, legal uncertainty, and contradictory positions between other WTO bodies and the Appellate Body.

Erroneous Interpretations of WTO Agreements

The Appellate Body's failure to respect the role assigned to it by WTO Members is only the beginning of U.S. concerns. In several issues of great importance to the United States and other Members, the Appellate Body has overreached on substantive issues, engaged in impermissible gap-filling, and read into the WTO agreements rules that are simply not there. Thus, the Appellate Body has repeatedly taken an approach that expands its own authority while adding to or diminishing the rights and obligations of WTO Members, something that WTO Members expressly prohibited it from doing.

The Appellate Body's erroneous findings have harmed WTO Members, and in particular have prejudiced the ability of market economy countries to take measures to address

economic distortions caused by non-market economies. The following examples … are illustrative, not exhaustive.

1. The Appellate Body's erroneous interpretation of "public body" favors non-market economies providing subsidies through state-owned enterprises over market economies. The WTO agreements discipline certain subsidies provided "by a government or any public body," but the Appellate Body has effectively collapsed the two terms. The Appellate Body adopted an erroneous interpretation of "public body" so that an entity will not be deemed a public body unless it possesses, exercises or is vested with governmental authority. That requirement is not found in the agreed text; nor is it consistent with the ordinary meaning of the term "public body."

As noted by a dissenting opinion in a recent appellate report, a definition more consistent with what Members agreed in the WTO agreements would entail an entity constituting a public body "when the government has the ability to control that entity and/or its conduct to convey financial value."

The narrow interpretation of public body fails to capture a potentially vast number of government-controlled entities, such … SOEs, that are owned or controlled by foreign governments, and therefore undermines the ability of Members to effectively counteract subsidies that are injuring their workers and businesses. The WTO was created by and for market economies, but the Appellate Body's public body interpretation undermines WTO subsidy rules and favors non-market economies operating through SOEs at the expense of market economies. The Appellate Body's interpretation has also given rise to confusion among WTO panels and WTO Members, leading to additional disputes.

2. The Appellate Body has undermined WTO Members' legitimate regulatory space by essentially converting non-discrimination obligations into a "detrimental impact" test. One of the key principles of the WTO agreements is the requirement that Members not discriminate against trade from other Members. This fundamental principle, reflected in the national treatment and most-favored nation obligations, was not intended to prevent Members from pursuing their legitimate policy objectives. The Appellate Body, however, has found a measure to be discriminatory (and therefore not consistent with WTO rules) based solely on evidence that the measure may impact imports from one country more than imports from another country.

Converting a non-discrimination inquiry into a detrimental impact test renders almost any origin neutral measure vulnerable to challenge in WTO dispute settlement. Under the Appellate Body's approach, any difference in the measure's market impact (such as a producer's financial situation or its choice of production method), no matter how unrelated to discrimination based on origin, could result in a WTO breach. WTO Members did not agree to refrain from taking otherwise legitimate measures simply because the measures could affect trade unevenly across the Membership of the WTO.

The Appellate Body's detrimental impact approach improperly intrudes on Members' regulatory space. It is much more difficult for a nation to pursue legitimate public policy

measures under the legal standard the Appellate Body has invented than under the standards to which Members actually agreed. In addition, the Appellate Body's approach would have WTO adjudicators second-guess Members' legislatures and serve as the ultimate arbiters of a range of important legislative questions. This is not a role that WTO Members assigned to the Appellate Body, and the Appellate Body is not equipped to conduct such an inquiry, or second-guess the myriad public policy decisions embedded in domestic regulations.

3. The Appellate Body's prohibition of "zeroing" to determine margins of dumping has diminished the ability of WTO Members to address injurious dumped imports. The WTO *Antidumping Agreement* provides that WTO Members may counteract injurious dumping by foreign producers and exporters by imposing duties up to the amount by which the "normal value" of a product (often its home market price) exceeds its "export price." In making this calculation, the United States and other WTO Members typically focus on those transactions in which dumping occurs (*i.e.*, only those transactions in which the normal value is higher than the export price). This approach has been described as "zeroing," because it assigns zero weight to non-dumped transactions (*i.e.*, where the Export Price exceeds the Normal Value).

This is a common-sense approach, and it is clear from the text of the *Antidumping Agreement*, its negotiating history, and the behavior of WTO Members, that WTO Members never agreed to prohibit zeroing. Despite this, the Appellate Body has created and continuously expanded a prohibition on zeroing, imposing an obligation on Members to calculate dumping by including non-dumped transactions, artificially reducing the margin of dumping. This prohibition has no basis in the text of the GATT 1994 or *Antidumping Agreement*. Further, the Appellate Body's reasoning in finding this prohibition has been shifting and inconsistent, and the Appellate Body has ignored that the Antidumping Agreement explicitly requires WTO adjudicators to determine whether a Member's interpretation is permissible, not whether the Appellate Body views that interpretation as the best interpretation. In fact, several provisions in the *Antidumping Agreement* were deliberately drafted to accommodate a variety of methodologies, but the Appellate Body's erroneous interpretative approach fails to recognize this.

In so doing, the Appellate Body has diminished the ability of WTO Members to address injurious dumping. Under the rules imposed by the Appellate Body, the determination of the amount of dumping will not be the true amount; the amount of antidumping duties that a WTO Member may collect necessarily would be lower than the accurate margin of dumping. By artificially reducing the margin of dumping, the Appellate Body's approach leads to antidumping duties being insufficient to offset the dumping that actually is taking place. As a result, workers and industries that are suffering or threatened with material injury due to dumped imports are unable to obtain the relief they are entitled to.

4. The Appellate Body's flawed test for using out-of-country benchmarks weakens the ability of WTO Members to address trade distorting subsidies, particularly those in nonmarket economies. The WTO *Subsidies Agreement* was agreed to by WTO Members to provide substantive and procedural rules aimed at effectively addressing the problems

faced by companies confronting subsidized competition anywhere in the world, while enabling Members to retain strong and effective legal remedies against subsidized imports that injure domestic industries.

To measure the subsidy when a government provides a good, the *Subsidies Agreement* contemplates the use of market-determined prices for an appropriate benchmark, and permits Members to use out-of-country prices as the benchmark where market-determined prices are not found within the subsidizing country. This could be the case, for example, where government intervention has distorted a market. The Appellate Body, however, has imposed an obligation on Members to consider government prices in establishing a benchmark, unless those prices are shown to be non-market prices. The Appellate Body has also effectively read the *Subsidies Agreement* as imposing an obligation on investigating authorities to justify recourse to out-of-country benchmarks through a quantitative analysis of in-country prices themselves, regardless of whether those prices have already been found by the investigating authority to be distorted.

By raising the bar higher and higher, beyond what Members agreed in the *Subsidies Agreement*, the Appellate Body has established a standard for measuring subsidies that may be impossible to meet. This is especially true when confronting subsidies in an economy dominated by state-owned enterprises; the greater the extent of government economic distortion, the harder it is to find a market-determined price. An impossible to meet standard favors non-market economies at the expense of market economies and makes it more difficult for WTO Members to counteract subsidies that are harming their workers and businesses.

5. The Appellate Body has radically diminished the right of WTO Members to impose safeguard measures. Safeguard measures provide a crucial means for WTO Members to protect their industries from import surges (including surges that would destroy domestic industry). WTO Members specifically reserved for themselves the right to impose such measures and established rules for the application of such measures in the WTO *Safeguards Agreement*. The Appellate Body, however, has dictated that prior to taking a safeguard action, a Member's competent authority must include in its report a demonstration of the existence of "unforeseen developments," despite the absence of any such requirement in the GATT 1994 and the *Safeguards Agreement*.

Through the imposition of these new obligations, the Appellate Body has rendered legitimate safeguard measures more difficult to defend. Requiring a demonstration of unforeseen developments before application of a safeguard measure essentially reverses the normal burden of proof. It requires the WTO Member maintaining a safeguard measure to bear the burden of demonstrating the existence of unforeseen developments before another WTO Member even challenges the safeguard measure.

The Appellate Body has also departed from the WTO agreements by creating a high threshold for serious injury determinations under the *Safeguards Agreement*. In particular, the Appellate Body has imposed on WTO Members an affirmative obligation to analyze not only the factors other than imports that are causing injury, but also to identify their

"extent," and then "separate and distinguish" the effects of those other factors from the effects of increased imports. The Appellate Body could even be understood as suggesting that the extent of injury from other factors should be mathematically ascertained so as to precisely separate and distinguish the injury. Such an approach would all but eliminate the rights of WTO Members to take safeguard actions.

6. The Appellate Body's erroneous interpretation of the Subsidies Agreement has limited the ability of WTO Members to simultaneously address dumped and subsidized imports from non-market economies like China. The WTO agreements and their predecessors have always recognized that the dumping and subsidization of imports, where they cause injury, are distinct unfair trade practices, to which WTO Members are entitled to apply separate remedies. No provision of the *Antidumping Agreement* or *Subsidies Agreement* restricts a WTO Member's ability to apply antidumping duties, including duties calculated using a non-market economy (NME) methodology, and countervailing duties concurrently. Rather, each agreement disciplines a different remedy, and neither agreement conditions or limits the ability of a Member to apply a countervailing duty on whether or not the antidumping duty is calculated using an NME approach.

The Appellate Body, based on an erroneous interpretation of the *Subsidies Agreement*, has invented an obligation to investigate and not to impose what it terms "double remedies" through the concurrent application of countervailing duties and antidumping duties calculated using an NME methodology. The Appellate Body's interpretation imposes significant administrative burdens on Members' trade remedy administrators in the situation of concurrent application of countervailing duties and NME antidumping duties. The difficulties associated with the Appellate Body's approach are significant and raise serious questions about the ability of WTO Members to address trade-distorting subsidies by non-market economies.

Consequences of Appellate Body Errors and Overreach

The Appellate Body's rule breaking and overreach have severely weakened the WTO dispute settlement system – and the WTO more generally – in numerous ways. The Appellate Body's failure to respect the *Dispute Settlement Understanding* has led to appeals taking significantly longer, moving the WTO dispute settlement system further away from its aim of resolving disputes. As a result, WTO Members are unable to effectively enforce the benefits of the WTO agreements for which they negotiated. Also, the high rate at which the Appellate Body reverses or modifies panel findings has increased the likelihood of appeals and made parties less willing to resolve disputes early in the process.

The Appellate Body's failure to follow the agreed rules has also diminished the ability of the WTO to serve as a forum for WTO Members to negotiate new trade agreements. The Appellate Body's persistent overreaching has encouraged some WTO Members to seek to gain through litigation what they have not achieved through negotiation; other Members may be reluctant to undertake new commitments without confidence that the Appellate Body will respect what is agreed. Moreover, by imposing on Members new obligations in

the area of trade remedies that Members never agreed to, the Appellate Body has weakened the ability of WTO Members to use the tools they negotiated for to counter injurious imports.

The Appellate Body's failure to follow agreed rules has affected U.S. trade efforts in particular. The Appellate Body's erroneous findings have hampered U.S. efforts to ensure U.S. businesses compete with state-owned enterprises on a level playing field. Appellate reports have also declared numerous U.S. laws and regulations to be WTO-inconsistent, rendering policy choices made by U.S. elected officials increasingly subject to second-guessing by a trio of unaccountable individuals sitting in Geneva.

U.S. concerns with the functioning of the Appellate Body are longstanding and shared. The United States has raised systemic concerns about the functioning of the Appellate Body for more than 20 years. These concerns are bipartisan and shared by both the Legislative Branch and the Executive Branch. Democrats and Republicans, Members of Congress and Members of the Administration, have all expressed concerns about Appellate Body overreach. …

Other WTO Members are also troubled by the failure of the Appellate Body to follow WTO rules and limit itself to its role. A number of WTO Members have stated in meetings of the Dispute Settlement Body and the General Council that they share many of the concerns expressed by the United States. …

Despite the consensus among U.S. lawmakers and Administrations, and a growing number of WTO Members, the United States has been stymied in its efforts to have the Appellate Body respect the limited role that the United States and other WTO Members assigned to it. And, unfortunately, several major users of the WTO dispute settlement system seem unwilling even to admit there is a problem.

* * *

Although the failings of the Appellate Body are disappointing, they are not altogether surprising. Indeed, not long after the creation of the Appellate Body a group of former Directors General of the GATT and WTO expressed concerns that seem prescient today:

> Our concern is that the dispute settlement system is being used as a means of filling out gaps in the WTO system; first, where rules and disciplines have not been put in place by its member governments or, second, are the subject of differences of interpretation. In other words, there is an excessive resort to litigation as a substitute for negotiation. This trend is dangerous in itself. The obligations which WTO members assume are properly for the member governments themselves to negotiate. The issue is still more concerning given certain public perceptions that the process of dispute settlement in the WTO is over-secret and over-powerful.[2]

[2] Arthur Dunkel, Peter Sutherland, and Renato Ruggiero, Joint Statement on the Multilateral Trading System, (February 1, 2001)

(available at www.wto.org/english/newse/news01e/jointstatdavosjan01e.htm); see also Peter Sutherland, Is Free Trade Fair? (2000) ("There are many gaps and ambiguities in the WTO rules. These frequently mask points of disagreement in the negotiations where "creative ambiguity" was the alternative to deadlock. In interpreting the rules, dispute panels should resist the temptation to substitute their insight for lack of precision in the text. They should not arrogate the rule-making responsibility which belongs to the member states.").]

The conduct that concerned these WTO officials back in 2001 has worsened several-fold over the last 19 years, due primarily to the failure of the WTO Membership to act and to rein in the Appellate Body. Recently, some WTO Members have made proposals purportedly in response to these concerns and other concerns expressed by the United States. But there has been little dialogue about the causes of the Appellate Body's failings. Band-aid solutions will not work; Members must grapple with the underlying problems. It would be futile to agree to new rules – rules that could, themselves, be undermined by adjudicatory overreach – until there is clear understanding on why the original rules failed to constrain the Appellate Body.

Honest and candid dialogue about how and why the WTO arrived at the current situation is necessary if any reform is to be meaningful and long lasting. This will require WTO Members to engage in a deeper discussion of why the Appellate Body has felt free to depart from the role Members assigned to it. Without this understanding, there is no reason to believe that simply adopting new or additional text, in whatever form, will solve these endemic problems.

If the WTO dispute settlement system is to remain viable, it must be returned to the role WTO Members assigned to it in the WTO agreements – to assist WTO Members in the resolution of trade disputes by applying the WTO agreements as written.

V. Reform Options

So, what were the options to rectify this "catastrophe"? The Trump Administration did not suggested any, other than renegotiating trade deals (under threat of withdrawal), but among those discussed in and outside of Geneva were:

(1) Majority voting for the appointment of Appellate Body members.

(2) A change in the *Working Procedures* whereby the Appellate Body would accept no new appeals until its ranks were restored to full strength, would dispose of appeals automatically upon their filing and allow Panel Reports to be adopted as final.

(3) Greater reliance on WTO bilateral arbitration as a means of appeal, in lieu of a full-blown, litigation-style appeal. *DSU* Article 25 allows disputing

Members to use a so-called "appeal-arbitration" process, but of course requires both complainant and respondent to agree.[273]

On the one hand, America in either role might abjure: "while Article 25 of the *DSU* is available to all WTO Members, such agreed *interim appeal arbitration arrangements* only concern those WTO Members that agreed to them."[274] On the other hand, several other Members might. For instance, Canada, EU, and Norway declared they "would [if need be] create an alternate arbitration process that would continue the 'essential principles and features' of the Appellate Body with a Panel of former Appellate Body members."[275] Indeed:

> On 21 October 2019, the EU and Norway notified to the … WTO their *interim* appeal arbitration arrangement, which is supposed to provide for an "*effective and binding dispute settlement for any potential trade disputes that might oppose them under the WTO law, in case the existing WTO Appellate Body stops being operational*."
>
> …
>
> Under the *interim appeal arbitration*, the EU mutually agreed with Canada and Norway to pursue arbitration under Article 25 of the *DSU* regarding the appeal of any final Panel Report that might result from a current or future WTO dispute. According to the agreed procedure, the *interim appeal arbitration may* only be initiated in the event that the Appellate Body is not able to hear an appeal. The *interim appeal arbitration* does not affect the panel stage of the dispute settlement, it only intends to substitute the WTO appeal stage until the Appellate Body is again composed of sufficient members to hear appeals. Under the agreed *interim appeal arbitration* procedures, after the issuance of the Panel Report to the parties, "*but no later than 10 days prior to the anticipated date of circulation of the final panel report to the rest of the membership, any party may request that the Panel suspend the panel proceedings with a view to initiating the arbitration*."
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> Following the suspension of the Panel proceedings, the arbitration must be initiated by filling a *Notice of Appeal* with the WTO Secretariat that must include the final

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[273] *DSU* Article 25(1) provides that *[e]xpeditious arbitration within the WTO as an alternative means of dispute settlement can facilitate the solution of certain disputes that concern issues that are clearly defined by both parties*."

[274] FratiniVergano European Lawyers, *The EU Takes Measures to Prepare for the WTO Appellate Body's Likely Paralysis by the End of the Year*, TRADE PERSPECTIVES, Issue Number 20 (1 November 2019), www.fratinivergano.eu/en/issue-number-20-1-november-2019/. [Hereinafter, *The EU Takes Measures*.]

[275] *U.S. Raises Prospect*.

> Panel report. The arbitrators must be three people, which will be selected by the WTO's Director General within 10 days from the filing of the *Notice of Appeal* from the pool of available former members of the Appellate Body. The selection process will be based on "*the same principles and methods that apply to constitute a division of the Appellate Body under Article 17:1 of the DSU and Rule 6(2) of the Working Procedures for Appellate Review*." However, two nationals of the same WTO Member may not serve on the same case. The agreed procedures for the *interim appeal arbitration* state that an appeal must be limited "*to issues of law covered by the Panel Report and legal interpretations developed by the Panel*." Arbitrators can uphold, modify, or reverse the legal findings and conclusions of the panel. Additionally, the findings of the panel that have not been appealed are to "*be deemed to form an integral part of the arbitration award*." The arbitration award is final, and parties agree to abide by it. The award must be notified to the DSB and to the Council or Committee administering any relevant WTO agreement. Third parties to the disputes cannot initiate the arbitration procedure. However, third parties, which have notified the DSB of a substantial interest in the matter before the panel, may make written submissions and must be given an opportunity to be heard by the arbitrators.[276]

In January 2020, 15 other WTO Members joined the EU-Norway arrangement. Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, Korea, Mexico, New Zealand, Panama, Singapore, Switzerland, and Uruguay all agreed "a multi-party interim appeal [arbitration] arrangement [*MPIA*] based on [*DSU*] Article 25 …, which would be in place only and until a reformed WTO Appellate Body becomes fully operational."[277] They explained their "arrangement will be open to any WTO Member willing to join it," *i.e.*, it was an closed plurilateral deal – a Member had to indicate its assent to the mechanism to use it.

By 30 April 2020, 46 Members notified the WTO they had agreed to the *MPIA*.[278] They were Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, Guatemala, Hong Kong, … Iceland, Mexico, New Zealand, Norway, Pakistan, Singapore, Switzerland, Uruguay and the EU (with its

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276 *The EU Takes Measures*.

277 Statement by Ministers, Davos, Switzerland, 24 January 2020, https://trade.ec.europa.eu/doclib/docs/2020/january/tradoc_158596.pdf.

278 *See* World Trade Organization, *Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU*, (27 March 2020), www.wto.org; Singapore Ministry of Foreign Affairs, *Multiparty Interim Appeal Arbitration Arrangement*, 6 April 2020, www.mfa.gov.sg/Overseas-Mission/Geneva/Mission-Updates/2020/04/Multiparty-Interim-Appeal-Arbitration-Arrangement.

27 member states, plus the U.K. on a temporary basis amidst Brexit). Together, they accounted for over 50% of global merchandise trade.

Under it, *MPIA* Members selected 10 arbitrators to sit on Panels consisting of three of them to decide appeals following procedural rules modelled on those of the Appellate Body. For example, the *MPIA* set a maximum 90-day deadline for completion of appeals, stated that findings rendered by arbitrators would be enforceable under *DSU* procedures, and affirmed that a Member failing to bring into compliance a measure that was found inconsistent with GATT-WTO obligations would be subject to retaliation.

The *MPIA* was structured as an open plurilateral arrangement. *MPIA* Members agreed not to appeal their disputes to the non-operational Appellate Body, *i.e.*, they committed to using only the *MPIA* mechanism.

Yet, the extent to which an arbitration playing field would be level if a litigant were a developing, much least developed, country was questionable. Could poor countries prosecute and/or defend GATT-WTO cases as well under a *DSU* Article 25 procedure as they could under the normal *DSU* procedures? And, from a systemic perspective, while "[t]he *interim appeal arbitration* could be a temporary solution to continue a kind of parallel appeal mechanism within the WTO framework [,] … such arrangements do not provide a sustainable solution to the '*demise*' of the WTO Appellate Body."[279]

(4) Negotiation of a new WTO dispute settlement agreement that would apply on a plurilateral basis, which perhaps would be invoked only if the Appellate Body could not function.

(5) Voluntary agreement between a complainant and respondent to forego their right of appeal.

None of these options was attractive; each suffered from conceptual and/or practical problems. Yet, excluding America from the *DSU* – that is, not addressing its systemic concerns – also was a poor option, at least if Members wanted to keep the world's largest and most powerful country in their club: was it "time to consider an accommodation on some of the U.S.' systemic concerns, if only to preserve the legitimacy of the WTO and its adjudicative function, and avoid a more damaging retreat from the rules-based international trade order," as "unilateralist" as those concerns might be?[280] Was the Melian Dialogue the alternative?[281]

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279 *The EU Takes Measures*.

280 *The Search for Solutions*.

281 In September 2018, the EU published a proposal for *DSU* reform. *See* Council of the European Union, General Secretariat, *WTO – EU's Proposals on Modernization*, WK 8329/2018 INIT (5 July 2018). The EU called (*inter alia*) for Appellate Body member terms to be extended from four to six-to-eight years, an increase in the number of members from seven to nine, more resources for the Appellate division, and a

In July 2019, Canada and the EU announced a temporary solution of their own.[282] WTO disputes between them would be heard by retired Appellate Body members, whom the Director General would pick. It was an *ad hoc*, arbitration-like patch over injury to the *DSU* that seemed unlikely to be repaired. And, in light of the September 2017 entry into

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mechanism to deal with instances in which a Panel or the Appellate Body oversteps its mandate. The U.S. rejected these proposals, with Deputy USTR and WTO Ambassador Dennis Shea stating:

> Our view is that that means less accountability. We cannot support something that will make the appellate body less accountable.

Quoted in Bryce Baschuk, *European Plan for Extending WTO Appellate Body Terms Panned by U.S.*, 35 International Trade Reporter (BNA) 1315 (11 October 2018). Canada, too, floated a reform proposal in September.

As the paralysis of the Appellate Body loomed, Members searched for an alternative dispute settlement scheme, with support emerging for the use of *DSU* Article 25, an idea championed by James Bacchus (1949-), the first American to serve on the Appellate Body, and a former Chair of that Body. Under Article 25, disputing parties would meet during the consultation phase and agree on a binding arbitration procedure. This procedure would sideline the U.S. and turn dispute settlement into a plurilateral system. That was a prospect Mr. Bacchus addressed candidly in an October 2018 address at the WTO:

> Then [with the *DSU* Article 25 proxy for the Appellate Body] they [the Members] could proceed under dispute settlement and have dispute settlement amongst themselves without worrying about the intransigence of the United States....
>
> ...
>
> [WTO Members should] consider isolating the United States in dispute settlement at this time by using a rarely used article in the dispute settlement understanding that provides for arbitration as an alternative to litigation in WTO dispute settlement....
>
> ...
>
> It would be perfectly within the rules for 163 WTO Members – all Members except the United States – to simply duplicate the WTO dispute settlement system, including the appellate body, as their chosen form of arbitration under the dispute settlement understanding....
>
> It is imperative that other WTO Members stand up against the bully.... If the dispute settlement system is paralyzed, the entire WTO is undermined.
>
> ...
>
> [It was] shameful and inexcusable [for America to seek to intimidate Appellate Body members by objecting to their reappointment.]
>
> What the U.S. really wants is to be the judge and jury in all its disputes in the WTO.... They [*sic*] want WTO judges to rule in favor of the United States under the threat of not being reappointed if they do not.
>
> The U.S. is particularly concerned about preserving the U.S. Commerce Department's ability to impose trade remedies on America's trading partners....
>
> That is truly what this is about.... The U.S. wants latitude to impose illegal anti-dumping duties ad countervailing duties to subsidies at their discretion. They do not want to be second guessed by jurists here in Geneva.

Quoted in id.

[282] *See* Kim Darrah, *EU and Canada Agree on Interim Alternative to WTO Appeal Court*, FINANCIAL TIMES, 25 July 2019, www.ft.com/content/8714fb22-ae1b-11e9-8030-530adfa879c2.

force of *CETA*, the practical relevance of this patch was minimal.

The patch also belied a disingenuous litigation strategy with untoward systemic implications. As of November 2021, 7 of the 8 Panel Reports that had been issued since the December 2019 death of the Appellate Body had been appealed to that Body, meaning they had been appealed into a legal void. (Overall, as of December 2021, 21 disputes awaited an Appellate Body hearing.[283]) A Member that lost at the Panel stage thus could stave off adoption of the adverse Panel Report by eschewing the *MPIA*, rejecting a bilateral Canada-EU arrangement, and sending the Report to a non-existent Appellate Body. That losing Member, then, never would have to comply with the Report – at least not until the day of resurrection of the Appellate Body. Such behavior, by some of the most prominent champions of the international rule of law, unaccompanied by any affirmative proposals to revive the Body or expand the *MPIA*, cast doubt on the commitment of Members to that rule of law architecture. It certainly suggested hypocrisy, when the same Members, including the U.S. and EU, attacked China for not submitting itself to the global rules of trade.

283 *See* Rintaro Hosokawa & Iori Kawate, *China's 20 Years at WTO: A Boon for Beijing, A Beef for Critics*, NIKKEI ASIA, 11 December 2021, https://asia.nikkei.com/Economy/Trade/China-s-20-years-at-WTO-A-boon-for-Beijing-a-beef-for-critics.

Chapter 9

ENFORCEMENT PROBLEMS[284]

I. "Three Year Pass"

It is sometimes remarked, with a dose of cynicism, any WTO Member can get away with any violation of a GATT-WTO obligation for about three years. That is because it takes 12-18 months for a case to proceed through the *DSU* mechanism, and the reasonable period for compliance with an adverse decision typically allotted is 15 months. Why not, then, commit a violation, if it is in the interest of a country, its political leaders, or some influential constituency, to do so, and then withdraw the offending measure after three years? Indeed, critics of steel safeguards imposed by President George W. Bush (1946-, President, 2001-2009) on 5 March 2002 noted a built-in sunset date of three years (through March 2005).[285]

True as this observation may be, it must be put into perspective. First, three years are not always exploited mercilessly. In the steel case, the President removed the safeguard 15 months early, on 4 December 2003. That was one week before the DSB adopted an adverse Appellate Body decision. The revocation followed a mid-term review by the ITC. The review showed steel prices had risen and the U.S. steel industry had successfully re-organized. Perhaps most relevant to the timing of the revocation was the completion of the November 2002 mid-term elections?

Second, and more generally, it would be an unfairly high standard to judge the efficacy of WTO adjudication by the standard of perfect compliance. In no legal system beneath the Heavens is there 100%, expeditious obedience with judgments. As it so happens, the vast majority of cases result in compliance – sooner or later – by the losing Member. Table 9-1 (containing data as of April 2005, thus covering the first 10 years of *DSU* operation, which commenced on 1 January 1995) suggests this fact.

Data from the first 17 years reinforce this conclusion. As of June 2012, *i.e.*, during the first 17 years of *DSU* operation, which commenced on 1 January 1995, Members had taken 439 trade disputes to the WTO.[286] They settled in 233 cases, and invoked Panels in 206, or 47%, of the cases. Of those 206 cases, 177 of them, *i.e.*, 40% of all cases initiated, resulted in Reports adopted by the DSB. Compliance disputes occurred in less than 30 instances, or less than 7% of all disputes, and sanctions because of non-compliance by the losing Member occurred in just 17 cases, or 4% of all disputes.

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[284] Documents References:
(1) *Havana Charter* Articles 41, 47-48, 66, 92-97
(2) GATT Articles XXII-XXIII
(3) WTO *DSU*

[285] *See* WTO Appellate Body Report, *United States – Definitive Safeguard Measures on Imports of Certain Steel Products*, WT/DS248/AB/R (adopted 10 December 2003).

[286] *See* World Trade Organization, *Lamy Cites "Very Broad Confidence" in WTO Dispute Settlement*, 28 June 2012, www.wto.org.

Why this general practice occurs is the subject of scholarly debate. The answer may differ depending on the Member, case, and context. Three commonly touted explanations involve game theory, reputation, and fidelity.

First, WTO Members may appreciate they are repeat players in a game, and seek to maximize joint, long-term outcomes. They see each other frequently, so if they expect others to comply with adverse judgments, then they, too, must comply when a Panel or the Appellate Body rules against them. Second, Members may care about their reputation in the world arena, not wanting to be considered unilateralist, much less an outlaw. Third, Members simply may believe in the international legal order, for idealistic or utilitarian reasons, or both. Fidelity to this order, manifest in adherence to WTO adjudicatory outcomes, may help secure their idealistic and utilitarian interests.

To be sure, serious problems of compliance have arisen in WTO cases, but only a minority of them. Two quintessential instances are the 1997 WTO Appellate Body outcome in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, and the 1998 Appellate Body decision in *EC Measures Concerning Meat and Meat Products (Hormones)* cases. In these instances, the EC lost, yet compliance with Appellate Body recommendations was not forthcoming.

TABLE 9-1
FIRST 10 YEARS (1995 -2005) OF *DSU* OPERATION

Variable	***Number of Cases***
Total Cases Brought	335
Mutually Agreed Solutions	50
Settled or Inactive Disputes	29
Panel and Appellate Body Reports Adopted by the DSB	95
Panel and Appellate Body Reports on Compliance Adopted by the DSB	15
Arbitrations on Level of Suspension of Concessions	16
Authorizations by DSB to Suspend Concessions	15

Lest there be any thought the U.S. always wears the "white hat," its compliance with the October 1998 *United States – Import Prohibition of Certain Shrimp and Shrimp Products* decision can be called into question. After it, American government officials visited Panama. They warned shrimp exports from that country would not be allowed into the U.S. pursuant to the statute the Appellate Body had ruled could not be justified under the GATT Article XX *chapeau*. The officials discovered many Panamanian shrimp trawlers had been outfitted with TEDs, but the TEDs had been turned off or intentionally disabled. (Panamanian fisherman, most of whom are poor, did not like using the TEDs because they reduced their shrimp catch.) About 20% of Panama's exports are shrimp to America, and the Panamanians were concerned about antagonizing the U.S., which was scheduled to return the Panama Canal in December 1999. Thus, they negotiated an

agreement with the U.S. Rather than worrying about compliance with the Appellate Body ruling and modifying its import ban on shrimp caught on vessels without appropriate TEDs, it seemed that the U.S. "bullying" Panama.

The fundamental debate, then, is about the nature of the legal obligation created by a recommendation from a WTO Panel or the Appellate Body and adopted by the DSB. (In keeping with GATT tradition, Panels and the Appellate Body phrase their prescriptions for a losing Member not as orders, but as recommendations.) That is, what is the responsibility of a WTO Member once it has lost a case? *DSU* Article 21 indicates the Member is supposed to comply, within a reasonable period of time, with the recommendations of the Panel or Appellate Body Report. Thus, in a violation nullification and impairment case, the losing Member is supposed to alter its offending trade law or regulation. In a non-violation nullification and impairment case, the losing Member is supposed to reach a mutually satisfactory adjustment with the winning Member.

But, *must* the losing Member take these corrective steps? *DSU* Article 21 states compliance is the preferred result. It also contemplates instances where the losing Member pays compensation or accepts retaliation. Thus, the question is, does the losing Member have an option to (1) comply, (2) pay compensation, or (3) subject itself to retaliation? Or, is the loser legally bound to comply? The *DSU* is not as clear on this point as it might be, and commentators differ on the answer.

The scenario in which this ambiguity becomes obvious is not only the *a priori* case, that is, the case in which a losing Member is deciding what to do. The ambiguity also becomes obvious *post hoc, i.e.,* after the losing Member has decided to comply. Suppose a losing Member announces unilaterally "I have implemented," and the prevailing Member replies "No, you have not, and I am now able to retaliate." Who is to judge compliance, and by what standards? This scenario materialized in the *EC – Bananas* case, as well as the *EC – Beef Hormones* case. Certainly, no Member commences a WTO action with the objective of retaliation. Retaliation is an indication of a break down, a failure. But, when a right to retaliate is claimed, inevitably the grander issue of compliance is at play.

On one side of this debate are scholars and practitioners who focus on the text of the *DSU*. It does not expressly obligate losing WTO Members to implement a Report's recommendations. These advocates point out if the Uruguay Round negotiators intended to require implementation, they could (and would) have said so. Rather, the relevant *DSU* provisions indicate a strong preference for compliance over compensation or retaliation:

(1) *DSU* Article 3:7:

> "In the absence of a mutually agreed solution, the first objective of the dispute settlement mechanism is usually to secure the withdrawal of the measures concerned if these are found to be inconsistent with the provisions of any of the covered agreements [*i.e.,* if there is violation nullification and impairment]. The provision of compensation should be resorted to only if the immediate withdrawal of the measure is impracticable.... The last resort ... is the possibility of suspending the application of concessions or other

obligations....”

(2) *DSU* Article 19:1:
“Where a Panel or the Appellate Body concludes that a measure is inconsistent with a covered agreement, it shall recommend that the Member concerned bring the measure into conformity with that agreement.”

(3) *DSU* Article 21:1:
“Prompt compliance with recommendations or rulings of the DSB is essential in order to ensure effective resolution of disputes to the benefit of all members.”

(4) *DSU* Article 22:1:
“Compensation and the suspension of concessions or other obligations are temporary measures available in the event that the recommendations and rulings are not implemented within a reasonable period of time. However, neither compensation nor the suspension of concessions or other obligations is preferred to full implementation of a recommendation....”

(5) *DSU* Article 22:8:
“The suspension of concessions or other obligations shall be temporary.... [T]he DSB shall continue to keep under surveillance the implementation of adopted recommendations or rulings, including those cases where compensation has been provided or concessions or other obligations have been suspended but the recommendations ... have not been implemented.”

(6) *DSU* Article 26(b):
“[W]here a measure has been found to nullify or impair benefits [*i.e.*, in a non-violation nullification and impairment case] ... there is no obligation to withdraw the measure. However, in such cases, the Panel or the Appellate Body shall recommend that the Member concerned make a mutually satisfactory adjustment....”

In contrast, Article 94 of the U.N. *Charter* states crisply “[e]ach Member of the United Nations *undertakes to comply* with the decision of the International Court of Justice in any case to which it is a party.”[287] Yes, it may be nice, for a variety of policy reasons, to encourage compliance. But, to say obedience is an international legal obligation under the *DSU* is an unjustified “stretch” of the *DSU* language quoted above.

On the other side of the debate are scholars and practitioners who find the *DSU* Article 22:1 language is sufficiently strict to eliminate the possibility of an option. They note a non-implemented Panel Report remains on the agenda of the DSB, and infer from this implementation is required under International Law. They add:

(1) Nothing in the *DSU* contravenes the rule of Article 26 of the *Vienna*

[287] Emphasis added.

Convention on the Law of Treaties, which requires treaty members to perform their obligations.

(2) Allowing Members to choose between implementation and compensation would render the provisions of the Uruguay Round agreements that expressly authorize payment of compensation redundant (*e.g.,* Article 26:1(b) of the *DSU*, which states there is no obligation to remove a measure causing non-violation nullification and impairment).

(3) Most WTO Members assume implementation is required.

(4) If losing Members had an option to choose whether to comply or pay compensation, then the dispute settlement system would favor large, rich Members over small, poor Members.

(5) The U.S. favors implementation whenever it is victorious and, therefore, ought not to be hypocritical.

Finally, they suggest Members seem quite willing to try to avoid compliance by seeking waivers (*e.g.,* for the *Lomé* and *Cotonou Conventions*) or replacing illegal measures with legal ones that still have a protective effect. Hence, there is no need to encourage such behavior by giving them an option to comply or compensate with a Panel or Appellate Body recommendation.

From a policy standpoint, the multilateral dispute settlement system would indeed be stronger if compliance is a mandatory obligation under international law. It also would be fairer, in that developed, developing, and least developed countries would be on a more level playing field. However, it is important to approach the problem unemotionally. The textual basis for arguing an option does not exist is weak, and the fact that *DSU* Article 26 does not contravene the *Vienna Convention* rule about following obligations begs the question of what the obligations are. It may well be the best argument against the "option theory" is emerging custom and practice: most WTO Members, including the U.S., believe compliance is demanded, there is no option to choose among the alternatives of compliance, compensation, or acceptance of retaliation. Eventually, that custom and practice may evolve into customary International Law.

This possibility, however, is by no means assured. Perhaps there is an enticing middle ground in the implementation-versus-compensation debate. Put bluntly, it is "who cares whether a losing party implements or compensates as long as the parties to the dispute are satisfied?" All that ought to matter is the achievement of a resolution of whatever sort with which the parties agree. Indeed, *DSU* Article 3:7 says "[t]he aim of the dispute settlement mechanism is to secure a positive solution to a dispute."

Finally, as an historical footnote, during the Congressional debate over the 1994 *Uruguay Round Agreements Act*, Senate Majority Leader Robert Dole (Republican-Kansas) and the Clinton Administration's USTR, Mickey Kantor, reached an accord on

America's posture in the event it lost several WTO cases. Essentially, the Administration agreed to support legislation to establish a "WTO Dispute Settlement Review Commission" consisting of five federal appellate judges. That Commission would review all WTO cases the U.S. lost to determine whether the Panel or Appellate Body had exceeded its authority or acted outside the scope of the relevant trade agreement, added to America's obligations or diminished its rights, acted arbitrarily or capriciously, or engaged in misconduct. If the Commission found three "violations" in a five-year period, then any member of the House or Senate could introduce a joint resolution to disapprove of America's participation in the WTO. If the resolution were approved, then the U.S. would commence withdrawal. The legislation called for in this Dole-USTR deal of 23 November 1994 never was enacted. Nevertheless, the point had been made: the U.S. was concerned about protecting its sovereignty as regards adverse WTO decisions.

II. Sequencing and Retaliation

If a losing WTO Member fails to comply with an adopted Panel or Appellate Body Report within the reasonable period allotted, then what procedures must the winning Member follow to exercise its right of retaliation? Can the winning Member "pull the trigger" immediately upon expiry of the reasonable period of time? What if the losing Member argues it indeed has complied? The problem, known as "sequencing," is whether the winner must obtain a ruling the loser in fact has failed to comply before retaliating. Specifically, in advance of retaliation, is it necessary to re-submit a dispute about compliance to the original Panel, or may a winning Member proceed directly to obtain authorization to retaliate from the DSB? The question is critical, because it goes to the essence of compliance with and enforcement of international trade law.

In the *Bananas* case, the U.S. and EU argued bitterly over the interpretation of *DSU* Articles 21:5-6 and 22:2, from which the sequencing problem arises. The Uruguay Round drafters of the *DSU* failed to catch a serious inconsistency between *DSU* Articles 21:5-6 and 22:5. America claimed the right to go straight for DSB authorization under *DSU* Article 22:5. Europe scoffed, citing *DSU* Article 21:5-6.

The EC argued it was impossible to read Article 22:2 without first observing the clear mandate of Article 21:5-6, which was to submit a dispute about compliance to a Panel and await a ruling. Article 21:5 mandates that disputes between Members over a measure taken to comply with a Panel or Appellate Body ruling "shall be decided through recourse to these dispute settlement procedures, including wherever possible resort to the original Panel." So, the U.S. was trying to avoid a key check against unilateral action, namely, to start the dispute settlement process from scratch before retaliating against a losing Member's plan for implementing Panel or Appellate Body recommendations. After all, how could a winning Member be allowed to judge compliance? Surely that was the province of a Panel.

There was a kernel of logic in the American position. If a fox cannot be trusted to guard a chicken coop, then neither can the chickens be left in charge. Why should compliance by a losing Member be presumed unless and until a Panel decides otherwise?

That would put the loser in the position of judging its own compliance, with no swift corrective action available to the winner. The loser could delay indefinitely real implementation, by tinkering with its trade regime, submitting to a compliance hearing, making a few more minor adjustments in response to the outcome of the hearing, submitting to another compliance hearing, making a few more minor changes in response, and so on *ad infinitum*.

Moreover, said the U.S., Article 22 obliges WTO Members to consider immediately the request of a winning Member to impose trade sanctions, because it gives them just 30 days from the deadline for implementation of a recommendation to do so. This tight 30-day timeframe contrasts with the 90 days a Panel has under Article 21:5 to issue a ruling on compliance (or lack thereof) by the losing Member.

The spectre of a horrible endless loop does not mean events would go on forever without retaliation. Possibly at worst (from the American perspective), under a close reading of *DSU* Articles 21:5 and 22:6 sympathetic to the EC position (*i.e.*, the necessity of going through an Article 21:5 proceeding before retaliating), the winning Member is free to retaliate after the first iteration, *i.e.*, after the original Panel has met and found the first minor adjustment to be non-compliant, and after the reasonable period for compliance defined in Article 21:3 has expired. At that juncture, there ought not to be any doubt about the right to retaliate under Article 22:6. However, even though the very right to retaliate has been established, and even with retaliation after the first iteration, good faith implementation by the losing Member is not assured. The losing Member still could protest it is making necessary modifications, and the retaliation is unjust, or at least excessive. It could stress retaliation is occurring against an offending measure – the original measure as modified the first time – that no longer exists, because that measure was altered after the Article 21:5 proceeding. Here, then, would be a potentially endless loop with retaliation triggered after the first round of the battle over compliance. Whether the prospect materializes will depend very much on the persuasiveness of the retaliation.

In any event, at the core of the American position was not only substantive logic, but also procedural fairness. Suppose a Panel is called under *DSU* Article 21:5 to adjudicate an issue of compliance. Why should a winning Member have to endure normal dispute resolution procedures, particularly the 60-day consultation period prior to the establishment of a Panel, yet again? In all likelihood, more consultations advantage the losing Member: it could delay, still further, compliance. Instead, the original Panel ought to be reconvened immediately, it ought to be permitted to rule on a compliance plan that has not yet taken effect, and the decision ought to be issued expeditiously (*e.g.*, within 90 days, as required by Article 21:5, which is half the usual time given for issuance of a Panel Report). Otherwise, any hope the winner might have of enforcing the initial judgment would be dashed in meaningless negotiations and endless delays.

The American position also had an implication for the allocation of the burden of proof in a *DSU* Article 21:5 hearing. Doubtless the U.S. would contend (in the *Bananas* context, anyway, if an Article 21:5 hearing were necessary) a losing Member that pleads compliance for a measure that has been modified more than once ought to have the burden

of proof the measure indeed is in compliance, just as the winning Member has the initial burden of proof the first modification to the measure is not compliant. In other words, it would be for the winning Member to prove the offending measure as modified initially by the losing Member still is insufficient to satisfy the relevant Panel or Appellate Body recommendations. At that point, retaliation under *DSU* Article 22:6 is permissible. Assuming the losing Member makes further modifications in response to the retaliation, it is for that Member to prove the changes are enough and justify an end to the sanctions.

In the *Bananas* case, the Arbitral Panel found the wording of the two Articles "apparently irreconcilable." It declined to resolve the matter, correctly pointing out a definitive solution was for the WTO to reach under the auspices of its review of the operation of the *DSU*. Nevertheless, the Arbitral Panel tipped its hat in favor of the American position. The Panel agreed a winning Member would be prevented from invoking its Article 22 right of retaliation if it were forced into a new Panel proceeding on compliance under Article 21:5. After all, Article 22:2 gives the winning Member just 20 days after the deadline for compliance to request DSB authorization for retaliation, but completion of a new Panel case would take considerably longer than that. Thus, insisting on an Article 21:5 hearing would render the Article 22 deadline, and thereby the all-important right attached to it, meaningless.

In *Bananas* and other cases, since 2000, the sequencing problem has been resolved in an *ad hoc* manner. Typically, the compromise is to suspend the right to retaliate until a Panel rules on compliance. In effect, a compliance ruling from a Panel is obtained, while the right to retaliate (and to request retaliation) is preserved outside of the 30-day Article 22 time period until that compliance ruling is issued.

So, in the *Bananas* case, America and Europe agreed to await an Arbitral Panel ruling (which came on 6 April 1999). For the fifth time in six years, the GATT-WTO published a ruling condemning the EC preferential trading arrangement for bananas. The latest decision was a near-complete vindication for the U.S. The Arbitral Panel agreed the EC modifications to its banana import regime fell short of satisfying the Appellate Body recommendations. In fact, they amounted to nothing more than a re-writing of the old rules in the hopes of avoiding compliance. Consequently, it said, America was justified retaliating against the EC. The consolation for the EC was the Panel trimmed the appropriate retaliation amount, from $520 million to $191.4 million.

The USTR published (on 9 April) a revised schedule of targeted products, and endured the formality of obtaining DSB authorization for retaliation (on 19 April), and began imposing the 100% retaliatory tariff (retroactive to 3 March 1999). The targeted products included: batteries, bath preparations, and lithographs from the U.K.; various paper products (*e.g.*, uncoated felt paper and paperboard) and lithographs, mainly from the U.K.; handbags from France and Italy; bed linen, largely from France and Italy; and electro-thermic coffee and tea makers from Germany. The DSB authorization was historic: it was the first time the WTO had authorized the use of sanctions. Only once in the pre-Uruguay Round era had sanctions been agreed upon – a 1952 case in which the GATT allowed Netherlands to implement quotas on imports of American wheat flour.

The EC accepted the ruling (quibbling only about the retroactive imposition of retaliatory duties). However, it said it would need at least 8 months – *i.e.*, until early 2000 – to develop a plan for reforming its preferential trading arrangement for bananas. After all, the EC had to please the competing interests of the U.S. (which sought an abolition of the tariff-rate quotas and licensing system), the ACP countries (which were entitled to preferences under the *Lomé Convention*), and other Latin American producers, including the *BFA* countries (which demanded fair market access).

However, *ad hoc* solutions have not been found in all instances. In March 2014, Indonesia demanded authorization from the DSB to put $42.9 million worth of retaliatory duties on imports from the U.S., after it won a 2012 case on *Clove Cigarettes* in which the Appellate Body held Section 907(a)(1)(A) of the 2009 *United States Family Smoking Prevention and Tobacco Control Act* was illegal under GATT-WTO rules.[288] The *Act* banned the sale of all cigarettes with a characterizing flavor, including clove cigarettes, but exempted menthol cigarettes. That discriminated against Indonesia, which exported nearly all the clove cigarettes America imported, whereas American companies produced most of the country's menthol cigarettes. The U.S. had the right to circumscribe cigarette sales for public health reasons, but not in a way that gave imported clove cigarettes less favorable treatment than domestically produced menthol cigarettes.

America replied to Indonesia's retaliation demand the way the EU responded to America's insistence on retaliation in the *Bananas* case: first get a ruling from a WTO Panel that American efforts to comply with recommendations in the *Cloves Cigarettes* case have failed to cure the national treatment violation. Those efforts were the production of new data showing a distinction between menthol and clove cigarettes is justified: menthol cigarettes are more addictive, so exempting them from the ban on sales of flavored cigarettes is logical to avoid the worse withdrawal symptoms that plague menthol cigarette smokers. Twisted as that logic might be, the American position remained that until Indonesia obtained a WTO ruling of non-compliance, said the U.S., Indonesia has no reasonable basis to retaliate.

III. Carousel Retaliation

The 2000 *Carousel Retaliation Act* permits retaliatory trade measures against nations that, in the estimation of the U.S., do not satisfactorily comply with recommendations in a Panel or Appellate Body Report adopted by the DSB.[289] (The topic of carousel retaliation is introduced in a separate Chapter.) The *Act* targets exports on a revolving schedule.

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[288] *See* Daniel Pruzin, *Revenge of Bananas: Procedural Feud Reignited in U.S.-Indonesia Cloves Dispute*, 31 International Trade Reporter (BNA) 408 (27 February 2014).

[289] *See* 19 U.S.C. 2416. The *Act* is an amendment to Section 306(b)(2) of the *Trade Act of 1974* (19 U.S.C. § 2416(b)(2)). Congress was passed it as Section 407 of the *Trade and Development Act of 2000* (106th Cong., Public Law 106-200, 114 Stat. 251) (18 May 2000).

Subsection (a) of 19 U.S.C. Section 2416 establishes a general monitoring obligation for the USTR:

> The Trade Representative shall monitor the implementation of each measure undertaken, or agreement that is entered into, by a foreign country to provide a satisfactory resolution of a matter subject to investigation under this subchapter or subject to dispute settlement proceedings to enforce the rights of the United States under a trade agreement providing for such proceedings.

Paragraph (1) of 19 U.S.C. Section 2416(b) explains what happens if the Trade Representative is unsatisfied:

> [i]f, on the basis of the monitoring carried out under subsection (a) of this section, the Trade Representative considers that a foreign country is not satisfactorily implementing a measure or agreement referred to in subsection (a) of this section, the Trade Representative shall determine what further action the Trade Representative shall take under section 2411(a) of this title.

In addition, Subsection (b)(2)(A) provides:

> [i]f the measure or agreement referred to in subsection (a) of this section concerns the implementation of a recommendation made pursuant to dispute settlement proceedings under the World Trade Organization, and the Trade Representative considers that the foreign country has failed to implement it, the Trade Representative shall make the determination in paragraph (1) no later than 30 days after the expiration of the reasonable period of time provided for such implementation under paragraph 21 of the *Understanding on Rules and Procedures Governing the Settlement of Disputes*…

Therefore, following a *DSU* proceeding, when the USTR monitors implementation (or the lack thereof) by a foreign country of a recommendation, and determines the foreign country is not "satisfactorily implementing" the decision in favor of the U.S., then the Trade Representative must take retaliatory action.

Of critical importance is the nature of the retaliation, which Section 2416(b)(2)(B) addresses. Assuming the problem concerns implementation of a WTO decision, then this Section is triggered. Section 2416(b)(2)(B) states:

> … in the event that the United States initiates a retaliation list or takes any other action described in section 2411 (c)(1)(A) or (B) of this title against the goods of a foreign country or countries because of the failure of such country or countries to implement the recommendation made pursuant to a dispute settlement proceeding under the World Trade Organization, the

> Trade Representative shall periodically revise the list or action to affect other goods of the country or countries that have failed to implement the recommendation.

Evidently, the periodic revision gives rise to the name "Carousel Retaliation." Further, Section 2416(b)(2)(C) requires the USTR to:

> 120 days after the date the retaliation list or other Section 2411(a) action is first taken, and every 180 days thereafter, review the list or action taken and revise, in whole or in part, the list or action to affect other goods of the subject country or countries.

In effect, six months is the speed at which the carousel turns. To make retaliation as effective as possible, Section 2416(b)(2)(D) says that whenever revising the lists:

> … the Trade Representative shall act in a manner that is most likely to result in the country or countries implementing the recommendations adopted in the dispute settlement proceeding or in achieving a mutually satisfactory solution to the issue that gave rise to the dispute settlement proceeding.

On 5 June 2000, following signature of the *Carousel Retaliation Act* by President Bill Clinton, the EC sued the U.S. in the WTO. The EC claimed carousel retaliation violates *DSU* Articles 3:2, 21:5, 22 and 23. The EC also argued the *Act* violates Article XVI:4 of the *WTO Agreement*, and GATT Articles I, II and XI. That is because, urged the EC, the *Act* mandates retaliation but fails to obtain authorization from the DSB for a specific retaliatory action. As yet, the case is unresolved.

What is the theory behind the *Act*? Congress passed it in the midst of frustration with the EU's failure to comply in the 1997 *Bananas* case. Neither diplomatic cajoling nor authorized sanctions on a fixed group of products seemed to work in that case. Why not, then, induce compliance by causing widespread uncertainty and fear? The threat of rotating the list of sanctioned products would cause unpredictability among producers in the losing WTO Member. Afraid their merchandise could be "hit" next, they would lobby their government to comply with the adverse WTO decision. Is the theory akin to a war strategy? Is that strategy intentional infliction of casualties on civilians? Or, are all merchandise targets legitimate enemy combatants?

Reciprocity is a hallmark of international trade relations, and it has been applied in the area of carousel retaliation. After a seven-year long battle at the WTO, Brazil defeated the U.S. in the infamous *Cotton* case. In August 2009, Brazil obtained authorization to retaliate against the U.S. for subsidies declared unlawful by the Appellate Body. In March 2010, Brazil drew up a list of 102 American products with an import value of $591 million on which Brazil threatened to double or triple tariffs, including food (*e.g.*, pears and potatoes) and manufactured goods (*e.g.*, appliances and cars). In addition, Brazil threatened cross-sectoral retaliation worth $238 million against American service suppliers to Brazil, and against holders of American IPRs (*e.g.*, by breaking patents of U.S. pharmaceutical

companies on drugs used in Brazil's public health system). In June 2010, the two countries reached a deal whereby Brazil would suspend until at least 2012 imposition of the sanctions, and the U.S. would create a $147 million fund to provide technical assistance to Brazilian cotton farmers. However, by June 2012, the U.S. still had not removed its offending cotton subsidies, nor cut its export credit guarantees for cotton. So, Brazil decided to update the suspended 2010 retaliation list, in effect threatening carousel retaliation against the U.S. The U.S., of course, used carousel retaliation against the EU to compel compliance in the 2011 *Airbus* case (discussed in separate Chapters).

IV. Non-Trade Reducing Retaliation

Advanced as *DSU* enforcement appears compared to the ICJ or other international mechanisms, the key tool – trade sanctions – is somewhat primitive. In contrast to the United Nations system, neither the WTO Secretariat, nor the Membership at large, plays a role in setting sanctions. Trade sanctions may not work in the case of a large country (*e.g.*, the U.S.) losing to a small country (*e.g.*, Togo), and even when the case involves two hegemons (*e.g.*, the U.S. and EU), query whether trade retaliation bring about a rapid resolution. Moreover, sanctions are prospective only – they do not date back in time to when an injury occurred.

To be sure, the record of compliance under the *DSU*, like the old GATT system, is good. In most cases, the losing party complies, if for no other reason than, as in the GATT era, countries realize the adjudicatory mechanism they have is all they have got. Non-compliance, occurring in relatively few cases, is most likely in a highly politicized dispute, such as *Bananas*, *Beef Hormones*, *Byrd Amendment*, *Foreign Sales Corporation*, and *Steel*. Nevertheless, to improve the *DSU* enforcement mechanism, four major proposals have been suggested.

- **1st: Trade Compensation**

A losing party could give additional non-MFN benefits to the winner.

- **2nd: Monetary Compensation**

Another reform suggestion is to allow for monetary compensation, that is, damages (fines). Under this proposal, a losing party would pay a fine to the winning party, and the fine would be calculated both prospectively and retrospectively. There would be an exemption for least developed countries, which cannot afford to pay fines. However, such countries, if they lost a case and refused to comply, would be susceptible to retaliation. A rather one-sided variant of this proposal, offered by several poor countries (including Cuba) would be to employ fines only if they win a case, but calculate damages only prospectively.

- **3rd: Tradeable Remedies**

A winning party could sell its right to retaliate against the losing party to another (third) WTO Member, and thereby get money from the sale proceeds. The other Member

could exercise the right to retaliate in favor of one of its industries.

- **4th: Joint Retaliation**

To encourage (if not bludgeon) compliance, retaliation could be had by a group of WTO Members, or possibly all of them. The idea is akin to collective security in the United Nations system. But, that analogy reveals a key weakness of the proposal. There is a cost to retaliating, so which WTO Members would participate in a case? Would there retaliation discussions become like Security Council sanctions debates? In the end, would one country, or an ad hoc coalition of the willing, take the lead in enforcement? If that scenario materialized, then would the system resemble vigilante justice?

Evidently, a feature common to the proposals is trade-shrinking, or trade-reducing, retaliation should be eliminated or circumscribed. The debate is over its replacement. More generally, what ethos should surround use of the *DSU*, including an enforcement tool? Uruguay Round negotiators made clear that use of the *DSU*, including retaliation, should not be considered a hostile act. Yet, when the U.S. first deployed sanctions against the EU – in the *Beef Hormones* and *Bananas* cases – the EU viewed it as a hostile act. The EU Trade Commissioner, Sir Leon Brittan, took his revenge, filing the *Foreign Sales Corporation* case against the U.S.

Part Three

PRODUCT RELATIONSHIPS IN GATT-WTO LAW

Chapter 10

LIKE PRODUCTS[290]

I. Line Drawing and Reliance on "Like Product"[291]

Law, in any legal system, at any time in human history, relies on categorization. Is a party a "buyer" or "seller," "debtor" or "creditor," "lessee" or "lessor"? Is evidence "relevant" or "irrelevant," "direct" or "circumstantial," "hearsay" or "non-hearsay"? Is a good "originating" or "non-originating," "dumped" or "not dumped," "subsidized" or "not subsidized"? Clearly delineating these categories is a critical second-order task in order to get to fulfill the first-order responsibilities of deciding "guilt" or "innocence," differentiating "right" from "wrong," and advancing "justice" against "injustice." The second- and first-order inquiries are related: how categories are drawn can determine whether outcomes are legally and morally acceptable.

Line drawing is learned early in life, and refined (or not) with education and experience. So, while *Sesame Street* would seem an odd place at which to commence serious discussion of the fundamental obligations of GATT-WTO law, it is a good place to do so. There is a *Sesame Street* song that teaches children about comparing and contrasting objects, asking them "which one of these things is not like the other, which one of these things is not quite the same?" That question is central not only to GATT-WTO practice, but also to the operation of FTAs and trade preferences.

In nearly every international trade matter, whether imported products are "like" domestic products is an issue. That is true whether the perspective is business planning or litigation. It is true because the law makes it so. GATT relies on the term "like product" heavily, and other close terms, to expound its trade liberalizing rules.

Throughout nearly all of GATT, consequences follow only if goods resemble one another. Consider the following legal facts:

(1) The MFN obligation in Article I:1 depends on an imported item from one country being like that of another country.

(2) The tariff binding obligation in Article II:1, which gives rise to eligibility for a concession agreed upon in trade negotiations, depends on classification of imported merchandise in the Schedule of Concessions (which, in turn, is based on the HS and its GRI). Thus, one of the exceptions

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290 Documents References:
(1) *Havana Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, II, III, X, and XI

291 This and various other portions of this Chapter draw from Raj Bhala, *Modern GATT Law* Chapter 8 (London, England: Thomson Sweet & Maxwell, 2nd ed., 2013).

in Article II:2 to the tariff binding obligation relies on the concept of "likeness."

(3) The national treatment obligation concerning internal taxation, set forth in Article III:1 and III:2, first sentence, depends on an imported item being like a domestic product. The national treatment obligation in Article III:4 depends on an imported item being like a domestic product.

(4) The AD rules in Article VI:1 presume an imported product that is allegedly dumped is "like" a product destined for domestic consumption or "like" a product in a third country. Article VI:7, which is an exception to the AD rules for agriculture commodity price stabilization schemes, uses the term "like commodity."

(5) Article VII sets forth rules about customs valuation, one of which – in Article VII:1 – is that value be based on the actual value of imported merchandise or of "like" merchandise.

(6) Article IX:1 is an MFN obligation for country of origin marking, and applies to "like products" from third countries.

(7) The prophylactic rule against quantitative restrictions in Article XI:1 is subject to various exceptions. One of them, in Article XI:2(c), permits import restrictions on agricultural products to enforce a governmental measure that operates to remove a temporary surplus of the "like domestic product."

(8) Article XIII:1 is an MFN obligation for the administration of quantitative restrictions. It requires any permitted restriction to be non-discriminatory with respect to all "like products" from third countries.

(9) The subsidy rule in Article XVI:4, which calls for the elimination of export subsidies on non-agricultural products, applies to a subsidy that results in the sale of a good for export at a price lower than the comparable price charged for the "like product" to buyers in the domestic market.

(10) The escape clause remedy in Article XIX:1, designed to combat fair foreign competition, requires that there be a "like product" made domestically (or a "directly competitive" one).

In brief, fundamental obligations concerning non-discrimination, tariff bindings, and QRs, as well as major trade remedies, and Customs Law, all operate using the concept of "likeness." In modern computer parlance, it might be said the term "like product" is indispensable code to write trade-liberalizing program rules.

There are still more essential code terms. The list continues with several GATT provisions that use words like "like," but do not mean to define a class of products that are as closely related as "like." The famous (or infamous) example is the national treatment obligation in Article III:2, second sentence. It applies when a "directly competitive or substitutable product" made domestically exists. A less cited instance is found in the CVD rule of Article VI:3. It refers to "such" product, essentially presuming an authorized anti-subsidy duty would apply to a product receiving an illegal subsidy that is like the injured domestic competitor. The expansion beyond "likeness" in Article XIX:1, to include "directly competitive products," ensures the escape clause can be invoked to protect a broader category of products than just "like" ones.

This list means the application of GATT-WTO rules calls on skills of comparing and distinguishing, learned in the first year of any American law school. By no means do American-trained lawyers have a monopoly on these skills. They are taught throughout the Common Law world, from the England to Singapore, and are part of learning how to apply Civil Codes to particular fact patterns in countries from Mexico to Japan.

Analogical reasoning is more than merely a skill in Islamic countries. Analogical reasoning – known as *qiyās* – is a source of the *Sharī'a* (Islamic Law), along with, according to the Classical Theory of the *Sharī'a*, the Holy Qur'ān, *sunnah*, and consensus (*ijmā'*). There is nothing unusual about GATT-WTO Law demanding an analysis of the resemblance of one good to another before its rules are triggered. From the *Sharī'a* to *Sesame Street*, analyzing goods to differentiate them from one another is a central matter.

II. Hypothetical Malaysian GM Corn Case, and 1981 *Spanish Coffee* and 1989 *Canada Spruce* Cases

Consider an hypothetical example. Suppose Malaysia imposes a 5% MFN tariff on corn imports from any source, so long as the corn is not GM. For GM corn, Malaysia imposes a 100% tariff. Corn grown in the EU is without genetic modification, so Malaysia imposes on EU corn imports the 5% rate. But, Malaysia imposes on Brazilian corn, which is genetically altered, the 100% duty. Setting aside the possibility Brazil might have a claim under the WTO *SPS Agreement* (that there is no scientific basis for the prohibitive tariff because GM corn is safe for human consumption), would Brazil have any other GATT-based claim? What would be Malaysia's defense?

The answers depend on how the term "like product" is applied to the facts. Some insight is provided by a 1981 GATT Panel decision in *Spain – Tariff Treatment of Unroasted Coffee*.[292] To be sure, GM products were not at issue in that case. Rather, the GATT Panel held all un-roasted, non-decaffeinated coffee beans were "like products" for purposes of Article I:1. Similarly, in a 1989 case, *Canada/Japan – Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber*, a GATT Panel held the concept of "dimension" lumber, whereby lumber is cut to pre-set dimensions, was not a basis for

[292] *See* GATT Panel Report, *Spain – Tariff Treatment of Unroasted Coffee*, B.I.S.D. (28th Supp.) 102 (1982) (adopted 11 June 1981).

establishing likeness of products under Article I:1.[293] The Panel reasoned the concept was not widely used among countries.

No doubt, Brazil would seek to argue Malaysia violated the Article I:1 MFN obligation, because Brazilian corn does not receive the 5% MFN rate. This argument would presume GM and non-GM corn are "like." The rebuttal from Kuala Lumpur would be they are not "like products," hence the MFN obligation is inapplicable.

III. 1946-1948 GATT Preparatory Conference Work

● Reason for Absence of Definition

If, therefore, "likeness" must be decided before applying GATT-WTO Law, what test must be used? At both the 1946 and 1947 GATT Preparatory Conferences in London and Geneva, respectively, the drafters consciously eschewed efforts to define the meaning of the term. Interestingly, the MFN clause in the *League of Nations Treaty* used the term "like product," and the Economic Committee of the League issued a report stating it meant "practically identical with another product."[294] An American delegate involved in drafting the *ITO Charter* urged the same meaning for the *Charter*.[295]

However, the British view prevailed, namely, the ITO would decide the matter later, after careful study, and the drafting process ought not to get "bogged down" on it.[296] An Australian delegate argued even that would be unnecessary, *i.e.*, that the ITO need not bother with the issue – because, as a practical matter, "like product," determinations are made by customs officers when classifying imported merchandise for the purpose of tariff assessment.[297] (The history of "like product" suggests the Australian delegate was a bit optimistic in thinking neither a general definition, nor a test, was required.) Thus, nowhere in GATT is a definition of "like product" to be found.

● How Much Weight?

To be sure, there was talk at the 1946-1948 Preparatory Conferences as to what "like product" means.[298] Opinions were given that, for example, all cereals could not be considered "like," but rather only "wheat." As another illustration, it was suggested cars weighing under 1,500 kilograms would not be "like" cars over that threshold. How much weight ought to be put on material from these Conferences? Professor Jackson's view is

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293 *See Canada/Japan-Tariff on Imports of Spruce, Pine, Fir (SPF) Dimension Lumber* B.I.S.D. (36th Supp.) 167 (1990) (adopted 19 July 1989).

294 *Quoted in* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT §11.4 at 249-264 (1969). [Hereinafter, JACKSON 1969.]

295 *See* JACKSON 1969, §11.2 at 249-264 (*quoting* the American delegate).

296 *See* JACKSON 1969, §11.2, § 11.4 at 249-264 (*quoting* the British delegate).

297 *See* JACKSON 1969, §11.4 at 249-264 (*quoting* the British delegate).

298 *See* JACKSON 1969, §11.4 at 249-264 (summarizing the discussion, and urging "[d]espite these statements of postponement and irresolution [by the British and Australian delegates], there were scattered discussions in the preparatory meetings that yielded some illustrations of the meaning of like products, particularly as used in the MFN clause").

"the term 'like products' … can probably be considered in the light of the … preparatory concepts."[299] This view is suspect, however, for three reasons.

First, there is little evidence the Preparatory Conference materials mattered much to the three early GATT cases on "like products" decided before 1969. These cases are:

(1) 1949 *Brazilian Internal Taxes*.[300]
(2) 1950 *The Australian Subsidy on Ammonium Sulfate*.[301]
(3) 1952 *Treatment by Germany of Imports of Sardines*.[302]

All three cases involved the Article I MFN obligation.[303]

Second, there may have been good reason why the Preparatory Conferences materials did not matter much in the disposition of these early cases. As Professor Jackson's own research suggests, the statements at the Conferences are not entirely consistent.[304] For example, one delegate suggested that as used in GATT Article VI, in the context of AD and CVD actions, "like" means "same."

There are sound policy reasons for construing "like product" more narrowly in a trade remedy case than the MFN clause. In a trade remedy case, imports are at risk of being restricted through an authorized departure from the mandate of non-discrimination, whereas in applying MFN treatment, the hope is to boost trade. To facilitate the purposes of GATT, minimizing the scope of a trade remedy, and maximizing the scope of trade liberalization, makes sense. Alas, this policy logic does not emerge from the text itself: Articles I:1, VI:1, and VI:4 speak of "like product," full stop. In other words, the suggestion of the delegate has no textual basis. If the drafters wanted "like" to mean "same," surely they would have used the latter word.

As another example, one delegate opined on the meaning of "like domestic product" in Article XI:2(c)(i)-(ii), which permits import restrictions on agriculture and fisheries products necessary to enforce a governmental measure restricting quantities of the "like domestic product" marketed or produced, or to remove a temporary surplus of that like product. (This permission is an exception to the Article XI:1 rule against QRs.) The suggestion was "like domestic product" does not mean "like product," but connotes a greater degree of similarity than "like product." This interpretation is difficult to justify, all the more so because of the nearly indefensible proposition made by the same delegate that "like" means "merely competing product[]," such as apples and bananas.

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299 JACKSON 1969, §11.4 at 249-264.
300 *See* GATT, II B.I.S.D. 181, 183 (1952) (adopted 30 June 1949).
301 *See* GATT, II B.I.S.D. 188, 191 (1952) (adopted 3 April 1950).
302 *See* GATT B.I.S.D. (1st Supp.) 53, 57 (1953) (adopted 31 October 1952).
303 *Brazilian Internal Taxes* also raised interpretative questions about "like product" under Article III:2, *Australian Ammonium Sulfate* also dealt with the meaning of "like product" under Article III:4, and *German Sardines* touched on the meaning of "likeness" under Article XIII:1.
304 *See* JACKSON 1969, §11.4 at 249-264.

Here again, it is safe to say if the drafters sought a loose interpretation of "like," then they would not have used that word, or only that word. They did just that in *Ad Article III Paragraph 2* (identifying the category of "directly competitive or substitutable product[]") so as to expand the national treatment rule with respect to internal taxation. They also did so in Article XIX (using the term "like or directly competitive") so as to authorize a safeguard remedy against more than just "like" imports, assuming other criteria (such as causation and injury) are met. In sum, in interpreting "like product," little weight ought to be given to the Preparatory Conference materials. The delegates themselves did not commit themselves to defining it, and their legacy is one of confusing, even implausible, statements.

There is a third reason for hesitancy about giving much weight to Preparatory Conference materials. Perhaps it is the most important one: since 1969, several developments in the jurisprudence on the meaning of "like products" have occurred that, taken together, overshadow those materials. Consider, again, the example of wheat. Obviously, not all wheat is alike. In a long-running dispute between the U.S. and Canada concerning the practices of the Canada Wheat Board, a clear distinction was made between durum wheat and hard red spring wheat.[305] The ITC found American farmers of hard red spring wheat were materially injured by reason of subsidization and dumping of the like product from Canada, but farmers of durum wheat were neither materially injured, nor threatened with material injury, by Canadian durum wheat.

IV. Zero Sum Game

[305] *See* United States International Trade Commission, *Durum and Hard Red Spring Wheat from Canada*, Publication 3639, Investigations Nos. 701-TA-430A and 430B and 731-TA-1019A and 1019B (Final) (October 2003) at 4-16. As for wheat varieties, the ITC usefully:

(1) Explains "[w]heat is the seed of an annual cereal grass."
(2) Identifies the "five primary classes of wheat grown in the United States," namely, hard red winter wheat (38% of domestic wheat production in 2002-03), hard red spring wheat (22%), soft red winter wheat (21%), white wheat (both hard and soft, 15%), and durum wheat (5%).
(3) Differentiates "spring" varieties, which are planted in the spring and harvested in the late summer or early fall, and "winter" varieties, which are planted in the fall, are dormant in the winter, and harvested in mid or late summer.
(4) Differentiates "hard" wheat, which has a kernel high in protein and gluten, and "soft," which has a kernel with a low protein content).
(5) Points out durum wheat is a hard wheat used to make semolina (an ingredient in pasta), the other hard wheat varieties are used to make flour (an ingredient in bread), soft wheat is used for biscuits, cakes, crackers, and pastries, and white wheat is used in breakfast cereals, crackers, donuts, and foam and layer cakes.

A different challenge the U.S. brought against the nature and operation of the Canada Wheat Board as a STE raised national treatment issues under GATT Article III:4 and XVII:1. *See* Panel Report, *Canada – Measures Relating to Exports of Wheat and Treatment of Imported Grain*, WT/DS276/12 (Preliminary Ruling by the Panel, issued 21 July 2003).

Manifestly, non-discriminatory tariff treatment applies only if "like products" are at issue, and only if such products are imported from another, or other, contracting parties – *i.e.*, WTO Members. The words to this effect are express. What is a "like product"?

That issue has been the subject of considerable litigation. Much of the case law arises under the national treatment obligation of GATT Article III, as the term "like product" is used in both the sentence of Article III:2 (the national treatment obligation for fiscal measures, namely, internal taxes), and in Article III:4 (the national treatment obligation for non-fiscal measures). The key test, set out by the WTO Appellate Body in the 1996 *Japan Alcoholic Beverages* case, calls for examination of the physical characteristics of a good, consumer tastes and preferences concerning the good, and end uses of the good. Subsequent jurisprudence suggests tariff classification in the HS also may be relevant in distinguishing "like" from "un-like" products.

The word "product" means Article I:1 covers goods, whether agricultural or manufactured items. Does the obligation extend to services or IP? No. But, there are analogous MFN provisions for services and IP, respectively, Article II of *GATS* and Article 4 of *TRIPs*.

By whatever indicia "likeness" is gauged, it is invariably true that in private litigation, petitioners and respondents, or in WTO adjudication, complainant and respondent Members have diametrically opposed interests. The argument over defining the term and applying it to the facts is a zero-sum game. In a non-discrimination case, a broad definition favors the petitioner or complainant. Why?

Because that party seeks to prove its merchandise is discriminated against vis-à-vis other foreign merchandise under Article I:1, or *vis-à-vis* domestic merchandise under Article III. The broader the scope of "like" products, the more likely it is that favoritism showed to one class of merchandise mattered to the product of the petitioner or complainant, *i.e.*, the more likely the non-discrimination rule of Article I:1 or III was triggered. Conversely, the respondent prefers a narrow definition, so it can claim any allegedly non-discriminatory treatment to favored merchandise is irrelevant to the goods of the petitioner. Because the supposedly favored merchandise is different from the goods of the petitioner or complainant, the non-discrimination obligation is not triggered.

In a trade remedy case (*e.g.*, an AD, CVD, or safeguard investigation), the incentives flip. Usually, petitioners and complainants seek as narrow as possible a definition. That helps them prove injury more easily, because they can show woes afflicting a narrow group of domestic producers. Conversely, respondents tend to advocate an expansive definition. That way, any injury is diluted, that is, spread across an array of producers.

V. Conceptual Considerations

● Broad-Narrow Spectrum and Sovereignty Implications

It is premature to launch into a detailed exposition of substantive GATT obligations, most notably, the non-discrimination mandates of MFN treatment in Article I and national treatment in Article III and *Ad Article III*, without knowing what "like" means. These mandates, and indeed many other provisions in GATT and other WTO agreements, depend first and foremost for their effective operation on the concept of "like" products. Unfortunately, there is no single, easy definition of the term.

To the contrary, even an attempt at defining the term implicates grand policy questions. The broader this term is interpreted, the more potent the GATT-WTO obligations, in the sense of their scope of application. Too broad an interpretation, however, threatens legitimate national regulatory interests, *i.e.*, sovereignty.

In *obiter dicta*, the Appellate Body has taken pains to explain its rulings are not intended to infringe on sovereignty. For example, in its 1996 *Japan Alcoholic Beverages* Report, the Appellate Body offered a general point about interpreting Article III:

> Members of the WTO are *free* to pursue their own domestic goals through internal taxation or regulation *so long as they do not do so in a way that violates Article III* or any of the other commitments they have made in the *WTO Agreement*.[306]

Similarly, in its 2000 *Chile Alcoholic Beverages* Report, the Appellate Body made the following observation in the course of interpreting the phrase "so as to afford protection" in Article III:1:

> Members of the WTO have *sovereign authority* to determine the basis or bases on which they will tax goods, such as, for example, distilled alcoholic beverages, and to classify such goods accordingly, *provided of course that the Members respect their WTO commitments*. The reference in *Ad Article III:2, second sentence* of the GATT 1994 to "not similarly taxed" is not in itself a prohibition against classifying goods for revenue and regulatory purposes that Members set for themselves as legitimate and desirable. Members of the WTO are free to tax distilled alcoholic beverages on the basis of their alcohol content and price, as long as the tax classification is not applied so as to protect domestic production over imports. *Alcohol content, like any other basis or criterion of taxation, is subject to the legal standard embodied in Article III:2 of the GATT 1994*.[307]

These comments amount to the unsurprising truism that "sovereignty is bounded by treaty, assuming parties interpret and execute the treaty in good faith." The Appellate Body reminds WTO Members that they, not judges in Geneva, agreed to limits on internal tax

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306 Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, § F (adopted 1 November 1996). (Emphasis added.) [Hereinafter, *Japan Alcoholic Beverages* Appellate Body Report.]

307 Appellate Body Report, *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R and WT/DS110/AB/R, ¶ 60 (adopted 12 January 2000). (Emphasis added.)

policy. That truism is as relevant in the context of defining "likeness" as in any other Article III context.

Yet, it is important to view the Appellate Body's *dicta* realistically, if not skeptically. Every international trade agreement contains some ambiguous terms that the drafters of the agreement did not, could not, or would not define with clarity for all time. Someone must step in to elucidate, and that "someone" is the Appellate Body. Put squarely, the narrower the Appellate Body translates the term "like product," the less force it imparts to non-discrimination rules, because it circumscribes their scope of application by defining "like product" narrowly. Too narrow an interpretation, however, is not a plausible solution for the Appellate Body. Were it to take an overly narrow approach, then the scope of the non-discrimination obligations shrinks beyond what is appropriate. In turn, sovereign measures that are not just protective of domestic interests, but outright protectionist, defeat trade-liberalizing efforts.

Of course, the diametrically opposite definition on the spectrum is not one the Appellate Body may choose. If it construes "likeness" too broadly, then it risks stomping all over the internal tax policies of WTO Members. In turn, no doubt, the Members will protest loudly about an activist judiciary infringing on their sovereignty – and maybe even threaten withdrawal from the WTO, or (in their disgust) allow it to atrophy.

- **Lexicographic Approach**

Unfortunately for the Appellate Body, it cannot avoid the conundrum by relying exclusively on the *Oxford English Dictionary* to pick a point on the spectrum. That venerable classic defines "like" as:

> Having the same characteristics or qualities as some other … thing; of approximately identical shape, size, etc., with something else; similar.[308]

Yet, as the Appellate Body warned in a 1999 case, *Canada – Measures Affecting the Export of Civilian Aircraft*, when it interpreted the word "benefit" as used in Article 1:1(b) of the WTO *SCM Agreement*, "dictionary meanings leave many interpretive questions open."[309] In the 2001 *EC Asbestos* case, the Appellate Body not only repeated this warning, but also articulated the problems of relying on the *Dictionary* definition of "like:"

> [T]his definition does not resolve three issues of interpretation. First, this dictionary definition of "like" does not indicate *which characteristics or qualities are important* in assessing the "likeness" of products under [GATT] Article III:4. For instance, most products will have many qualities and characteristics, ranging from physical properties such as composition, size, shape, texture, and possibly taste and smell, to the end-uses and applications of the product. Second, this dictionary definition provides no

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308 *The New Shorter Oxford English Dictionary*, vol. I, 1588 (1993).

309 Appellate Body Report, *Canada – Measures Affecting the Export of Civilian Aircraft*, WT/DS70/AB/R, ¶ 153 (adopted 20 August 1999).

> guidance in determining the *degree or extent to which products must share qualities or characteristics* in order to be "like products" under Article III:4. Products may share only very few characteristics or qualities, or they may share many. Thus, in the abstract, the term "like" can encompass a spectrum of differing degrees of "likeness" or "similarity." Third, this dictionary definition of "like" does not indicate *from whose perspective* "likeness" should be judged. For instance, ultimate consumers may have a view about the "likeness" of two products that is very different from that of the inventors or producers of those products.[310]

So, lexicography is of limited assistance, because it does not answer the questions "Which features? How similar? Whose view?" Even if provided satisfactory answers, it is unlikely WTO Members would accept them in every dispute to demarcate legitimate from illegal trade-infringing discriminatory treatment. In other words, dictionaries are not designed to balance sovereignty against trade liberalization.

- **"Identical," "Similar," and "Different" Merchandise Continuum**

How, then, is the term "like products" interpreted – either by the Appellate Body in a litigation setting, or a trade lawyer in a business planning environment? Before answering the question from a legal perspective, it must be emphasized the answer is not binomial. True, in an individual case, merchandise either is, or is not, "like" other merchandise. But, in a conceptual sense, "likeness" is a continuum, with "identical" merchandise at one end of the spectrum, and "different" merchandise at the other end. In between, along the continuum, would be products that are "similar," and the legally significant point of "directly competitive or substitutable" merchandise.

Is there a definition of these points in any WTO text? The answer is a qualified "yes." Article 15 of the WTO *Customs Valuation Agreement* distinguishes "identical" from "similar" merchandise.[311] Article 15:2(a) defines "identical goods" as:

> goods which are the same in all respects, including physical characteristics, quality and reputation.

Evident from this definition is a three-part, non-exclusive test.

Goods may be judged identical on the basis of their tangible features, excellence, and stature. The definition uses the conjunctive ("and"), as it should, because if goods are the "same in all respects," then it would be incongruous to link the items in the test with the disjunctive ("or"). But, does "same in all respects" literally mean what it says? Or, are small deviations in appearance, quality, or reputation permissible?

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310 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 12 March 2001). (Emphasis original.)

311 *See* WON-MOG CHOI, "LIKE PRODUCTS" IN INTERNATIONAL TRADE LAW 12-13 (2003) (referring to these definitions in the context of a discussion of the meaning of "like products. [Hereinafter, CHOI 2003.]

> The answer is provided for in the second sentence of the definition, which states
>
> [m]inor differences in appearance would not preclude goods otherwise conforming to the definition from being regarded as identical.

Of course, this sentence begs the question "how minor is 'minor'?" Compare the British versus American editions of the *Oxford English Dictionary*. If, on the one hand, the only differences in the two editions were the dust jacket and the spelling of certain words, then these editions could be regarded as "identical." On the other hand, if (in addition to these distinctions), the editions contained different words based on relative usage in the U.K. and U.S., then it would be a challenge to call them "identical."

What about the definition of "similar goods"? Article 15:2(b) of the *Customs Valuation Agreement* defines them as:

> goods which, although not alike in all respects, have like characteristics and like component materials which enable them to perform the same functions and to be commercially interchangeable.

An understandable initial reaction to this definition is that it is sloppy, because it relies heavily on the word "like." One reading of the definition suggests "similar" and "like" are synonymous. However, upon reflection, that suggestion is not unfortunate, at least from a lexicographic standpoint. The *Oxford English Dictionary* repeatedly mentions "similar" in its definition of "like."[312]

What is more troubling about this definition is that it does not build directly on the meaning of "identical." In particular, "similar" is not defined as goods alike in most respects, including physical characteristics, quality and reputation. In other words, the definition of "similar" uses only one of the three parts in the test contained in the definition of "identical." (To be fair, the definition of "similar" does not preclude use of the other two parts.) "Similar" is defined by characteristics (but not quality or reputation) and component materials. As long as the tangible features, along with the elements, of the merchandise are generally alike so that the merchandise performs the same functions and is interchangeable in the marketplace, then the merchandise is "similar."

Consider, again, the scenario of the *Oxford English Dictionary* in which different words, based on relative usage, are contained in the British and American editions. Are these editions "similar"? The physical characteristics – a big, thick book with many word definitions, and a dust jacket – resemble one another, and they share the components of paper, ink, and so forth. But, do they perform the same functions, and are they commercially interchangeable? The answer might depend on to whom the question is posed. A researcher or librarian might vociferously objective to calling them "similar." A corporate office worker might be quite satisfied to use either edition.

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[312] *See* OXFORD AMERICAN DICTIONARY AND THESAURUS 869 (2003) (defining "like" as "a counterpart; an equal; a similar person or thing…").

Article 15 of the *Customs Valuation Agreement* adds two more, albeit modest, insights into the distinction between "identical" and "similar" goods. First, Article 15:1(c) says the terms do not include a good that either incorporates or reflects engineering, development, artwork, design work, plans, or sketches, where no adjustment was made for these elements when the transaction value (*i.e.*, the price actually paid or payable under Articles 1 and 8 of the *Customs Valuation Agreement*) of the good was established because of the fact these elements were undertaken in the country of importation. In other words, if engineering or engineering-type work is done to merchandise after importation, that after-the-fact work cannot be used to claim the merchandise is "identical" or "similar." Rather, what matters is the status of the merchandise at the time of importation.

Second, goods are not to be considered "identical" or "similar" unless they are produced in the same country as the goods being valued. This rule, contained in Article 15:2(d), means that goods from (say) China cannot be considered "identical" or "similar" to goods not also produced in China. However, this rule applies only for purposes of customs valuation. With respect to the non-discrimination rules of GATT, "like" product determinations are necessary with respect to goods from (say) China and India (under Article I) or China and an importing country (under Article III). Article 15:2(e) reinforces this rule, stating that goods produced by a different entity are not to be considered as "identical" or "similar" unless there are no other identical or similar goods produced by the same producer. Rather, pursuant to Article 15:3, goods produced by another entity generally would fall within the term "goods of the same class or kind" (as the goods subject to customs valuation), because they are produced in a particular industry or industrial sector, and include identical or similar goods.

- **Analogy to Customs Law, and Balancing Protectionism against Protection**

Of what value are the definitions of "identical" and "similar" in Article 15 of the *Customs Valuation Agreement* with respect to interpreting the word "like" in the context of the GATT non-discrimination rules? Unfortunately, the answer may be "not much." That *Agreement* does not define "directly competitive" merchandise, nor does it interpret the term "substitutable merchandise." Yet, these words matter to the application of GATT non-discrimination rules, especially Article III:2. Moreover, that *Agreement* governs only valuation of merchandise for purposes of assessing tariff liability. It does not purport to be of general applicability to "like product" issues in other trade contexts. Therefore, it would be technically incorrect to export the definitions from the *Agreement* to GATT Articles I and III, without hastening to qualify the move.

That is, exporting these definitions to the non-discrimination provisions of GATT would presume it is appropriate to draw an analogy between the process of customs valuation and the discernment of prohibited discrimination. On the one hand, it could be urged that the analogy is appropriate because the greater the degree of consistency in the definition of "like product" in different contexts, the greater the uniformity of outcomes in

disputes.[313] This argument champions harmony, and seeks a body of rules that form a seamless web.

On the other hand, it could be argued customs valuation is a fundamentally narrow, methodical process that demands a high degree of certainty and predictability. In turn, relatively inelastic definitions of "like product" are appropriate. In contrast, rooting out protective measures that favor products from one country over another (the MFN issue), or products made domestically over imported products (the national treatment issue), is less of a science and more of an art – though it is not an arbitrary decision. As the Appellate Body said in the 1996 *Japan Alcoholic Beverages* case:

> In applying the criteria cited in [the 1970 GATT Working Party Report in] *Border Tax Adjustments* [which, as discussed below, are a case-by-case analysis of the (1) end uses of a product in a given market, (2) tastes and habits of consumers, which vary from one country to another, and (3) properties, nature, and quality of a product] to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, panels can only apply their *best judgment* in determining whether in fact products are "like." *This will always involve an unavoidable element of individual, discretionary judgment*. … [W]e think it is a discretionary decision that must be made in considering the various characteristics of products in individual cases.[314]

Succinctly put, every "like product" determination requires a balance between attacking protectionism and protecting legitimate sovereign domestic policies.[315]

That also would be true, on this line of argumentation, with respect to trade remedies, as "like products" in unfair trade remedy cases (*i.e.*, AD and CVD cases) would not automatically be given the same meaning as in trade remedy cases involving fair foreign competition (*i.e.*, safeguards). Accordingly, this argument champions discernment, and seeks a body of law tailored to the nuances of different contexts.

- **Accordion Metaphor from 1996 *Japan Alcoholic Beverages* Case**

As to these two arguments, neither is wholly correct. There exists only a preference for one or the other, depending on the judge. If the Appellate Body is asked, then the answer

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313 *See, e.g.*, CHOI 2003 49-90 (arguing for consistent jurisprudence in "like" product determinations by relying on economic criteria such as objective characteristics, demand substitutability, supply substitutability, and potential or future competition substitutability); Gerald C. Berg, *An Economic Interpretation of "Like Product,"* 30 JOURNAL OF WORLD TRADE 195 (April 1996) (advocating an economic definition of "like product" to allow for more consistent determinations as to whether imported merchandise threatens domestic production).

314 *Japan Alcoholic Beverages* Appellate Body Report, § H:1(a). (Emphasis added.)

315 *See. e.g.*, Hanno E. Kube, *Competence Conflicts and Solutions: National Tax Exemptions and Transnational Controls*, 9 COLUMBIA JOURNAL OF EUROPEAN LAW 79, 108 (Fall 2002) (arguing trade discrimination rules should not rely solely on a simple economic definition of "like" product, but rather should consider other criteria for ascertaining likeness, such as ecological impact).

is clear after its 1996 decision in *Japan Alcoholic Beverages*. There, the Appellate Body says a continuum of possibilities between "identical" and "dissimilar" presumes flexibility. Its does so with its now-famous metaphor, namely, the accordion, which it invoked when opining on what "like products" means:

> No one approach to exercising judgment will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise and absolute definition of what is "like." [This 1970 case is discussed later. Briefly, in *Border Tax Adjustments*, the GATT Panel held the term "like or similar products" ought to be examined on a case-by-case basis using criteria such as end uses, consumer tastes and habits, and product characteristics.] *The concept of "likeness" is a relative one that evokes the image of an accordion*. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. *We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed*.[316]

It is not clear whether any of the Appellate Body members were fans of this musical instrument, nor whether they thought WTO disputes were analogous to polka, in which accordions are commonplace.

In any event, the message from the metaphor is this: there is no single definition of "like" to be used every time this word appears in a trade treaty. Rather, the definition depends on the place in which it is found. So, recourse to Article 15 of the *Customs Valuation Agreement* does not offer a conclusive definition of the term. To the contrary, the meaning of the term is relative to the context in which it appears.

In the context of the GATT national treatment rule of Article III:2, first sentence, the Appellate Body held the meaning is narrow. Why? One reason could be its respect for the sovereign autonomy of WTO Members. Too broad a definition would mean the Appellate Body would have to strike down a wide array of internal tax measures as discriminatory. As Member after Member lost, resentment against the judges of Geneva could grow. Indeed, conscious it was just a year old at the time of the *Japan Alcoholic Beverages* case, and, therefore, needing to establish its legitimacy, the Appellate Body did not want to over-reach and be accused of judicial activism. Another reason for defining "like" narrowly in Article III:2, first sentence, could be the Appellate Body sought to differentiate the term from "directly competitive or substitutable products." The second sentence of Article III:2 contains the latter phrase. The Appellate Body might have felt comfortable that it had the tool it needed – the non-discrimination rule in the second sentence – to strike down measures it found inappropriate.

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316 *Japan Alcoholic Beverages* Appellate Body Report, § H:1(a). (Emphasis added.)

It is important to appreciate what the accordion metaphor does not connote. It does not imply the word "like" is of indeterminate meaning, nor does it lead to the depressing thought that non-discrimination rules are pointless. There is a cottage industry in legal scholarship, unfortunately gripped by analytic philosophy (especially the philosophy of language), the output of which is the contention legal rules and their constituent parts – words – have no meaning. That argument is (at best) a *jeu d'esprit* for which most International Trade lawyers ought to have little patience. The Appellate Body is saying the meaning of "like" is contextual, not hopelessly vague.

The accordion metaphor also does not connote scientific precision. Multiple factors are to be considered in deciding whether to squeeze the accordion, and by how much. That is, the Appellate Body is upholding the importance of a balancing test, which necessarily entails judicial discretion, in deciding what "like" means in one context or another. To be sure, there is an inherent tension about judicial discretion between ruling that the definition of "like" in Article III:2, first sentence, is narrow, and indicating the need to balance factors. After all, a narrow definition in a particular context allows WTO Members more room for maneuver to discriminate. But, balancing factors, like playing an accordion (or any musical instrument), requires creative judgment. In the *Japan Alcoholic Beverages* case, the Appellate Body preserved its own discretion, but did so by constricting the definition of "like."

Finally, the impact of the accordion metaphor should not be exaggerated. True, it means part of the answer to "how is the term 'like products' interpreted?" depends on the context in which the term arises. The most vital contexts are the non-discrimination rules of GATT Article I:1, III:1-2, and III:4. So, it is not safe to say the interpretation is the same in all such contexts. But, it would be wrong to say the answer is "absolutely not."

- **Crossover from GATT Article III to Article I and 1998 *Indonesia Car* Case**

"Like product" tests developed in the context of Article III have persuasive force when interpreting the term in other GATT provisions. For example, in the 1998 *Indonesia Car* case, a WTO Panel applied its finding on like products from Article III:2 to the MFN issue raised in that case. The Panel stated:

> The European Communities, following the same logic it used for the like product definition in its Article III claims, submit that National Cars and their parts and components imported from Korea are to be considered "like" any motor vehicle and parts and components imported from other Members. The European Communities argue that imported parts and components and motor vehicles are all like the relevant domestic products since the definition of "National Cars" and their parts and components is not based on any factor which may affect *per se* the physical characteristics of those cars and parts and components, or their end uses. The United States argues that cars imported in Indonesia are like the Kia Sephia from Korea. Japan argues that parts and components and cars imported from Japan, or

> any other country, and those imported from Korea constitute "like products."
>
> We have found in our discussion of like products under Article III:2 that certain imported motor vehicles are like the National Car.[317] The same considerations justify a finding that such imported vehicles can be considered like National Cars imported from Korea for the purpose of Article I. We also consider that parts and components imported from the complainants are like imports from Korea. Indonesia concedes that some parts and components are exactly the same for all cars. As to the parts and components, which arguably are specific to the National Car, Indonesia does not contest that they can be produced by the complainants' companies. This fact confirms that the parts and components imported for use in the National Car are not unique. As before, we note in addition that the criteria for benefiting from reduced customs duties and taxes are not based on any factor which may affect *per se* the physical characteristics of those cars and parts and components, or their end uses. In this regard, we note that past panels interpreting Article I have found that a legislation itself may violate that provision if it could lead in principle to less favorable treatment of the same products.[318]
>
> We find, therefore, that for the purpose of the MFN obligation of Article I of GATT, National Cars and the parts and components thereof imported into Indonesia from Korea are to be considered "like" other similar motor vehicles and parts and components imported from other Members.[319]

In brief, the *Indonesia Car* Panel Report – which was not appealed – authorizes reliance in Article I on the definition of "like" from Article III.

VI. "Like Products," MFN Treatment, and Three Seminal Cases:

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317 The Panel added the following footnote:

> We refer to our discussions in paragraphs 14.110 and 14.111 where we found that given that the Timor, Escort, 306, Optima and Corolla models are in the same market segments, there would not appear to be any relevant differences in respect of consumers' tastes and habits sufficient to render these products unlike. In our view, this evidence is also sufficient to establish a presumption of likeness between the Timor, Corolla, Escort, 306 and Optima for purposes of Article I of GATT. Since Indonesia has submitted no evidence or argument to rebut the presumption of likeness for purposes of Article I of GATT, we find that at least these imported motor vehicles are like the National Car for purposes of Article I of GATT.

318 *See, e.g.*, GATT Panel Report, *United States – Denial of Most-Favored-Nation Treatment as to Non-rubber Footwear from Brazil*, B.I.S.D. (39th Supp.) 128 at ¶ 6.12 (adopted 19 June 1992).

319 Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, ¶¶ 14.140-142 (adopted 23 July 1998, not appealed).

For a history and analysis of the Indonesian national car program, see Christopher D. Hale, *Indonesia's National Car Project Revisited – The History of Kia–Timor Motors and its Aftermath*, XLI ASIAN SURVEY 629-45 (July/August 2001).

1949 *Brazilian Internal Taxes*, 1950 *Australian Ammonium Sulfate*, and 1952 *German Sardines*

As indicated above, Preparatory Conference materials carried little weight on the meaning of "like product" in three seminal GATT cases concerning the MFN obligation:

(1) From 1949, *Brazilian Internal Taxes*.[320]
(2) From 1950, *The Australian Subsidy on Ammonium Sulfate*.[321]
(3) From 1952, *Treatment by Germany of Imports of Sardines*.[322]

In *Brazilian Internal Taxes*, Brazil defended its discriminatory internal tax regime, and did so with the ostensibly farcical argument that imported and domestic cognac are not "like products." But, when Brazil pointed out the ingredients in the beverages differed considerably, the argument made sense. The GATT Panel accepted it, thus confirming that whether products are "like" depends vitally on their physical characteristics.

Whether ammonium sulphate and sodium nitrate are "like products" was at issue in *Australian Ammonium Sulfate*. The GATT Panel answered "no." As in the other early cases, the Panel reasoning is of interest. For customs classification purposes, the products are in distinct categories and, therefore, accorded separate tariff treatment. Here, then, is a second criterion for analogizing and distinguishing products: tariff classification.

The issue in *German Sardines* was the "likeness" of three kinds of small fish – sardines (*clupea pilchardus*), sprats (*clupea sprattus*), and herrings (*clupea harengus*). (The distinct scientific names, in parentheses, suggests the products are not "like," but biological species classification is not the test for "likeness.") Germany imported sprats and herrings from Norway, and sardines from other countries. Germany treated Norwegian sprats and herrings differently from imported sardines. Norway alleged the differentiation violated Article I (as well as Article XIII), in that all three should receive the same non-discriminatory treatment. In other words, Norway argued its sprats and herrings were disadvantaged relative to sardines imported by Germany from other countries, yet it was improper to distinguish among these three types of fish.

The GATT Panel disavowed a generic definition of "like product" (other than mentioning it was not synonymous with "directly competitive or substitutable product"). The Panel deemed it unnecessary to decide whether sardines, sprats, and herrings were "like" products. Instead, the Panel considered what the two countries negotiated during the 1950-1951 Torquay Round of MTNs, implying if Germany and Norway expressly or implicitly discussed these types of fish as a "like" product, then there ended the matter. In the end, the Panel found no violation of Article I.

The *German Sardines* case is as close as an early GATT Panel comes to putting faith in negotiating history. However, even that Panel did not rest its decision on the 1946-

320 *See* GATT, II B.I.S.D. 181, 183 (1952) (adopted 30 June 1949).
321 *See* GATT, II B.I.S.D. 188, 191 (1952) (adopted 3 April 1950).
322 *See* GATT B.I.S.D. (1st Supp.) 53, 57 (1953) (adopted 31 October 1952).

1948 Preparatory Conferences. Arguably, therefore, if the Preparatory Conference materials from the 1946 London and 1947 Geneva conferences are helpful in defining "like product," then the early GATT panels might have relied to some degree on them for guidance (notwithstanding the hesitancy in some legal cultures to use legislative history).

How, then, is "like product" interpreted under Article I? The short answer is likeness is determined according to three key factors: (1) characteristics; (2) end use; and (3) consumer behavior (specifically, tastes and preferences).[323] "Characteristics" refers to the physical characteristics of the imported good compared with the domestic product. An examination of what the two items look, feel, taste, smell, and/or sound like is required. This factor helped determine the outcome of not only the 1949 *Brazilian Internal Taxes* case, but also the 1952 *Belgian Family Allowances* case.[324] In a memorable passage, the GATT Panel in this case intoned that distinctions between goods may be based on the characteristics of the goods themselves, but not on the characteristics of their country of origin. If that point were not true, then discrimination based on country of origin would be legally permissible, and undermine efforts to liberalize trade.

Of course, adjudication imparts to that enterprise sophistication, namely, the three-pronged test. The Appellate Body best articulates the test in the 1996 *Japan Alcoholic Beverages* case. In subsequent cases, it elaborates on the test. (The "like product" test in *Japan Alcoholic Beverages* case, and its progeny cases, is discussed later.) The test is relevant to, and applied (in one sense or another) in, contexts far wider than Article I:1. After all, a "like product" analysis is required under Article III:2 and III:4, Article VI, and various other GATT provisions.

VII. "Like Products," National Treatment on Internal Taxes, and 1970 *Border Tax Adjustments* Case

● Three Significant Decisions

In the history of GATT-WTO adjudication, many cases have dealt with "like products." Not every such case yielded a practical test for defining when merchandise is "like." But, following the three seminal cases (above), the most significant decisions articulating a test have been:

(1) 1970 GATT Working Party Report in *Border Tax Adjustments*.[325]
(2) 1996 Appellate Body Report in *Japan Alcoholic Beverages*.[326]

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323 *See* Won Mog Choi, *Overcoming the "Aim and Effect" Theory: Interpretation of the "Like Product" in GATT Article III*, 8 UNIVERSITY OF CALIFORNIA DAVIS JOURNAL OF INTERNATIONAL LAW AND POLICY 107, 119 (Winter 2002) (arguing the Appellate Body excessively emphasizes extraneous criteria, such as the inferred purpose of a government for imposing a tariff, at the expense of the end use and consumer behavior the GATT Working Party set forth in its 1970 *Border Tax Adjustment* Report). [Hereinafter, Choi 2002.]

324 *See* B.I.S.D. (1st Supp.) 59 (1953) (adopted 7 November 1952).

325 *See* B.I.S.D. (18th Supp.) 97 at ¶ 18 (1972) (adopted 2 December 1970).

326 *Japan Alcoholic Beverages* Appellate Body Report, §§ H.1(a) (concerning "like products"), H.2(a) (concerning "directly competitive or substitutable products").

(3) 2001 Appellate Body Report in *EC Asbestos*.[327]

Between 1970, when a GATT Working Party issued its *Border Tax Adjustments* Report, and 1996, when the WTO Appellate Body issued its *Japan Alcoholic Beverages* decision, there were no major innovations in the test for "like products." Not surprisingly, the Appellate Body followed its test from *Japan Alcoholic Beverages* in two "progeny" cases, 1999 *Korea Alcoholic Beverages* and 2000 *Chile Alcoholic Beverages*. In *EC Asbestos,* the Appellate Body amended this test.

The *Border Tax Adjustments* case stands for the proposition that "like product" is to be defined in a case-specific manner by referring to relevant criteria such as the end use of a product, the tastes and preferences consumers have for a product, and the physical characteristics of a product.[328] As the Working Party stated:

> the interpretation of the term should be examined on a *case-by-case basis*. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's *end-uses* in a given market; *consumers' tastes and habits*, which change from country to country; the product's *properties, nature and quality*.[329]

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327 *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 12 March 2001).

328 To be sure, this proposition is not the only one for which the case stands. It also made formal in GATT jurisprudence the distinction between indirect and direct taxes. So, in respect of the case and concept of a border tax adjustment, a:

> [b]order tax adjustment (BTA) is the mechanism invented to harmonize the international taxation of products in accordance with the destination principle, which holds that goods should be taxed where they are used or consumed. BTA, which can be traced to the eighteenth century, allows each nation to implement its own regime of domestic taxation while assuring that goods that move in international trade are neither exempt from taxation nor subject to double taxation. BTA allows (1) an internal tax to be imposed on imported products; and (2) the remission of internal taxes on domestic products destined for export.
>
> … Only taxes on products, indirect taxes, [not taxes on income or the ownership of property, *i.e.*, direct taxes] are eligible for BTA. … In 1970, the GATT Working Party on *Border Tax Adjustments* made the distinction [between indirect and direct taxes] explicit, agreeing that "taxes directly levied on products were eligible for tax adjustment," and that "certain taxes that were not directly levied on products were not eligible for adjustment [including, for example] social security charges … and payroll taxes."

MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION – LAW, PRACTICE, AND POLICY 479 (2003).

329 Working Party Report, *Border Tax Adjustments*, B.I.S.D. (18th Supp.) 97 at ¶ 18 (1972) (adopted 2 December 1970). (Emphasis added.) This case raised interpretative questions about "like product" under several GATT provisions, namely, Article II:2, III:2, III:4, and XVI:4.

Nearly all subsequent adopted GATT Panel Reports, plus the first decision of the WTO Appellate Body, adhered to the case-by-case approach established in *Border Tax Adjustments*.

- **Facts**

In *Japan Alcoholic Beverages*, the Appellate Body acknowledged the importance of the case-by-case approach, citing not only the subsequent decisions, but also a decision using the case-by-case approach 20 years before *Border Tax Adjustments*:

(1) *The Australian Subsidy on Ammonium Sulphate* (1950).[330]
(2) *EEC – Measures on Animal Feed Proteins* (1978).[331]
(3) *Spain – Tariff Treatment of Unroasted Coffee* (1981).[332]
(4) *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages* (1987).[333]
(5) *United States – Taxes on Petroleum and Certain Imported Substances* (1987).[334]
(6) *United States – Standards for Reformulated and Conventional Gasoline* (1996).[335]

What were the essential facts in *Border Tax Adjustments*, and how did the Working Party come to its case-by-case test?

The Working Party observed the term occurred 16 times throughout the GATT, and although there had been considerable discussion of the term in the past, the term had not been perfected (in the sense of exact specification).[336] The Working Party concluded conflicts arising from the term should be analyzed on a case-by-case basis. The Working Party also emphasized the difference in tax systems, and accepted the definition of a "border tax adjustment" issued by the OECD. The Working Party recognized it was almost impossible to determine the extent to which direct and indirect taxes are shifted into commodity prices, and could not reach a conclusion on this issue.[337]

- **Case by Case Approach and Four Specific Criteria**

For a brief discussion of the history of BTAs, see Paul Demaret & Raoul Stewardson, *Border Tax Adjustments under GATT and EC Law and the General Implications for Environmental Taxes*, 28 JOURNAL OF WORLD TRADE 5, 6-7 (1994).

330 *See* II B.I.S.D. II at 188 (1952) (adopted 3 April 1950).

331 *See* B.I.S.D. (25th Supp.) 49 (1979) (adopted 14 March 1978).

332 *See* B.I.S.D. (28th Supp.) 102 (1982) (adopted 11 June 1981).

333 *See* B.I.S.D. (34th Supp.) 83 at ¶ 5.5(b)-(d) (1988) (adopted 10 November 1987).

334 *See* B.I.S.D. (34th Supp.) 136 at ¶ 5.1.9 (1988) (adopted 17 June 1987).

335 *See* Panel Report, WT/DS2/9 (adopted 20 May 1996).

336 *See* Working Party Report, *Border Tax Adjustments*, B.I.S.D. (18th Supp.) 97 at ¶ 18 (1972) (adopted 2 December 1970).

337 *See* Working Party Report, *Border Tax Adjustments*, B.I.S.D. (18th Supp.) 100-102 at ¶¶ 22-24 (1972) (adopted 2 December 1970).

It would be difficult to overstate the continuing importance of the case-by-case approach developed in *Border Tax Adjustments*. Almost invariably, when the term "like product" under Article III:1-2 or Article III:4 is at issue, the WTO Appellate Body reminds the complainant and respondent WTO Members of the criteria for defining this term developed in *Border Tax Adjustments*.

Notably, in its 2001 decision in *EC Asbestos*, the Appellate Body recounted:

> The Report of the Working Party on *Border Tax Adjustments* outlined an approach for analyzing "likeness" that has been followed and developed since by several panels and the Appellate Body. This approach has, in the main, consisted of employing four general criteria in analyzing "likeness": (i) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits – more comprehensively termed consumers' perceptions and behavior – in respect of the products; and (iv) the tariff classification of the products. We note that these four criteria comprise four categories of "characteristics" that the products might share: (i) the *physical properties* of the products; (ii) the extent to which the products are capable of serving the same or similar *end-uses*; (iii) the extent to which *consumers perceive* and treat the products as alternative means of performing particular functions in order to satisfy a particular want or demand; and (iv) the international *classification* of the products for tariff purposes.[338]

In brief, the Appellate Body endeavors to determine whether imports and domestic goods are "like products" squarely in the line of the *Border Tax Adjustments*.

At the same time, it would be a mistake to think the *Border Tax Adjustments* precedent is a straitjacket. The above-quoted passage illustrates the point. The Working Party in *Border Tax Adjustments* did not mention the fourth criterion, tariff classification. Rather, subsequent GATT panels, in the 1978 *EEC Animal Feed* and 1987 *Japan Customs Duties* cases, relied in part on this factor.[339]

Thus, the Appellate Body also said in *EC Asbestos*:

> [t]hese general criteria, or groupings of potentially shared characteristics, [from *Border Tax Adjustments*] provide a framework for analyzing the "likeness" of particular products on a case-by-case basis. These criteria are, it is well to bear in mind, simply tools to assist in the task of sorting and examining the relevant evidence. They are neither a treaty-mandated nor a closed list of criteria that will determine the legal

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338 Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 102 (adopted 12 March 2001). (Emphasis added.)

339 *See Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, B.I.S.D. (34th Supp.) 83 at ¶ 5.6 (1988) (adopted 10 November 1987); *EEC – Measures on Animal Feed Proteins*, B.I.S.D. (25th Supp.) 49 at ¶ 4.2 (1979) (adopted 14 March 1978).

> characterization of products. More important, the adoption of a particular framework to aid in the examination of evidence does not dissolve the duty or the need to examine, in each case, *all* of the pertinent evidence. In addition, although each criterion addresses, in principle, a different aspect of the products involved, which should be examined separately, the different criteria are interrelated. For instance, the physical properties of a product shape and limit the end-uses to which the products can be devoted. Consumer perceptions may similarly influence – modify or even render obsolete – traditional uses of the products. Tariff classification clearly reflects the physical properties of a product.[340]

This observation could well have come from a Common Law judge. As any lawyer familiar with the Anglo-American legal system knows, the doctrine of *stare decisis* does not entail rigid application of previous holdings. In the above-quoted passage, the Appellate Body politely demands the flexibility required for any legal system – domestic or international, case law-based or treaty-based – to remain robust and vibrant. Indeed, in *EC Asbestos* the Appellate Body "updates" the *Border Tax Adjustments* criteria to take account of new facts, by adding a fifth factor on which to judge "likeness:" health risks posed by a product.

VIII: "Like Products," National Treatment on Internal Taxes, and 1996 *Japan Alcoholic Beverages* Case

● Facts

Japan is the second largest market in the world for American distilled spirits. Under Japan's *Liquor Tax Law*, certain imported alcoholic beverages – such as brandy, cognac, genever, gin, liqueurs, rum, vodka, whiskey, and other spirits – were subject to an internal tax. However, that *Law* subjected domestically produced *shochu* (a distilled white spirit) to a much-reduced tax.

For example, the tax on *shochu* was between one-fourth and one-seventh of the tax on imported brandy and whiskey, and two-thirds of the tax on imported rum and vodka. Not surprisingly, between 1989 and 1996, the share of *shochu* in the Japanese market for distilled spirits grew from 61% to 74%. And, whereas other industrialized countries import an average of 30% of such beverages consumed, Japan imports only 8%.

Naturally, the complainants – the U.S., EU, and Canada – claimed the Japanese tax scheme violated Article III:2. They claimed the Japanese *Liquor Tax Law* violated both the first and second sentences of Article III:2. Contrary to the first sentence, the *Law* applied different tax rates to "like domestic products." Contrary to the second sentence, that *Law* distorted the relative prices of imports and *shochu*, and consequently distorted consumer choice between these categories of alcoholic beverages.

The first sentence of Article III:2 calls for non-discriminatory treatment with

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[340] Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 102 (adopted 12 March 2001). (Emphasis original.)

respect to internal taxes or other internal charges as between imports and "like domestic products." Related to Article III:2 is an important Interpretative Note, *Ad Article III*. Paragraph 2 of *Ad Article III* provides the following:

> [a] tax conforming to the requirements of the first sentence of paragraph 2 [of Article III] would be considered to be inconsistent with the provisions of the second sentence [of Article III:2] only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a *directly competitive or substitutable product* which was not similarly taxed.[341]

Thus, the complainants faced a threshold problem associated with each claim.

- **Issues**

As regards the first sentence of Article III:2, were imported spirits and *shochu* "like" products? If not, then there could be no violation of this sentence, because the sentence expressly refers to "like domestic products." As regards the second sentence, were imported spirits and *shochu* "directly competitive and substitutable products"? If not, this sentence was inapplicable, because Paragraph 2 of the Interpretative Note expressly refers to "directly competitive or substitutable product." In brief, only if *shochu* were a "like" or a "directly competitive and substitutable product" would the complainants qualify for the protection of the national treatment principle of Article III:2.

Japan countered imported spirits were neither "like" nor "directly competitive or substitutable" products. Hence, neither the first nor the second sentence of Article III:2 was applicable. Japan had to make this argument. Almost any respondent in an Article III case should consider a threshold argument that the national treatment obligation is inapposite, because the imported and domestic products do not bear the resemblance necessary to one another to trigger the obligation. For the argument to be plausible, the respondent not only must know the intimate details of the products at issue, but also what "like" and "directly competitive or substitutable" mean.

- **Japanese Arguments and Rebuttals**

In *Japan Alcoholic Beverages*, Japan advocated a highly restrictive definition of "like product." Conjuring up the concept of "identicalness" in Article 15:2(a) of the *Customs Valuation Agreement*, Japan defined "like products" as more-or-less the same products. Because they were unlike products, the obligation of the first sentence of Article III:2 – namely, not to subject imports to internal taxes of charges in excess of those applied to like domestic products – was not triggered, and Japan could tax the imports at whatever rate it chose. Japan also contended the products neither competed with one another directly, nor were substitutable with one another.

But, as any well-argued respondent should, Japan had a fallback position. Even if

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341 Emphasis added.

shochu were "directly competitive or substitutable" with imported alcoholic beverages, the Japanese *Liquor Tax Law* still did not violate the second sentence of Article III:2. This sentence refers to Article III:1. Paragraph 1 of this Article instructs (using the word "should," not "shall") WTO Members to apply internal taxes or charges, or other laws and regulations, in a manner that "afford[s] protection to domestic production." Japan argued its *Law* was not designed to protect domestic production. Evident from this argument is Japan's emphasis on its pure-hearted motivation.

At bottom, Japan was saying the aim of its *Law* was relevant to the application of the second sentence of Article III:2. That sentence refers to Article III:1, which, in turn, frowns upon internal taxes applied so as to afford domestic protection, and how better to assess whether taxes yield protection than to ascertain the intent of the tax? The obvious rebuttal to this argument is to look at the actual effect of the tax, *i.e.*, the comparative tax burdens on imported products and directly competitive or substitutable domestic merchandise. Herein, then, lies the "aims and effects" test for national treatment.[342]

- **Panel Holding and Rationale**

The *Japan Alcoholic Beverages* Panel rejected Japan's restrictive approach to defining a "like product." The Panel took a flexible, eclectic approach to defining both a "like product" and a "directly competitive or substitutable product." There is no single, precise, uniform, or absolute definition of these terms, and nor could there be one. Rather, these terms have to be interpreted on a case-by-case basis. The meaning of "likeness" and "directly competitive or substitutable" depended dearly on the context in which these terms are used in a particular GATT-WTO provision.

In effect, the Panel followed the *Border Tax Adjustments* approach. That also is true of the Appellate Body, which sought to put itself in the line of *Border Tax Adjustments*: "We agree with the practice under the GATT 1947 of determining whether imported and domestic products are 'like' on a case-by-case basis."[343] The Appellate Body called this practice the "basic approach," and observed it "was followed in almost all adopted panel reports after *Border Tax Adjustments*."[344]

It cited six such cases:

(1) 1950 Working Party Report in *The Australian Subsidy on Ammonium Sulphate*.[345]
(2) 1978 GATT Panel Report in *EEC – Measures on Animal Feed Proteins*.[346]
(3) 1981 GATT Panel Report in *Spain – Tariff Treatment of Unroasted Coffee*.[347]

342 The "aims and effects" test is criticized strongly in Choi 2002, 119.
343 *Japan Alcoholic Beverages* Appellate Body Report, § H.1(a).
344 *Japan Alcoholic Beverages* Appellate Body Report, § H.1(a).
345 *See* B.I.S.D. vol. II at 188 (1952) (adopted 3 April 1950).
346 *See* B.I.S.D. (25th Supp.) 49 (1979) (adopted 14 March 1978).
347 *See* B.I.S.D. (28th Supp.) 102 (1982) (adopted 11 June 1981)

(4) 1987 GATT Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*.[348]
(5) 1987 GATT Panel Report on *United States – Taxes on Petroleum and Certain Imported Substances*.[349]
(6) 1996 WTO Panel Report in *United States – Standards for Reformulated and Conventional Gasoline*.[350]

Thus, in *Japan Alcoholic Beverages*, neither the Panel nor the Appellate Body meant to imply the case-by-case approach of *Border Tax Adjustments* lacks substance.

At the same time, the Panel and Appellate Body elaborated on this approach. First, the Panel affirmed the nature of the word "like" means that "like products" do not have to be identical in all respects, though they ought to have essentially the same physical characteristics and end uses. "Directly competitive or substitutable products" need not even physically resemble one another, though they ought to have common end uses. The Panel also pointed out "like products" is a narrower class of products than "directly competitive or substitutable products." That is because the first and second sentences of, coupled with the Interpretative Note to, Article III:2, differentiate between these two classes.

- **Appellate Body Holding and Rationale**

In *Japan Alcoholic Beverages*, the Appellate Body rightly agreed that the definition of "like products" in the first sentence "should be construed narrowly."[351] "Like products" is a more selective category than "directly competitive or substitutable" products. In other words, all goods that are "like" are *a fortiori* directly competitive or substitutable with one another. But, the converse is not true. Directly competitive or substitutable products are not necessarily "like" one another.

As the Appellate Body said in the 1999 *Korea Alcoholic Beverages* case:

> "like" products are a *subset* of directly competitive or substitutable products: *all like products are, by definition, directly competitive or substitutable products, whereas not all "directly competitive or substitutable" products are "like."* The notion of like products must be construed narrowly, but the category of directly competitive or substitutable products is broader. While perfectly substitutable products fall within Article III:2, first sentence, imperfectly substitutable products can be assessed under Article III:2, second sentence.[352]

This distinction is not a matter of playing word games or drawing Venn diagrams.

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348 *See* B.I.S.D. (34th Supp.) 83 at ¶ 5.8 (1988) (adopted 10 November 1987).
349 *See* B.I.S.D. (34th Supp.) 136 at ¶ 5.1.9 (1988) (adopted 17 June 1987).
350 *See* WT/DS2/9 (adopted 20 May 1996).
351 *Japan Alcoholic Beverages* Appellate Body Report, § H.1(a).
352 Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R and WT/DS84/AB/R, ¶ 118 (adopted 18 January 1999). (Emphasis added.)

The terms of the first sentence of Article III:2 are "strict," said the Appellate Body in *Japan Alcoholic Beverages*. They condemn measures affecting the narrow class of products that are "like." The second sentence of Article III:2 exists to scrutinize a broader category of products, ones that are "directly competitive or substitutable." If "like" products were not defined narrowly, then the distinction between the first and second sentences of Article III:2, when read in conjunction with *Ad Article III*, would eviscerate.

Second, the Appellate Body expanded the *Border Tax Adjustments* criteria beyond the three prongs the GATT Working Party identified (product end uses in a given market, consumer tastes and habits in a particular country, and product properties, nature, and quality). The Appellate Body said tariff classification also was an appropriate criterion on which to judge whether an imported product was "like" a domestic product.

In fact, it cited three previous cases in which a sufficiently detailed tariff classification had been used as a criterion for determining "like products:"

(1) 1978 GATT Panel Report in *EEC – Measures on Animal Feed Proteins*.[353]
(2) 1987 GATT Panel Report in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*.[354]
(3) 1996 WTO Panel Report in *United States – Standards for Reformulated and Conventional Gasoline*.[355]

Accordingly, the Appellate Body might not agree it "expanded" the jurisprudence, but rather characterize its work as being firmly in the line of case law.[356]

The Appellate Body carefully distinguished between tariff classification, by which it meant tariff nomenclatures used in the HS, and concessions on tariff bindings. During multilateral trade negotiations, some countries offer concessions on a range of products that cut across more than one HS tariff heading (*e.g.*, an across-the-board cut on non-agricultural products). Depending on the case, tariff bindings may be too broad to be a suitable basis for ascertaining "likeness," whereas the HS offers near pinpoint precision.

- **Substantive Outcomes**

What were the decisions of the Panel and Appellate Body on the merits of the Japan *Liquor Tax Law* as it applied to "like products"? (They are discussed in a separate Chapter.) Briefly, the Panel held *shochu* is a "like" domestic product *vis-á-vis* vodka (but not *vis-á-vis* other imported alcoholic beverages). The Panel further held the *Law* violated the first sentence of Article III:2, because it taxed vodka in excess of the *shochu*. The Appellate

353 *See* B.I.S.D. (25th Supp.) 49 (1979) (adopted 14 March 1978).
354 *See* B.I.S.D. (34th Supp.) 83 at ¶ 5.8 (1988) (adopted 10 November 1987).
355 *See* WT/DS2/9 (adopted 20 May 1996).
356 Some observers disagree with the decisions of the Appellate Body. *See, e.g.*, Edward S. Tsai, "*Like" is a Four Letter Word – GATT Article III's "Like Product" Conundrum*, 17 BERKELEY JOURNAL OF INTERNATIONAL LAW 26 (1999) (arguing the Panel and Appellate Body decisions in *Japan Alcoholic Beverages* are unclear, too harsh, and allow the WTO to intrude on national government policy making).

Body essentially agreed with these findings by the Panel. That is, the Appellate Body upheld the Panel determinations that (1) *shochu* and vodka are "like" products, and (2) Japan's *Liquor Tax Law* violated Article III:2, first sentence, by taxing vodka more heavily than *shochu*.

IX. "Like Products," National Treatment on Regulations, and 2001 *EC Asbestos* Case

● Facts

What the French did that gave rise to the dispute 2001 *EC Asbestos* case is easy to understand: they forbid asbestos imports.[357] On 24 December 1996, France adopted Decree 96-1133 banning asbestos. Asbestos is a fibrous mineral made from hydrated silicates. Asbestos fibers have attractive chemical and physical properties, such as resistance to different kinds of chemical attacks and to high temperatures. Consequently, they have been used for commercial and industrial purposes, such as building construction. Asbestos is generally acknowledged to cause serious health risks.[358]

France issued the ban under its Labor and Consumer Codes, which protect workers and consumers, respectively. The ban took effect on 1 January 1997 and was comprehensive in scope.[359] It applied to not only to importation, but also to exportation, manufacture, marketing, offer, possession, processing, sale, and transfer. The ban covered both groups of asbestos, which differ by chemical and physical properties:

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357 *See* Panel Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/R, ¶¶ 1.1-3.20 (adopted as modified by the Appellate Body 12 March 2001). [Hereinafter, *EC Asbestos* Panel Report.]

358 In challenging the ban, Canada put itself in the uncomfortable position of challenging scientific evidence about the health risks posed by different kinds of asbestos fibers (identified below). Canada differentiated chrysotile fibers, which are used in a limited number of products and encapsulated in an inert matrix, from other fibers, and said they do not pose risks to business or the general public. As for the exception to the ban, Canada queried the logic of replacing an undetectable risk from chrysotile with unknown risks from substitute products.

Canada also accused France of implementing the ban as a political reaction to alarmist campaigns against all forms of asbestos. Canada drew a parallel between this reaction and a similar ban in 1989 issued by the EPA. The EPA could not justify the ban on scientific grounds, and had to withdraw it in 1992, acknowledging modern products with chrysotile enclosed in a matrix of cement or resin do not pose a detectable risk to public health. Thus, in the U.S., while asbestos fibers in the amphiboles group are prohibited, several products containing non-brittle chrysotile are permitted. Of course, the EC disputed the Canadian rendition of many of the facts. *See EC Asbestos* Panel Report, ¶¶ 3.8-3.10. The Appellate Body rejected Canada's arguments, ruling in favor of the EC defense of the ban under GATT Article XX(b).

359 France limited the ban in one way with a "no substitute" exception to it. On a temporary basis, and just for chrysotile and products containing chrysotile, France allowed importation. But, the exception could be invoked only if there were no acceptable substitutes, *i.e.*, no substitute fiber existed that, based on extant scientific knowledge, posed a lesser occupational health risk than chrysotile fiber. Moreover, the domestic business establishment, importer, or other responsible party invoking the exception provided technical safety guarantees on the ultimate use of the chrysotile. Under these conditions, commonly called "short supply," the chrysotile or chrysotile-containing product could be imported for the function equivalent to the unacceptable substitute. The exception terminated, making the ban total, on 1 January 2002.

(1) Amphiboles, of which there are five varieties, actinolite, amosite (also known as "brown asbestos"), anthophyllite, crocidolite (also known as "blue asbestos"), and tremolite.
(2) Serpentine, of which there is one variety, chrysolite (also known as "white asbestos").

(Of these fibers, amosite, crocidolite, and chrysolite are most commonly used for commercial and industrial purposes.) The ban also covered all devices, materials, or products containing any asbestos fibers.

- **Canadian Winning Argument at Panel Stage**

Trade data showed unequivocally Canadian exports were adversely affected by the ban. Before the ban, France imported annually from Canada between 20,000 and 40,000 tons of chrysotile fiber. For Canadian exporters, these volumes translated into a two-thirds share of all imports into France. When, in July 1996, France announced its intention to promulgate a ban on asbestos, Canadian imports dropped to less than 15,000 tons. In the first year of the ban, 1997, just 18 tons were imported (presumably as lawful exceptions): the French market was lost. In turn, over 4,000 Canadian jobs were imperiled. Canadian chrysotile mines were located in Quebec. About 1,300 jobs were directly connected to these mines, and a further 1,300 jobs indirectly depend on it. An additional 1,500 jobs, mainly in Quebec, are in the chrysotile processing industry (*e.g.*, workers employed in friction product, composite material, and asbestos textile companies).

Canada claimed the ban was an unnecessary obstacle to international trade in violation of Article 2:2 of the WTO *TBT Agreement*, and not in compliance with effective, appropriate international standards in violation of Article 2:4 of this *Agreement*.[360] These claims were unsuccessful, essentially because the Panel decided not to examine them, hence they posed no issue of law for the Appellate Body. The Appellate Body did, however, overrule the Panel holding the ban was not a "technical regulation" under the *TBT Agreement*. To the contrary, said the Appellate Body, the French Decree was a "technical regulation" within the meaning of Annex 1:1 to that *Agreement*.[361]

Accordingly, the case focused on Canada's other principal claim, which was the ban violated the national treatment obligation of Article III:4. To make this claim, Canada had to prove the products at issue were "like" within the meaning of Article III:4. Paragraph 4 of Article III extends the national treatment obligation beyond internal taxation, which Paragraph 2 covers, to any measure affecting international trade:

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360 Canada also claimed the ban violated the national treatment rule of Article 2:1 of the *TBT Agreement*, and the rule relating to product performance in Article 2:8 of that *Agreement*. As with the Article 2:2 and 2:4 claims, these claims were unsuccessful, essentially because the Panel held the ban did not fall within the scope of the *Agreement*. Finally, Canada argued the ban was contrary to the prohibition against QRs under GATT Article XI:1. Because the Panel found the Decree was inconsistent with Article III:4, it did not rule on the Article XI:1 argument. *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶¶ 3-4 (adopted 12 March 2001) [hereinafter, *EC Asbestos* Appellate Body Report]; *EC Asbestos* Panel Report, ¶¶ 3.1(a)(iii)-(iv), (b), 8.159.

361 *See EC Asbestos* Appellate Body Report, ¶¶ 58(a), 59-83, 192(a).

> The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment *no less favorable* than that accorded to *like products* of national origin in respect of *all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use*. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.[362]

In the *EC Asbestos* case, Canada characterized two sets of products as "like."[363]

First, chrysotile asbestos fibers are "like" certain non-asbestos fibers, specifically, polyvinyl alcohol (PVA) fibers, cellulose fibers, and glass fibers. (These non-asbestos fibers are collectively called "PCG" fibers). Second, cement-based products that contain chrysotile asbestos fibers are "like" cement-based products containing any PCG fiber. Canada persuaded the Panel, which agreed chrysotile and PCG fibers are "like products," and granted that cement-based products with chrysotile are "like" cement-based products with PCG fibers.

In other words, Canada persuaded the Panel that PCG fibers and cement-based products with PCG fibers are the "like product" made in France. In turn, the Panel accepted the Canadian claim that the French ban on asbestos and asbestos-containing products violated the national treatment obligation of Article III:4.

Why did the Panel regard favorably the Canadian characterizations? The answer is the Panel said it applied the "like product" test established in 1970 by the GATT Working Party in *Border Tax Adjustments*.[364] Using that case-by-case approach to analyze "likeness," the Panel examined:

> four general criteria … : (1) the properties, nature and quality of the products; (ii) the end-uses of the products; (iii) consumers' tastes and habits; and, (iv) the tariff classification of the products.[365]

However, significantly, the Panel expressly declined to consider a fifth criterion – the risk of a product. It would not even consider it in the context of the general criteria, most obviously, the properties, nature, and quality of a product.

So, the Panel held (1) chrysotile asbestos fibers are "like" PCG fibers, and (2) cement-based products with chrysotile are "like" cement-based products with PCG fibers,

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362 Emphasis added.

363 *See EC Asbestos* Appellate Body Report, ¶¶ 58(a)-(b), 84.

364 *See* Working Party Report, *Border Tax Adjustments*, B.I.S.D. (18th Supp.) (1972) 97 (adopted 2 December 1970).

365 *EC Asbestos* Appellate Body Report, ¶ 85.

on the basis of the first two factors: the properties, nature, and quality of the products, and their end uses.[366] The Panel conceded the products at issue did not share the same structure or chemical composition, but said these distinctions were not decisive. What mattered was market access, namely, the products have the same applications and can replace each other in industrial uses. In turn, the second factor was satisfied. The Panel expressly declined to take a position on the third factor, consumer tastes and habits, saying there are no clear results in this regard. On the fourth factor, tariff classification, the Panel relied on it (plus the first two factors) to find cement-based products containing chrysotile asbestos fibers are "like" cement-based products containing PCG fibers.

- **Appellate Body Adds Health Risks and Canada Loses**

The EC appealed, contending the Panel erred in excluding the health risks associated with chrysotile asbestos fibers in deciding whether they are "like" PCG fibers. The Appellate Body found the European contention persuasive. The Appellate Body overruled all Panel conclusions, *i.e.*, it held the products were not "like." Consequently, with no "like" products, there was no GATT Article III:4 violation.[367] The Appellate Body also accepted the EC defense, forged under Article XX:(b), that the ban is "necessary to protect human … life or health."

- **1st Consequence:**
  Meaning of "Like Product" in Article III:4

The Appellate Body judgment against the Canadian claim of a violation of Article III:4 followed inexorably from its "like product" determination. Thus, the importance of *EC Asbestos* lies not in a contribution to the jurisprudence on national treatment, but rather in this determination. The Appellate Body determination is of great moment. First, the *EC Asbestos* decision is historic. Second, the decision clarifies the relationship between the meaning of "like products" in distinct legal contexts, Article III:2 and III:4. Third, the decision embodies doctrinal evolution with respect to the meaning of "like products" in different factual contexts. Fourth, one Appellate Body member added a concurring opinion posing a doctrinal challenge for the future.

As to the first reason, *EC Asbestos* is the first WTO dispute in which the Appellate Body opined on the meaning of "like product" in the context of Article III:4. Consequently, the case presented the Appellate Body with the challenge of rendering a decision at once in line with *Border Tax Adjustments* and sufficiently innovative to account for an entirely new set of facts.

The Appellate Body took full advantage of the opportunity. It began dismantling the Panel holding on "like products" by re-teaching the proper application of the *Border Tax Adjustments* approach:

[H]aving adopted an approach based on the four criteria set forth in *Border*

366 *See EC Asbestos* Appellate Body Report, ¶¶ 85, 105-108, 127.
367 *See EC Asbestos* Appellate Body Report, ¶ 132.

> *Tax Adjustments*, the Panel should have examined the evidence relating to *each* of those four criteria and, then weighed *all* of that evidence, along with any other evidence, in making an *overall* determination of whether the products at issue could be characterized as "like." Yet, the Panel expressed a "conclusion" that the products were "like" after examining only the *first* of the four criteria. The Panel then repeated that conclusion under the second criterion – without further analysis – before dismissing altogether the relevance of the third criterion and also before rejecting the differing tariff classifications under the fourth criterion. In our view, it was inappropriate for the Panel to express a "conclusion" after examining only one of the four criteria. By reaching a "conclusion" without examining all of the criteria it had decided to examine, the Panel, in reality, expressed a conclusion after examining only some of the evidence.[368]

In particular, the Panel confused the first two criteria from *Border Tax Adjustments*. When it compared the market access of chrysotile asbestos fibers to PCG fibers, and the market access of cement-based products with chrysotile to cement-based products with PCG fibers, the Panel did so by examining physical properties. But, market access is related to end uses, not physical properties.

Hence, the Appellate Body pointed out the logical problem: intertwining distinct criteria. The Panel ought to have engaged in a comprehensive analysis of each criterion on its own merits, which as regards the second criterion would mean studying all plausible end uses of chrysotile and PCG fibers, and cement-based products with these kinds of fibers.[369] Further, contrary to the Panel's conviction, just because an imported item and a domestic product share the same end use, it does not follow their physical properties are equivalent. Even an amateur Egyptologist knows both a sarcophagus and coffin are used for burial, but the former is made of stone and the latter of wood. Conversely, as the Appellate Body properly pointed out, goods with different physical properties can have identical end uses.[370]

Worse yet, the Panel committed a serious legal error by consciously eschewing the third criterion, consumer tastes and habits. The Appellate Body essentially accused the Panel of dereliction of duty, saying "[a] Panel cannot decline to inquire into relevant evidence simply because it suspects that evidence may not be 'clear'…."[371] The third criterion is especially important when comparing products that, on the first criterion, have different physical properties – like chrysotile asbestos fibers (and cement-based products containing them), which are a known carcinogen, and PCG fibers (and cement-based products containing them), which do not pose that risk.

As the Appellate Body put it, whether a consumer is a commercial party like a construction company or a DIY enthusiast, or simply an owner or inhabitant of a building,

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368 *EC Asbestos* Appellate Body Report, ¶ 109. (Emphasis original.)
369 *See EC Asbestos* Appellate Body Report, ¶ 119.
370 *EC Asbestos* Appellate Body Report, ¶¶ 110-112.
371 *EC Asbestos* Appellate Body Report, ¶ 120.

consumer tastes and habits are almost surely to be affected by the presence of a known carcinogen in a product.[372] Succinctly put, the Panel conclusion in favor of "likeness" lacked credibility because its analysis was inchoate. Consumer tastes and habits with respect to physically different fibers must be checked, if the *Border Tax Adjustments* approach is to be followed faithfully.

In turn, less-than-faithful adherence by the Panel doomed its analysis to a focus on the wrong target. The Panel studied market access. The Appellate Body said it should have looked at the competitive relationship between products in a marketplace. The Panel erred by converting the "like products" examination from a full test on competitive relationship to a misplaced measurement of import access to the French market.[373]

In sum, the Appellate Body used its first occasion to rule on "like products" under Article III:4 to affirm the continuing vitality of *Border Tax Adjustments* and criticize the Panel for deviating from this precedent. Upon rejecting the Panel conclusions on "like products" and national treatment, the Appellate Body could have ended its Report. Instead, the Appellate Body did the work of the Panel the way the Panel ought to have done it in the first place. Thus, several paragraphs of the Appellate Body Report are dedicated to a "like product" comparison of chrysotile fibers to PCG fibers, and cement-based products with chrysotile fibers to cement-based products with PCG fibers.[374]

Neither the reasoning in, nor outcome of, the Appellate Body "like product" discussion is surprising. On the first *Border Tax Adjustment* criterion, the Appellate Body said the carcinogenic nature of chrysotile asbestos fibers, associated with their particular molecular structure, chemical composition, and fibrillation capacity, render them physically distinct from PCG fibers, which do not pose the same risk to human health. The Appellate Body relied on scientific evidence, including from international bodies like the WHO. Carcinogenicity difference also physically differentiates cement-based products with chrysotile fibers from those products with PCG fibers.[375]

As to the second criterion, the Appellate Body said there was no evidence about end uses of chrysotile and PCG fibers that do not overlap. Asbestos fibers have about 3,000 commercial applications, most notably cement-based products, insulation, and friction lining. In France, 90% of imports of chrysotile fibers were used in cement-based products. PCG fibers may be put to the same end use. But, without evidence on applications that chrysotile and PCG fibers do not have in common, the Appellate Body logically deduced it was impossible to know what proportion of all end uses overlap. It made the same deduction with respect to cement-based products.

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372 *See EC Asbestos* Appellate Body Report, ¶ 130.

373 *See EC Asbestos* Appellate Body Report, ¶¶ 117-18.

374 *See EC Asbestos* Appellate Body Report, ¶¶ 134-48.

375 *See* Marie-Claire Cordonier Segger & Markus W. Gehring, *The WTO and Precaution: Sustainable Development Implications of the WTO Asbestos Dispute*, 15 JOURNAL OF ENVIRONMENTAL LAW 289 (2003 (arguing the precautionary principle adopted by the Appellate Body, when it determined toxicity is relevant to establishing product "likeness," is crucial for ensuring international trade fosters efforts to enact sustainable development, health, and environmental rules).

Thus, the first criterion clearly pointed away from "likeness," and no conclusion could be drawn from the second criterion. As for the third criterion, no conclusion could be drawn from it, either. That was because Canada chose not to present evidence on consumer tastes and habits, saying they were irrelevant. The final criterion, tariff categorization, indicated the products were not "like," because chrysotile asbestos fibers and PCG fibers fall into different customs classifications in the HS. That was not true of cement-based products, as the tariff classification of any given cement-based product is the same. However, the Appellate Body ruled tariff classification alone is an insufficient basis on which to conclude products are "like."[376]

- **2nd Consequence:**
  Meaning of "Like Product" in Article III:2 and Article III:4

The second ground for proclaiming the Appellate Body decision in *EC Asbestos* to be valuable follows logically from the first reason. The case clarifies what "like products" means in Article III:2 and III:4. The "general principle" of Article III:1 informs the interpretation of "like product," as the Appellate Body said in *Japan Alcoholic Beverages* and repeated in *EC Asbestos*.[377] But, it offered the metaphor of the accordion in *Japan Alcoholic Beverages*.[378] That metaphor connotes the need to interpret the term "like products" contextually, *i.e.*, in light of the GATT Article in which it appears.

So, for example, Article III:2, which was at issue in *Japan Alcoholic Beverages*, contains two sentences – the first imposing an obligation with respect to "like products," and the second imposing an obligation with respect to "directly competitive or substitutable products." In contrast, Article III:4, which was at issue in *EC Asbestos*, has no provision analogous to the second sentence of Article III:2. That is, Article III:4 regulates only "like products." What conclusion may be drawn from this contrast?

In *EC Asbestos*, the Appellate Body inferred the meaning of "like product" in Article III:2, first sentence, is narrower than the meaning in Article III:4. That is because the second sentence of Article III:2 plays the role of expanding the national treatment obligation to "directly competitive or substitutable products." Article III:4 has no sentence playing that kind of role. Rather, all of the work is done by the term "like products." So, it is reasonable to view this term in the Article III:4 context more broadly than in Article III:2, first sentence, assuming the goal of the interpretative process is to impart strong meaning to the national treatment obligation. As the Appellate Body put it in *EC Asbestos*: "we conclude that, *given the textual difference between Article III:2 and III:4, the 'accordion' of 'likeness' stretches in a different way in Article III:4*."[379]

The Appellate Body buttressed this conclusion by recalling the "general principle"

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376 *See EC Asbestos* Appellate Body Report, ¶ 146.

377 *EC Asbestos* Appellate Body Report, ¶ 93; Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, § H:1 (adopted 1 November 1996).

378 *See* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, § H:1(a) (adopted 1 November 1996). (Emphasis added.)

379 *EC Asbestos* Appellate Body Report, ¶ 96. (Emphasis added.)

of Article III:1, which informs the meaning of "like product" in Article III:4 even though it is not expressly invoked in Paragraph 4. This principle does not guarantee any particular volume of trade. Rather, it "obliges Members of the WTO to provide *equality of competitive conditions for imported products in relation to domestic products*…."[380] Put succinctly, the term "like products" in Article III:4 is concerned with a competitive relationship between imports and domestic goods, whereas a separate term exists to capture that relationship in the second sentence of Article III:2.

What, then, is the definition of "like product" in Article III:4? In *EC Asbestos*, the Appellate Body answered, albeit with some difficulty:

> As products that are in a competitive relationship in the marketplace could be affected through treatment of *imports* "less favorable" than the treatment accorded to *domestic* products, it follows that the word "like" in Article III:4 is to be interpreted to apply to products that are in such a competitive relationship. Thus, a determination of "likeness" under Article III:4 is, fundamentally, a determination about the nature and extent of a competitive relationship between and among products. … [W]e are mindful that there is a spectrum of degrees of "competitiveness" or "substitutability" of products in the marketplace, and that it is difficult, if not impossible, in the abstract, to indicate precisely where on this spectrum the word "like" in Article III:4 of the GATT 1994 falls. We are not saying that *all* products which are in *some* competitive relationship are "like products" under Article III:4. In ruling on the measure at issue [France's ban of asbestos and asbestos-containing products], we also do not attempt to define the precise scope of the word "like" in Article III:4. Nor do we wish to decide if the scope of "like products" in Article III:4 is co-extensive with the combined scope of "like" and "directly competitive or substitutable" products in Article III:2. However, we recognize that the relationship between these provisions is important, because there is no sharp distinction between fiscal regulation, covered by Article III:2, and non-fiscal regulation, covered by Article III:4. Both forms of regulation can often be used to achieve the same ends. It would be incongruous if, due to a significant difference in the product scope of these two provisions, Members were prevented from using one form of regulation – for instance, fiscal – to protect domestic production of certain products, but were able to use another form of regulation – for instance, non-fiscal – to achieve those ends. This would frustrate a consistent application of the "general principle" in Article III:1. For these reasons, we conclude that the scope of "like" in Article III:4 is broader than the scope of "like" in Article III:2, first sentence. … [A]lthough we need not rule, and do not rule, on the precise product scope of Article III:4, we do conclude that the product scope of Article III:4, although broader than the *first* sentence of Article III:2, is certainly *not* broader than the *combined*

[380] *EC Asbestos* Appellate Body Report, ¶ 97 (*quoting* Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, § F (adopted 1 November 1996). (Emphasis added by Appellate Body.)

product scope of the *two* sentences of Article III:2 of the GATT 1994.[381]

In sum, the number of domestic goods that would qualify as a "like product" under Article III:4 is bigger than the number of goods that would qualify as a "like product" under Article III:2, first sentence. But, it is not as big as the sum of "like products" under Article III:2, first sentence, plus "directly competitive or substitutable product" in Article III:2, second sentence.

True, this "bottom line" definition is fuzzier than legal practitioners or scholars might prefer. True, also, the Appellate Body is to be faulted for an inherent contradiction in the above-quoted passage. On the one hand, it denies (in the sixth sentence) deciding whether the term "like products" in Article III:4 is co-extensive with the combined scope of the "like products" in Article III:2, first sentence, and "directly competitive or substitutable" in Article III:2, second sentence. On the other hand, it comes very close to making that decision (in the final sentence), when it holds the "like products" in Article III:4 is not broader than the combined scope.

Nonetheless, two points must be insisted upon in favor of the Appellate Body. First, and most obviously, the drafting of Article III:1-2 and III:4 is so poor. This poverty is worsened by the importance of the legal obligation contained in these provisions. The Appellate Body cannot be blamed for creating the text. It inherited the problematic text, and at least tries to avoid making matters worse by focusing on the underlying policy goal of national treatment, which it correctly identifies from Article III:1 as a level playing field for goods in a competitive relationship. Of course, its higher calling is to make matters better through the resolute application of its reasoned judgment.

Second, as the Appellate Body indicates in the above-quoted *EC Asbestos* passage, it had no choice but to enlarge the meaning of "like product" in Article III:4 beyond the definition in Article III:2, first sentence. If it applies the same narrow definition in both contexts, then an importing country could undermine, and even defeat, the general principle of Article III:1 with respect to products falling just outside this narrow definition. That country could do so by providing equal competitive treatment on a fiscal measure (internal taxation) to imports and "like" domestic products, but denying it on a non-fiscal measure (internal regulation). By incorporating into the definition of "like product" in Article III:4 at least some of the goods that would be considered "directly competitive or substitutable" under Article III:2, second sentence, the Appellate Body defends the integrity of the overall Article III national treatment obligation.

- **3rd Consequence:**
  5th Criterion for "Likeness"

What about the third reason for the value of the *EC Asbestos* Report of the Appellate Body? It concerns the evolution of the test in *EC Asbestos*. The Appellate Body's decision to add a factor on which to adjudicate "likeness" evinces the development of jurisprudence on "likeness." There is no single, immutable, much less stagnant, test for "like products."

381 *EC Asbestos* Appellate Body Report, ¶ 99. (Emphasis original.)

The factor the Appellate Body added to the test, risks to human health posed by a product, was not one to which any previous GATT or WTO adjudicator had looked. The Panel demurred, saying to do so would nullify the effect of Article XX(b), which concerns measures necessary to protect human life or health.

The Appellate Body expressed near-shock the Panel excluded this factor, and thus advanced the doctrine on "like products:"

> In reviewing this finding by the Panel, we note that neither the text of Article III:4 nor the practice of panels and the Appellate Body suggest that any evidence should be excluded *a priori* from a panel's examination of "likeness." … [I]n examining the "likeness" of products, panels must evaluate *all* of the relevant evidence. We are very much of the view that evidence relating to the health risks associated with a product may be pertinent in an examination of "likeness" under Article III:4…. We do not, however, consider that the evidence relating to the health risks associated with chrysotile asbestos fibers [or cement-based products containing them] need be examined under a *separate* criterion, because we believe that this evidence can be evaluated under the existing criteria of physical properties, and of consumers' tastes and habits….
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> Panels must examine fully the physical properties of products. In particular, panels must examine those physical properties of products that are likely to influence the competitive relationship between products in the marketplace. In the case of chrysotile asbestos fibers, their molecular structure, chemical composition, and fibrillation capacity are important because the microscopic particles and filaments of chrysotile asbestos fibers are carcinogenic in humans, following inhalation. … This carcinogenicity, or toxicity, constitutes, as we see it, a defining aspect of the physical properties of chrysotile asbestos fibers [and cement-based products containing them]. The evidence indicates that PCG fibers [and cement-based products containing them], in contrast, do not share these properties, at least to the same extent. We do not see how this highly significant physical difference *cannot* be a consideration in examining the physical properties of a product as part of a determination of "likeness" under Article III:4….
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> …
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> [W]e believe that the health risks associated with a product may be relevant to the inquiry into the physical properties of a product when making a determination of "likeness" under Article III:4…. This is also true for cement-based products containing the different fibers. In examining the *physical properties* of the two sets of cement-based products, it cannot be ignored that one set of products contains a fiber known to be highly carcinogenic, while the other does not.[382]

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382 *EC Asbestos* Appellate Body Report, ¶¶ 113-14, 128. (Emphasis original.)

Clearly, from the perspective of the Appellate Body, it is a natural evolution of the *Border Tax Adjustments* criteria to elaborate on one of them, physical properties, by adding health risks to that criterion. The Appellate Body even implies the possibility product risks, under different facts, could be a separate criterion. It also, explicitly, points out that the four criteria, while evaluated separately, may interact with one another. For example, consumer tastes and habits (the second criterion) may be affected by health risks (a component of physical properties, the first criterion). If a product jeopardizes human health, then consumer demand may decline, even to zero.[383]

As for Article XX(b), the Panel had no need to fret about it. The Appellate Body explained the obvious: it is a distinct, independent provision from Article III and the two are to be interpreted separately.[384] Evidence about health risks is examined in the Article III:4 context to ascertain the competitive relationship between imports and a domestic product. That same evidence is examined under Article XX(b) for an entirely different purpose: to see whether a trade-restrictive measure inconsistent with a GATT obligation like Article III:4 justifiably defends human health. Possibly, the way in which Article III:4 is interpreted may lead to less frequent recourse to Article XX(b). Nevertheless, the utility of this exception to national treatment and other GATT obligations still exists.

In sum, evaluating health risks (whether as a component of an existing criterion, or as a distinct criterion) adduces doctrinal evolution on "like product" determinations. This kind of evolution is perfectly consistent with the accordion metaphor from *Japan Alcoholic Beverages*. The metaphor connotes interpretative flexibility not only in different legal contexts (*e.g.,* Article III:1-2 versus Article III:4), but also in different fact settings (*e.g.*, innocuous versus risky products). With each new fact pattern, as with each different legal provision, the metaphor declaims the opportunity to expand, refine, or develop the test for "like products" in some way.

- **4th Consequence: Concurrence**

The final key ramification of *EC Asbestos* is the concurring opinion.[385] It is unusual to find a concurrence in an Appellate Body Report. Yet, rarity is not a reason to declaim a case noteworthy. Rather, it is the challenge posed by the concurrence to the "like product"

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383 The interaction between consumer preferences and health risks also implicates a point about latent demand made by the Appellate Body in *Korea Alcoholic Beverages*, and brought up by it in *EC Asbestos*. The French asbestos ban clearly is a non-fiscal measure that disturbs conditions of competition between chrysotile and PCG fibers, and cement-based products containing these respective fibers. Canada urged that consumer tastes and habits are irrelevant whenever conditions of competition are altered by a regulatory measure. The Appellate Body, while careful to disavow a declaration that latent demand for chrysotile asbestos fibers (or cement-based products containing them) exists in France, rejected Canada's point. Citing *Korea Alcoholic Beverages*, the Appellate Body said evidence of suppressed consumer demand, and evidence of substitutability in a third country market, is relevant to determining "likeness" notwithstanding a severe measure like the French ban. *See EC Asbestos* Appellate Body Report, ¶ 123.

384 *See EC Asbestos* Appellate Body Report, ¶¶ 115.

385 *See EC Asbestos* Appellate Body Report, ¶¶ 149-54. The presiding member was Florentino P. Feliciano (Philippines), and the other members were James Bacchus (U.S.) and Claus-Dieter Ehlermann (EU). The author of the concurrence is anonymous.

doctrine, as it evolved from *Border Tax Adjustments* through *EC Asbestos*. The concurrence views the carcinogenicity of chrysotile fibers as such an egregious physical property that this criterion alone is a sufficient basis on which to hold chrysotile fibers (and cement-based products with them) are not "like" PCG fibers (and cement-based products with them). Why insist on a robotic application of four criteria, when one or a few facts point to a definitive characterization against "likeness"? No amount of evidence on the economic competitive relationships between products, illustrated through the same end uses or consumer tastes and habits, could outweigh "the undisputed deadly nature of chrysotile asbestos fibers, compared with PCG fibers, when inhaled by humans, and thereby compel a characterization of 'likeness'" of the products.[386]

This common-sense approach led the concurrence to a general point. It may be neither necessary nor appropriate to adopt a "fundamentally" economic interpretation of "likeness" under Article III:4. A "fundamental" economic focus, *i.e.*, concentrating on the competitive relationships between imported and domestic goods, could well become an "exclusively" economic test. The concurrence declines to take a position: "the better part of valor [is] to reserve one's opinion on such an important, indeed, *philosophical* matter, which may have unforeseeable implications…."[387] Here, then, is the challenge presented by the concurrence, and the final reason *EC Asbestos* is so important: to what extent should non-economic factors, apart from the economic variable of competition between imported merchandise and a domestic good, matter in making a "like product" determination to enforce the national treatment obligation of Article III:4?

386 *EC Asbestos* Appellate Body Report, ¶ 154.

387 *EC Asbestos* Appellate Body Report, ¶ 154. (Emphasis added.)

Chapter 11

DIRECTLY COMPETITIVE OR SUBSTITUTABLE PRODUCTS[388]

I. Unclear Meaning

"Like products" is not the only term GATT uses to describe product relationships with legal consequences. In delineating the scope of the national treatment obligation, GATT refers to products that are "directly competitive or substitutable." What does this phrase mean?

The answer is not found in the text of GATT. The drafters of GATT, while eschewing a generic definition, gave strong hints of what the phrase means. As Professor Jackson recounts:

> [D]elegates seemed to agree that among things that could be competitive products were: tung oil and linseed oil, tramways and buses, coal and fuel oil, although one delegate said it would depend on the specific factual competitive situation in each case.[389]

But, most significantly, the answer to the meaning of "directly competitive or substitutable" products is in jurisprudence that has evolved, particularly since the birth of the WTO on 1 January 1995.

II. 1996 *Japan Alcoholic Beverages* Case and Elasticity of Substitution

● Internal Taxes and Context of GATT Article III:2, Second Sentence

In the 1996 *Japan Alcoholic Beverages* case, a WTO Panel confronted the problem of determining whether imported and domestic merchandise are "directly competitive or substitutable" for purposes of Article III:2, second sentence, and the Interpretative Note, *Ad Article III, Paragraph 2*.[390] The Panel made use of an economic criterion. The Panel viewed it appropriate to gauge common end uses with a statistic familiar to economists, namely, elasticity of substitution. In using this statistic, the Panel did not strike out on an entirely new venture. It relied on a 1987 case, *Japan – Customs Duties, Taxes, and Labeling Practices on Imported Wines and Alcoholic Beverages*, which had looked to economic

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[388] Documents References:
(1) *Havana Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, II, III, X, and XI
This Chapter draws from Raj Bhala, *Modern GATT Law* Chapter 8 (London, England: Thomson Sweet & Maxwell, 2nd ed., 2013).

[389] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT §12.3 at 283.

[390] *See* WT/DS8/R, WT/DS10/R, and WT/DS11/R (adopted as modified by the Appellate Body 1 November 1996). [Hereinafter, *Japan Alcoholic Beverages* Panel Report.] The facts are summarized in an earlier Chapter.

statistics for guidance.[391]

- **Elasticity of Substitution**

Essentially, elasticity of substitution is the percent change in the quantity demanded of one product associated with a percent change in the price of another product. (It also is called the "cross-price elasticity of demand.) The basic conceptual formula is:

$$\text{Elasticity of Substitution} = \frac{\text{Percent change in Quantity Demanded of Good 2}}{\text{Percent change in Price of Good 1}}$$

A substitution elasticity of "1" connotes "elastic," as a 10% increase in the price of one product would cause a 10% rise in the demand for the associated product. A substitution elasticity of "less than 1" would suggest "inelasticity," as a 10% rise in the price of one product would be associated with an increase in demand for the other product of less than 10%. A substitution elasticity of "more than 1" would indicate high elasticity, because an increase in the price of one product of 10% would stimulate a larger-than-10% increase in demand for the other product. In sum, an elasticity of substitution of 1 or more is evidence that two products are, in fact, substitutes in terms of their end uses.[392]

The Appellate Body agreed with the economic analysis of the Panel of the phrase "directly competitive or substitutable." In coming to this conclusion, the Appellate Body made clear the case-by-case approach for "like product" determinations also "*must*" be used to ascertain whether imported and domestic merchandise are "directly competitive or substitutable."[393] Indeed, it affirmed the freedom – or responsibility – of Panels to use "*all* the relevant facts" in a case to determine direct competitiveness and substitutability:[394]

> In this case, the Panel emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the "market place." This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as "directly competitive or substitutable."
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> Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is "*the* decisive criterion" for

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391 *See* B.I.S.D. (34th Su4) 83 ¶¶ 5.7-5.10 (adopted 10 November 1987). The relevant discussion in the *Japan Alcoholic Beverages* Panel Report is found at Paragraphs 6.29-6.30.

392 *See* ALPHA C. CHIANG, FUNDAMENTAL METHODS OF MATHEMATICAL ECONOMICS 425-27 (3rd ed. 1984).

393 Appellate Body Report, *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, and WT/DS11/AB/R, § H.2(a) (adopted 1 November 1996). (Emphasis added.) [Hereinafter, *Japan Alcoholic Beverages* Appellate Body Report.]

394 *Japan Alcoholic Beverages* Appellate Body Report, § H.2(a). (Emphasis added.)

determining whether products are "directly competitive or substitutable." The Panel stated the following:

> In the Panel's view, the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution.

We agree.[395]

It is worth underscoring that elasticity of substitution is not a new or distinct criterion from the three given in *Border Tax Adjustments*, nor from the one added by the Appellate Body in *Japan Alcoholic Beverages*. Rather, elasticity is a refinement of one of the original three criteria, end uses. It is a quantitative measure of whether, in a particular market, imported and domestic products are used in the same way.

- **Specific Findings**

What were the decisions of the Panel and Appellate Body on the merits of the Japan *Liquor Tax Law* with respect to "like or directly competitive products"? (They are discussed later in this Chapter.) Briefly, while it said *shochu* and vodka were "like products," the Panel did not find *shochu* to be "like" all imported alcoholic beverages. Rather, the Panel differentiated vodka from the others – though whether some of the Panelists did so with a taste test is unclear. The Panel concluded *shochu*, brandy, genever, gin, liqueurs, rum, and whisky were "directly competitive or substitutable products." On this basis, the Panel held the *Liquor Tax Law* violated the second sentence of Article III:2, because the dissimilar treatment of *shochu* and these imports afforded domestic protection to *shochu* producers. Accordingly, the WTO Panel recommended Japan equalize the taxes, either by raising the tax on *shochu* or lowering it on imported spirits.

The Appellate Body agreed with these findings by the Panel, though it modified the legal methodology of the Panel. That is, the Appellate Body upheld the Panel's determinations that (1) *shochu* and the other distilled spirits and liqueurs are "directly competitive or substitutable" products, and (2) the *Law* violated Article III:2, second sentence, by taking imports of the other spirits and liqueurs in a way that confers protection to domestic production of *shochu*. However, the Appellate Body said the Panel failed to take into account Article III:1 when interpreting the first and second sentences of Article III:2. It also faulted the Panel for failing to consider the "so as to afford protection" language of Article III:1 separately from the "not similarly taxed" language in *Ad Article III, Paragraph 2*.[396]

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395 *Japan Alcoholic Beverages* Appellate Body Report, § H.2(a). (Emphasis original.)

396 The Appellate Body said the Panel erred in limiting its conclusion about "directly competitive or substitutable products" to *shochu*, brandy, genever, gin, liqueurs, rum, and whisky. That limitation was inconsistent with the Panel's terms of reference, which covered all other distilled spirits and liqueurs within HS Heading 2208.

III. 1999 *Korea Alcoholic Beverages* Case and 1996 *Japan Alcoholic Beverages* Precedent

- **Facts**

Hardly three years after its 1996 decision in *Japan Alcoholic Beverages*, the WTO Appellate Body faced a case of uncanny resemblance, *Korea – Taxes on Alcoholic Beverages*. The Panel issued its Report in this case in 1998, the Appellate Body did so in 1999, and the Appellate Body Report was adopted by the DSB on 8 April 1999.[397] The U.S. and EC were co-complainants battling against the Korean multi-tiered taxation regime on the sale of alcoholic beverages.

Via this regime, set by the *Liquor Tax Law of 1949*, as amended, Korea established various categories of distilled spirits, and then assessed excise taxes at different *ad valorem* taxes based on the product category. There were 10 such categories, each defined by the *Law* fairly precisely in terms of production, ingredients, and content:

(1) "Diluted *soju*," which is produced by diluting neutral spirits with water, or by adding ingredients (authorized by a decree from the President of Korea) to the neutral spirits, where "neutral spirits" are produced from the distillation of a fermented mash derived from a starch source and a sugar source resulting in a product that is 85% or more alcohol, or from the distillation of ingredients containing alcohol, again resulting in a product that is 85% or more alcohol.

(2) "Distilled *soju*," which is produced from discontinuous distillation of a fermented mash derived from a starch source, yeast, and water, possibly with ingredients (authorized by a decree from the President of Korea) added during fermentation, and which has an extract content of 2% or less, but which may not be produced from sprouted grain, nor by a process of mixing water with grain and sealing the mash for fermentation and subsequent distillations, and which may not be filtered through charcoal of white birch.

(3) "Brandy," which has a 2% extract limitation (to distinguish brandy from liqueurs), uses fermentation and distillation in the manufacturing process, and is derived from specified starch sources, and thus covers all liquors distilled from a fermented mash of fruit or fruit wine and aged in wooden casks, and also (under certain conditions) covers admixtures of these liquors with other spirits or ingredients.

(4) "Whisky," which has a 2% extract limitation (to distinguish whisky from

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397 *See* Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R and WT/DS84/AB/R (adopted 18 January 1999); Panel Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/R and WT/DS84/R (adopted as modified by the Appellate Body 18 January 1999). [Hereinafter, *Korea Alcoholic Beverages* Appellate Body Report and Panel Report, respectively.] The discussion of the facts draws on ¶¶ 2.1-2.23 of the Panel Report.

liqueurs), uses fermentation and distillation in the manufacturing process, and is derived from specified starch sources, and which thus covers all types of whisky made totally or partly from spouted grain and aged in wooden casks, or (under certain conditions) from admixtures of whisky and other spirits or ingredients, and also covers malt whisky (the starch source of which is spouted grain), ordinary grain whisky (the starch source of which is normal grain), premium brands of whisky (which are aged in wooden barrels), and premium blended whisky and whisky (which have additives like acids, carbon dioxides, coloring, fragrances, seasonings, and sugars).

(5) "General distilled liquors," namely, gin (*i.e.*, distilled spirits with fruits of the juniper tree as an ingredient), *kaoliang-ju* (*i.e.*, a distilled spirit imported from China that has *kaoliang-ju lees* as a starch source, and that is made by sealing prior to fermenting and distilling), rum (*i.e.*, distilled spirits with sugar, sugar beet, sugar cane, or molasses as a starch source), tequila (*i.e.*, distilled spirits with materials mainly containing starch or sugar produced by fermentation and distillation), and vodka (*i.e.*, distilled spirits specified in terms of the filtering of alcohol), and also mixed distilled drinks (*e.g.*, gin and rum mixed drinks).

(6) "General distilled liquors containing brandy or whisky," which is defined in terms of the other categories.

(7) "Liqueurs," which have more than 2% extract content produced by distillation of a starch or sugar source, and to which is added fruit, fruit extract, or ginseng juice.

(8) "Other liquors with 25 percent or more alcohol," which is a residual category covering all liquors, whether fermented to distilled, not falling in any other category.

(9) "Other liquors with less than 25 percent alcohol," which is another residual category including all liquors, whether fermented to distilled, not falling in any other category.

(10) "Other liquors that contain 20 percent or more brandy or whisky," *i.e.*, another residual category covering admixtures of brandy and whisky.

In brief, the 10 categories were carefully defined and encompassed all alcoholic beverages, whether produced in Korea or overseas. Thus, the scope of the excise tax regime established by the *Law* was equally broad.

Precisely what *ad valorem* excise tax rate did Korea impose on each category of alcoholic beverage? The answer is provided in Table 11-1. A cursory glance at the Table reveals the differential tax rates applied to the categories – basically, 35%-50% for *soju*, and 80%-100% for imported alcoholic beverages. From a business perspective, these

differences are more than just stunning. They mean that business – in the sense of market access – is effectively impossible for imports.

Table 11-1
Korean *Liquor Tax Law* Alcoholic Beverage Categories and *Ad Valorem* Tax Rates

Alcoholic Beverage Category	***Ad Valorem* Tax Rate (%)**
Diluted *soju*	35 %
Distilled *soju*	50
Brandy	100
Whisky	100
General distilled liquors (gin, *kaoliang-ju*, rum, tequila, vodka, and mixed distilled drinks)	80
General distilled liquors containing Brandy or Whisky	100
Liqueur	50
Other Liquors, with 25% or more alcohol	80
Other Liquors, with less than 25% alcohol	70
Other Liquors, which contain 20% or more brandy or whisky	100

As if the *Liquor Tax Law* did not afford enough protection to domestically manufactured *soju*, Korea applied another type of taxation to alcoholic beverages.

The *Education Tax Law of 1982*, as amended, authorized Korea to impose a surtax on sales of certain categories of distilled spirits (as well as on a variety of other products). The surtax was a percentage of the liquor tax applicable to the category in question. Any alcoholic beverage that, under the *Liquor Tax Law*, had an *ad valorem* rate of 80% or more faced a surtax under the *Education Tax Law* of 30% of the liquor tax imposed. Any beverage to which the applicable liquor tax rate was less than 80% triggered an education surtax of 10% of the liquor tax.

Consequently, *soju* and liqueurs – on which the liquor tax was 35%-50% – had an education tax of between 3.5% and 5% (*i.e.*, 10% of the liquor tax rate). In contrast, all other alcoholic beverages – brandy, whisky, general distilled liquors, and other liquors – faced an education tax between 21% and 30% (*i.e.*, 10% of the liquor tax rates, which varied from 70% to 100%). Table 11-2 shows the differential tax rates under the *Education Tax Law*. Clearly, the Surtax Rate (Column 2) was lower for *soju* than for the remaining categories, except liqueurs and other liquors with less than 25% alcohol. Therefore, insofar as beverages other than *soju* were imports, the *Education Tax Law* appeared discriminatory on its face. In terms of the total tax rate burden (the right-hand column), *i.e.*, the sum of the *ad valorem* excise tax under the *Liquor Law* and the effective surtax under the *Education Tax Law*, only one class of imported alcoholic beverage was treated in the same manner as *soju* – all others were taxed at markedly higher rates. (Parity existed between liqueurs and distilled *soju*.)

Table 11-2
Korean *Education Tax Law* Alcoholic Beverage Categories and Surtax

Alcoholic Beverage Category	Surtax Rate (%)	Effective Surtax Rate (Surtax calculated as a percent of Liquor Tax)	Total Tax Rate Liability (Liquor Tax plus Effective Surtax Rate)
Diluted *soju*	10%	3.5%	38.5%
Distilled *soju*	10	5	55
Brandy	30	30	130
Whisky	30	30	130
General distilled liquors (gin, *kaoliang-ju*, rum, tequila, vodka, and mixed distilled drinks)	30	24	104
General distilled liquors containing Brandy or Whisky	30	30	130
Liqueur	10	5	55
Other Liquors, with 25% or more alcohol	30	24	104
Other Liquors, with less than 25% alcohol	10	7	77
Other Liquors, which contain 20% or more brandy or whisky	30	30	130

Interestingly, in administering the *Education Tax Law*, Korea put imports of Japanese *shochu* in a 10% surtax category. Also, between 1990 (when the *Law* was implemented) and 1995, Korea exempted *soju* from the surtax. Under pressure from the EC, Korea eliminated the exemption in 1995.

Korea imposed the liquor tax and surtax at the wholesale level, not on retail sales. Consequently, a domestic manufacturer of an alcoholic beverage had to pay the tax and surtax upon shipment from the factory. The tax base for a domestically made beverage was the price when shipped from the production site, *i.e.*, the sum total of production costs, sales and advertising costs, extraordinary costs, and profits. As for imported alcoholic beverages, the tax liability accrued when the importer of a foreign-produced beverage withdrew them from a bonded warehouse. As to imports, the tax base was the CIF price stated in the importer's customs declaration form, plus the imported duty imposed by Korean customs authorities, *i.e.*, the CIF price plus the tariff.

- **Panel Holdings**

The Panel concluded *soju* (whether diluted or distilled) was a "directly competitive or substitutable product" in comparison with all of the categorized imported alcoholic

beverages, be it brandy, cognac, gin, liqueurs, rum, tequila, whisky, and admixtures. In an important paragraph, the Panel said:

> We are of the view that there is sufficient unrebutted evidence in this case to show *present direct competition* between the products. Furthermore, we are of the view that the complainants also have shown a *strong potentially direct competitive relationship*. Thus, on balance, we find that the evidence concerning *physical characteristics, end-uses, channels of distribution and pricing*, leads us to conclude that the imported and domestic products are directly competitive or substitutable.[398]

The Panel found Korea taxed the imported, "Western-style" beverages in a dissimilar manner, and the tax differential was more than *de minimis*. Consequently, the Panel held, the dissimilar taxation affords protection to domestic production.[399]

Significantly, the Panel added to the list of factors that may be examined to determine whether products are "directly competitive or substitutable." Physical characteristics and end uses already were on the list. Channels of distribution and pricing had not been considered expressly in *Japan Alcoholic Beverages*. The addition by the Panel of these two factors to the list, and their consideration, was not an appellate issue.

The Panel also reaffirmed the helpfulness of quantitative analyses, such as cross-price elasticity, in deciding whether products are "directly competitive or substitutable." However, those analyses must not be exclusive, and could not be decisive. A protectionist government policy could distort the competitive relationship between products, and thus cause a quantitative measurement of a competitive relationship to be understated. This line of reasoning was not a principal controversy on appeal.[400]

- **Korea's First Losing Appellate Argument**

The two key Korean appellate arguments were against the Panel interpretation and application of the phrases (1) "directly competitive or substitutable product," found in *Ad Article III, Paragraph 2*, and (2) "so as to afford protection," found in Article III:1 and incorporated by reference into Article III:2, second sentence.[401] The Korean appeal was unsuccessful. Despite the outcome, the two Korean losing arguments are instructive. They reveal not only the Panel's definitions of these critical terms, but also how the Appellate Body nudged the jurisprudence on these terms a bit forward from its 1996 *Japan Alcoholic Beverages* decision. In comparison with the earlier decision, *Korea Alcoholic Beverages* provides three innovations. These innovations are by no means revolutions, but rather evolutionary progressions.

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398 *See Alcoholic Beverages* Panel Report, ¶ 10.98. (Emphasis added.)

399 *See Korea Alcoholic Beverages* Panel Report, ¶ 2; *Korea Alcoholic Beverages* Panel Report, ¶¶ 11.1-11.2.

400 *See Korea Alcoholic Beverages* Appellate Body Report, ¶ 109.

401 *See Korea Alcoholic Beverages* Appellate Body Report, ¶ 102(a)-(b).

As regards its first losing argument, Korea sharply criticized the Panel for considering a potentially direct competitive relationship. Potential competition is irrelevant, argued Korea, because it unacceptably broadens the term "directly competitive or substitutable," and "open[s] the door to speculation about how the market could evolve in the future, irrespective of the tax measure in question."[402] In brief, Korea said latent competition cannot be used as a factor to determine whether products are "directly competitive or substitutable."

The Panel said a temporal dimension is an inherent aspect of any assessment of competition between two or more products. For example, "evidence of trends and changes in consumption patterns" should be considered when deciding whether products "are either directly competitive now or can reasonably be expected to become directly competitive in the near future."[403] The Panel insisted it did not intend "to speculate on what could happen in the distant future," but rather "to consider evidence pertaining to what could reasonably be expected to occur in the near term." This consideration was a case-by-case one, covering factors such as "market structure, … the quality of evidence, and the extent of the inference required."[404]

- **Appellate Body Holding**

Upholding the Panel's reasoning, the Appellate Body said Korea did not rely exclusively on potential competition to overcome the absence of a present direct competitive relationship. Rather, the Panel found both present and future competition, and its finding about the future was not speculative, but rather based on the present.[405]

> The term "directly competitive or substitutable" describes a particular type of relationship between two products, one imported and the other domestic. It is evident from the wording of the term that *the essence of that relationship is that the products are in competition*. This much is clear both from the word "competitive" which means "characterized by competition," and from the word "substitutable" which means "able to be substituted" [Characteristically, the Appellate Body cited *The New Shorter Oxford English Dictionary* for both definitions.] The context of the competitive relationship is necessarily the marketplace since this is the forum where consumers choose between [*sic*] different products. *Competition in the market place is a dynamic, evolving process*. Accordingly, the wording of the term "directly competitive or substitutable" implies that the competitive relationship between products is *not* to be analyzed *exclusively* by reference to *current* consumer preferences. In our view, the word "substitutable" indicates that the requisite relationship *may* exist between products that are not, at a given moment, considered by consumers to be substitutes but which

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402 *See Korea Alcoholic Beverages* Appellate Body Report, ¶ 112.
403 *See Korea Alcoholic Beverages* Panel Report, ¶¶ 10.47-10.48.
404 *See Korea Alcoholic Beverages* Panel Report, ¶ 10.50.
405 *See* Appellate Body Report, *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R and WT/DS84/AB/R, ¶ 113 (adopted 18 January 1999).

are, nonetheless, *capable* of being substituted for one another.

> Thus, according to the ordinary meaning of the term, products are competitive or substitutable when they are interchangeable or if they offer, as the Panel noted, "*alternative ways of satisfying a particular need or taste*." Particularly in a market where there are regulatory barriers to trade or to competition, there may well be latent demand.[406]

The Appellate Body also evaluated the importance of the modifying word, "directly." It interpreted this word to convey "a *degree of proximity* in the competitive relationship between the domestic and the imported products."[407] But, the Appellate Body did not view the modifier as precluding "consideration of *both* latent and extant demand."[408]

- **Importance of 1996 *Japan Alcoholic Beverages* Precedent**

Aside from the inherently dynamic nature of the marketplace, and the consistency with the language of GATT, why did the Appellate Body agree latent demand was appropriate to consider when deciding whether imported and domestic products are "directly competitive or substitutable"? Of course, economic forces and legal text are strong enough reasons in themselves, or certainly when taken together. But, is there an additional justification for the Appellate Body conclusion that "the scope of the term 'directly competitive or substitutable' cannot be limited to situations where consumers *already* regard products as alternatives"?[409] The answer is yes – precedent.

The Appellate Body referred to its opinion in *Japan Alcoholic Beverages*, and the 1987 GATT Panel decision in *Japan – Customs Duties, Taxes and Labelling Practices on Imported Wines and Alcoholic Beverages*, to explain "that consumer behavior might be influenced … by protectionist internal taxation."[410] A tax regime that discriminates against an imported product could create – and even freeze – a consumer preference for a directly competitive or substitutable domestic product. As a result, a consumer survey in the importing country might understate the extent of potential competitiveness between substitute products. In turn, latent demand – what future demand would be if the tax regime were neutral – could be highly relevant. To be sure, the Appellate Body did not couch its justification in terms of *stare decisis*. Rather, it said the previous cases showed examining latent demand is consistent with the "object and purpose of Article III" (which, in turn, is an acceptable means of interpreting a treaty under the *Vienna Convention on the Law of Treaties*). The result, however, was all the same.

Equally important, in *Japan Alcoholic Beverages*, the Appellate Body resolutely endorsed the use by Panels of cross price elasticity as "*evidence of* latent consumer

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406 *Korea Alcoholic Beverages* Appellate Body Report, ¶¶ 114-115. (Emphases in 2nd and 5th sentences, and in last paragraph, added, remaining emphases original.)

407 *Korea Alcoholic Beverages* Appellate Body Report, ¶ 116. (Emphasis added.)

408 *Korea Alcoholic Beverages* Appellate Body Report, ¶ 116. (Emphasis added.)

409 *See Korea Alcoholic Beverages* Appellate Body Report, ¶ 113. (Emphasis original.)

410 *See Korea Alcoholic Beverages* ¶ 120. The 1987 case is published at B.I.S.D. (34th Supp.) 83 at ¶ 5.8 (1988) (adopted 10 November 1987).

demand."[411] This statistic could be "*one of a range of factors* to be considered when assessing the competitive relationship between imported and domestic products under Article III:2, second sentence…."[412] Not surprisingly, the Appellate Body cited its opinion in *Japan Alcoholic Beverages* to support the proposition that cross-price elasticity was an acceptable means by which to study latent demand in a market.

In *Korea Alcoholic Beverages*, the Appellate Body also backed the Panel's statement that no "particular degree of competition" needs "to be shown in quantitative terms."[413] Were that not the case – for instance, if a particular threshold for cross-price elasticity had to be satisfied to consider products "like or directly competitive" – then it would amount to a "trade effects test." In other words, a quantitative benchmark would amount to proof that an internal tax measure in dispute has a particular impact on trade.

- **Holistic Approach**

In brief, the nature, or quality, of competition – not just the quantity of competition – is what matters.[414] Indeed, the Appellate Body approach might be characterized as a holistic one. Thus, for example, it supported the Panel examination of evidence from a third country market – Japan – to see whether imported and Korean products were "directly competitive or substitutable." The Panel logic was that the Korean market was relatively closed, and characterized by substantial tax differentials. As a result, the current market information from Korea might understate the true competitive relationship between imported and Korean alcoholic beverages, precisely because of the discriminatory Korean tax policies at issue. The Appellate Body agreed that on a case-by-case basis, "evidence from other markets may be pertinent to the examination of the market at issue, particularly when demand on that market has been influenced by regulatory barriers to trade or competition."[415]

- **Why Cross-Price Elasticity of Demand Matters**

However, to say the nature of competition matters is to beg an important conceptual question: why did the Appellate Body endorse the use of cross-price elasticity when deciding whether products are "directly competitive or substitutable"? Simply put, because it measures exactly what Article II:2, second sentence, prohibits. This statistic, said the Appellate Body, "attempt[s] to predict the change in demand that would result from a change in the price of a product following, *inter alia*, from a change in the *relative tax burdens* on domestic and imported products."[416]

In sum, it is safe to say the question of using cross-price elasticity in evaluating latent demand is firmly resolved. And, the question of whether it is appropriate to examine

411 *Korea Alcoholic Beverages* Appellate Body Report, ¶ 124. (Emphasis added.)
412 *Korea Alcoholic Beverages* Appellate Body Report, ¶ 124. (Emphasis added.)
413 *Korea Alcoholic Beverages* Appellate Body Report, ¶ 130.
414 *See Korea Alcoholic Beverages* Appellate Body Report, ¶ 133.
415 *Korea Alcoholic Beverages* Appellate Body Report, ¶ 137.
416 *Korea Alcoholic Beverages* Appellate Body Report, ¶ 121. (Emphasis added.)

latent demand as a basis when considering whether products are "directly competitive or substitutable" is settled law. To be critical, however, the Appellate Body did not provide as much certainty and predictability as it might have. It is clear a finding of a direct competition or substitution between imported and domestic products cannot be rendered solely on the basis of a current market environment. An inquiry into potential future competition is necessary. But, how far into the future must this inquiry project?

Notwithstanding the answer to this question, suppose a future-directed inquiry reveals no latent competition, *i.e.*, the competition exists now. Yet, suppose further that no latent competition is foreseeable into the future. Is present competition, alone, sufficient to find products are "directly competitive or substitutable? (This scenario might arise in fast-changing markets, such as computer software, hardware, and peripherals, or digital cameras.) There remains uncertainty as to the converse scenario. Suppose there is no present competition. Could a finding of "direct competition" be based largely, or even wholly, on latent (*i.e.*, potential future) competition? If the answer here is "yes," then the obvious follow-up question is whether a finding of latent demand, in support of a conclusion of direct competitiveness or substitutability, could be based solely on evidence from cross-price elasticity.

Finally, was the Appellate Body incautious in endorsing the language of the Panel that products are competitive or substitutable if they are "interchangeable," or if they offer "alternative ways of satisfying a particular need or taste"? Subtle as the distinction is, "interchangeable" connotes a higher degree of competition or substitutability (almost akin to "like" products) than "alternative." Any runner appreciates athletic shoes are not easily "interchangeable," especially if the event is a marathon or half-marathon and the runner cares about completing the race with a solid time and in good health. Yet, it is possible to run a half-marathon in "alternative" shoes, though at the risk of time and injury. (The same point can be made with sports drinks and protein bars.) Simply put, did the Appellate Body really mean to expand the category of competitive and substitutable products to include "mere" alternatives?

The answers to these questions are needed to clarify the boundaries of Article III:2, second sentence. Not surprisingly, in *Korea Alcoholic Beverages*, the Appellate Body cited repeatedly to its Report in *Japan Alcoholic Beverages*. Thus, for instance, the Appellate Body cited to the earlier Report for its delineation of the elements of an Article III:2, second sentence claim of a discriminatory internal tax or other charge, namely, determining whether (1) products are "directly competitive or substitutable," (2) such products are "not similarly taxed," and (3) the dissimilar taxation is "applied … so as to afford protection to domestic production."[417] Clearly, if the answer to the first inquiry is negative, then the case is over. If latent competition can be the basis for an affirmative answer, then the scope of the national treatment obligation is enlarged.

- **Korea's Second Losing Appellate Argument**

There was a second aspect to the Korean loss concerning the proper interpretation

[417] *See Korea Alcoholic Beverages* Appellate Body Report, ¶ 107.

and application of "directly competitive or substitutable product." Korea urged that expectations are immaterial in defining this phrase. Korea accepted, as the Panel put it, the "settled law" that Article III protects "competitive expectations and opportunities." And, it understood the Appellate Body teaching in *Japan Alcoholic Beverages* that the protection is for an "equal competitive relationship between imported and domestic products," but does not extend to expectations about a particular volume of trade.[418]

Korea thought it specious to consider expectations in the context of latent competition. It is possible to have expectations for products that are "like," and for products that are currently "directly competitive or substitutable." However, it is possible to have expectations only for these categories of products, said Korea. It is impossible to have expectations about products not presently in competition with one another, but which might become so at some future date.

Pushing forward the jurisprudence on "directly competitive or substitutable product," both the Panel and Appellate Body rejected the Korean argument that expectations about competition be considered only with respect to actual, but not latent, competition. The Appellate Body said it was "not only legitimate, but even necessary," to account for the object and purpose of Article III, namely, the maintenance of equal competitive conditions.[419] To do so, it is right to consider expectations about latent competition.

Is there a weakness in the statement of the Appellate Body, namely, a lack of reasoning to support it? The statement presumes as obvious the possibility of expectations about latent competition.

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418 *Japan Alcoholic Beverages* Appellate Body Report, § F. (Emphasis added.)

419 *See Korea Alcoholic Beverages* Appellate Body Report, ¶ 127.

Part Four

FIVE PILLARS OF GATT-WTO LAW

Chapter 12

FIRST PILLAR: GATT ARTICLE I AND MFN TREATMENT[420]

I. Overview

The GATT Article I:1 most favored nation obligation may be most famous rule in international trade.[421] But, its language is not easy to digest:

> 1. With respect to customs duties and charges of any kind imposed on or in connection with importation or exportation or imposed on the international transfer of payments for imports or exports, and with respect to the method of levying such duties and charges, and with respect to all rules and formalities in connection with importation and exportation, and with respect to all matters referred to in paragraphs 2 and 4 of Article III, ***** any advantage, favor, privilege or immunity granted by any contracting party to any product originating in or destined for any other country shall be accorded immediately and unconditionally to the like product originating in or destined for the territories of all other contracting parties.
>
> 2. The provisions of paragraph 1 of this Article shall not require the elimination of any preferences in respect of import duties or charges which do not exceed the levels provided for in paragraph 4 of this Article and which fall within the following descriptions:
>
> > (a) Preferences in force exclusively between two or more of the territories listed in Annex A, subject to the conditions set forth therein;
> >
> > (b) Preferences in force exclusively between two or more territories which on July 1, 1939, were connected by common sovereignty or relations of protection or suzerainty and which are

[420] Documents References:
(1) *Havana (ITO) Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, XX, XXI, XXIV, and XXXV
(3) 1979 Tokyo Round *Enabling Clause*

[421] The MFN rule arises not only in the context of GATT-WTO texts, but also BITs. *See* John W. Boscariol & Orlando E. Silva, *The Widening Application of the MFN Obligation and its Impact on Investor Protection*, 11 INTERNATIONAL TRADE LAW & REGULATION issue 2, 61-67 (March 2005) (addressing the general question of whether a host state is required to extend provisions of a BIT with one country to investors of another country by virtue of an MFN clause in a pertinent BIT, and focusing specifically on dispute settlement in BITs that call for MFN treatment, thus creating the potential obligation to import procedural and substantive benefits from a BIT that a host government signed with a third country, whereby an investor suing that host government seeks to rely on the MFN obligation, presumably in its BIT with the host, to defeat any jurisdictional objection the host might raise, and take advantage of more favorable substantive elements in another BIT to which the host government has with a third country.).

listed in Annexes B, C and D, subject to the conditions set forth therein;

(c) Preferences in force exclusively between the United States of America and the Republic of Cuba;

(d) Preferences in force exclusively between neighboring countries listed in Annexes E and F.

3. The provisions of paragraph 1 shall not apply to preferences between the countries formerly a part of the Ottoman Empire and detached from it on July 24, 1923, provided such preferences are approved under paragraph 5 of Article XXV, which shall be applied in this respect in the light of paragraph 1 of Article XXIX.

4. The margin of preference***** on any product in respect of which a preference is permitted under paragraph 2 of this Article but is not specifically set forth as a maximum margin of preference in the appropriate Schedule annexed to this Agreement shall not exceed:

(a) in respect of duties or charges on any product described in such Schedule, the difference between the most-favored-nation and preferential rates provided for therein; if no preferential rate is provided for, the preferential rate shall for the purposes of this paragraph be taken to be that in force on April 10, 1947, and, if no most-favored-nation rate is provided for, the margin shall not exceed the difference between the most-favored-nation and preferential rates existing on April 10, 1947;

(b) in respect of duties or charges on any product not described in the appropriate Schedule, the difference between the most-favored-nation and preferential rates existing on April 10, 1947.

In the case of the contracting parties named in Annex G, the date of April 10, 1947, referred to in sub-paragraphs (a) and (b) of this paragraph shall be replaced by the respective dates set forth in that Annex.

Ad Article I

Paragraph 1

The obligations incorporated in paragraph 1 of Article I by reference to paragraphs 2 and 4 of Article III and those incorporated in paragraph 2(b) of Article II by reference to Article VI shall be considered as falling within Part II for the purposes of the Protocol of Provisional Application.

The cross-references, in the paragraph immediately above and in paragraph 1 of Article I, to paragraphs 2 and 4 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the *Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade*, dated September 14, 1948.[422]

Paragraph 4

The term "margin of preference" means the absolute difference between the most-favored-nation rate of duty and the preferential rate of duty for the like product, and not the proportionate relation between those rates. As examples:

> (1) If the most-favored-nation rate were 36 per cent *ad valorem* and the preferential rate were 24 per cent *ad valorem*, the margin of preference would be 12 per cent *ad valorem*, and not one-third of the most-favored-nation rate.
>
> (2) If the most-favored-nation rate were 36 per cent *ad valorem* and the preferential rate were expressed as two-thirds of the most-favored-nation rate, the margin of preference would be 12 per cent *ad valorem*.
>
> (3) If the most-favored-nation rate were 2 francs per kilogram and the preferential rate 1.50 francs per kilogram, the margin of preference would be 0.50 franc per kilogram.

The following kinds of customs action, taken in accordance with established uniform procedures, would not be contrary to a general binding of margins of preference:

> (i) The re-application to an imported product of a tariff classification or rate of duty, properly applicable to such product, in cases in which the application of such classification or rate to such product was temporarily suspended or inoperative on April 10, 1947; and
>
> (ii) The classification of a particular product under a tariff item other than that under which importations of that product were classified on April 10, 1947, in cases in which the tariff law clearly contemplates that such product may be classified under more than one tariff item.[423]

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422 This *Protocol* entered into force on 14 December 1948.

423 https://kansas.sharepoint.com/:w:/t/WheatLawLibrary-Documents/EaCECtiEA7hDvm7vo1ab4MoBOXNmkCMVOtnjIrFHUVzFAQ?e=eoeBe6.

What is the substantive nature of the obligation? Briefly put, the rule demands non-discrimination. No WTO Member is to discriminate on measures affecting international trade against another or other WTO Members.

To take an example, consider tea trade among the U.S., India, and Sri Lanka. Assume the teas traded are like products. In negotiations between the U.S. and Sri Lanka, the U.S. commits to reducing its tariff from 10 to 5%, and eliminate any applicable quantitative restrictions (such as import licenses and quotas), on Sri Lankan grown tea. The U.S. cannot keep the tariff at 10%, or maintain quantitative restrictions, on Indian tea (or, for that matter, tea originating in any other WTO Member, such as Kenya). Rather, the U.S. must extend the same concession to India, and must do so right away without conditions. Immediate, unconditional extension to India of the best trade treatment the U.S. affords is what the MFN obligation commands.

This synopsis raises at least as many questions as it answers. The text of the MFN obligation is nuanced. It is risky to underestimate the power of the obligation. A careful reading of GATT Article I:1 reveals there is more to it than giving equal tariff treatment to imported goods. However, continued reading points up limitation on this potency. Article I:2 is an illustration, which benefited colonial preference schemes, such as Britain's Imperial Preference System, and similar links between France and its former colonies, Belgium and its former colonies. Still other limitations on the duty to confer MFN treatment exist for preferential trading arrangements for poor countries (in the 1979 Tokyo Round *Enabling Clause*), RTAs (in Article XXIV), and a so-called "laundry list" of reasons (in Article XX).

II. 1998 *Indonesia Car* Case and Four Analytical Issues

Subsequent decisions from GATT and WTO adjudicators confirm the potency of the MFN obligation. For instance, a 1998 WTO Panel ruled that the National Car program sponsored by the government of Indonesia blatantly violated Article I:1, stating:

> The Appellate Body, in *Bananas III*, confirmed that *to establish a violation of Article I, there must be an advantage, of the type covered by Article I and which is not accorded unconditionally to all "like products" of all WTO Members. Following this analysis, we shall first examine whether the tax and customs duty benefits are advantages of the types covered by Article I. Second, we shall decide whether the advantages are offered (i) to all like products and (ii) unconditionally*.[424]

The italicized language in the *Indonesia Car* Panel Report reveals four analytical questions at the heart of every MFN problem:

1st: Advantage

[424] Panel Report, *Indonesia – Certain Measures Affecting the Automobile Industry*, WT/DS54/R, ¶¶ 14.137-138 (adopted 23 July 1998, not appealed). (Emphasis added.) [Hereinafter, *Indonesia Car* Panel Report.]

Whether there is an advantage created by a measure?

2nd: Likeness?
Whether the products affected by the measure are "like"? For purposes of national treatment concerning fiscal (tax) measures, it also is relevant to consider whether the products, if not "like," are "directly competitive or substitutable." Both relationships – likeness and direct competition or substitution – are considered in other Chapters.

3rd: Scope?
Whether the disputed measure is a type regulated by the MFN provision?

4th: Conditionality?
Whether the advantage is offered to all like products unconditionally?

Only if the answer to the first three questions is "yes," and to the fourth question "no," is there a violation of Article I:1.

In the *Indonesia Car* case, the Panel answered "yes" easily to the first two questions. (The Panel applied the same "like product" analysis under Article I as under Article III, holding National Cars and their parts imported from Korea are "like" any motor vehicle and parts and components imported from other WTO Members.) As to the third question, the Panel queried whether tax and customs duty benefits of the February and June 1996 car programs are advantages covered by Article I? It replied:

> The *customs duty benefits* of the various Indonesian car programs are *explicitly covered by the wording of Article I*. As to the *tax benefits* of these programs, we note that *Article I:1 refers explicitly to "all matters referred to in paragraphs 2 and 4 of Article III."* We have already decided that the *tax discrimination aspects of the National Car program were matters covered by Article III:2* of GATT. Therefore, the customs duty and tax advantages of the February and June 1996 car programs are of the type covered by Article I of GATT.[425]

As the italicized language indicates, a key issue in any Article I case is whether the MFN obligation is applicable to the type of measure at issue. The Panel separately identified the benefits at issue – tax treatment and customs duties. The first clause of Article I:1 expressly mentions customs duties. So, those benefits are subject to scrutiny under the Article. Tax treatment is not expressly mentioned in this Article. But, Article I:1 does state it covers all matters subject to Article III:2 and III:4. Tax treatment is explicitly mentioned in Article III:2, hence it also is subject to scrutiny under Article I:1.

On the final question, the Panel found Indonesia did not confer unconditionally to all like products the advantages from its customs duty and tax treatment measures:

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425 *Indonesia Car* Panel Report, ¶ 14.139. (Emphasis added.)

14.143 We now examine whether the advantages accorded to National Cars and parts and components thereof from Korea are unconditionally accorded to the products of other Members, as required by Article I. The GATT case law is clear to the effect that any such advantage (here tax and customs duty benefits) cannot be made conditional on any criteria that is not related to the imported product itself. [The Panel quoted from the 1952 *Belgian Family Allowances* case.]

…

14.145 Indeed, it appears that the design and structure of the June 1996 car program is such as to allow situations where another Member's like product to a National Car imported by PT PTN from Korea will be subject to much higher duties and sales taxes than those imposed on such National Cars. For example, *customs duties as high as 200% can be imposed on finished motor vehicles while an imported National Car benefits from a 0% customs duty*. *No taxes are imposed on a National Car while an imported like motor vehicle from another Member would be subject to a 35% sales tax*. The distinction as to *whether one product is subject to 0 % duty and the other one is subject to 200% duty or whether one product is subject to 0% sales tax and the other one is subject to a 35% sales tax, depends on whether or not PT TPN had made a "deal" with that exporting company to produce that National Car*, and is covered by the authorization of June 1996 with specifications that correspond to those of the Kia car produced only in Korea. *In the GATT/WTO, the right of Members cannot be made dependent upon, conditional on or even affected by, any private contractual obligations in place*. [On this point, the Panel cited to the GATT Panel Report in the *Canada – Administration of the Foreign Investment Review Act* case, B.I.S.D. (30th Supp.) (adopted 7 February 1984).] The existence of these conditions is inconsistent with the provisions of Article I:1 which provides that tax and customs duty benefits accorded to products of one Member (here on Korean products) be accorded to imported like products from other Members "immediately and unconditionally." [Citation omitted.]

14.146 We note also that *under the February 1996 car program the granting of customs duty benefits to parts and components is conditional to their being used in the assembly in Indonesia of a National Car*. The granting of tax benefits is conditional and limited to the only Pioneer company producing National Cars. And there is also a third condition for these benefits: *the meeting of certain local content targets*. Indeed, under all these car programs, customs duty and tax benefits are conditional on achieving a certain local content value for the finished car. The existence of these conditions is inconsistent with the provisions of Article I:1, which provides that tax and customs duty advantages accorded to products of one

> Member (here on Korean products) be accorded to imported like products from other Members "immediately and unconditionally."
>
> 14.147 For the reasons discussed above, we consider that the June 1996 car program which *introduced discrimination between imports in the allocation of tax and customs duty benefits based on various conditions and other criteria not related to the imports themselves* and the February 1996 car program which also introduce discrimination between imports in the allocation of customs duty benefits based on various conditions and other criteria not related to the imports themselves, are inconsistent with the provisions of Article I of GATT.[426]

Finally, the untenable legal position of Indonesia is worthy of remark. Legal argumentation – a proposition followed by a rebuttal – is dialectical. A key to understanding future implications of many international trade disputes, and fashioning winning legal arguments, is to understand the losing argument, and why it failed.

The theory of Indonesia's argument was the public–private distinction. Indonesia argued receipt of tariff and sales tax exemptions is a private sector choice. A firm is free to choose where to locate its factory, and to decide how much local content to use, not government direction. Because the decision to receive these benefits is a private choice, the benefits were not subject to scrutiny under GATT. After all, GATT regulates only public (*i.e.*, official or governmental) measures. Consistent with the general erosion in both international and U.S. law of the public-private distinction, the Panel rejected Indonesia's defense. Its findings in the *Indonesia Car* case were not appealed.

III. Scope of Application: 1948 *India Tax Rebates on Exports* and 1952 *Belgian Family Allowances* Cases

Assuming "likeness" of "products," what is the scope of the MFN obligation? That is, precisely what conduct is barred, and how far does the obligation apply? Article I:1 refers to "any advantage, favor, privilege or immunity" granted by one WTO Member to goods imported from any other country (whether or not an original GATT contracting party or WTO Member). Yet, neither Article I, nor the attendant Interpretative Note, defines this critical phrase. Early GATT Panels stepped in to offer guidance, and took literally the word "any" – it means "any."

An early, relevant case, *India Tax Rebates on Exports*, is from 1948.[427] The facts are unsurprising in the context of the regrettable Post-1947 Partition history on the Indian Subcontinent. India granted rebates of excise taxes with respect to products exported to GATT contracting parties, except for exports to Pakistan. In so doing, India conferred an

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426 *Indonesia Car* Panel Report, ¶¶ 14.143, 14.145-147. (Emphasis added.)

427 *See Application of Article I:1 to Rebates on Internal Taxes*, Ruling by the Chairman on 24 August 1948, II GATT B.I.S.D. 12 (1948).

obvious "advantage," "favor," and "privilege" extended to Indian exports to all GATT countries other than Pakistan. The Chairman of the Working Group deciding the case found the Indian measure incongruous with Article I:1. The adversaries settled the case.

Observe, then, application of the MFN obligation is not limited to importation of goods from overseas. The rule covers exportation of goods to an overseas destination. From the GATT Article I:1 text, the scope of the rule encompasses rendering payment for imports or exports, as long as the payment transaction crosses an international boundary. In brief, imports, exports, and cross-border payments for them are covered.

Governments can be (and many are) devilishly clever in articulating a trade measure, disguising it to be facially neutral. Suppose a government defines a rule in terms of goods with certain characteristics. Might the actual or potential result be discrimination against goods based on their origin? The answer is "yes, especially if the correlation is high between physical characteristics and a particular country of origin." Consequently, the MFN mandate covers instances of *de facto*, as well as *de jure*, discrimination against goods imported from one or more particular countries.

There is early supporting case law, albeit modest. In a 1952 decision, *Belgian Family Allowances* (*Allocations Familiales*), a GATT Panel considered a border tax adjustment, in the form of a special charge Belgium imposed on purchases by public agencies of Danish and Norwegian imports.[428] Belgium did not apply the BTA to goods from four other countries. Rather, whether it levied the charge hinged on whether Belgium judged the country of export had a welfare system to support families similar to that of Belgium. Evidently, Belgium considered Denmark and Norway did not have sufficiently similar systems. Hence, the Belgians imposed the charge on their exports, and used the proceeds for family allowances (and, presumably, to pressure the Danes and Norwegians to implement a Belgian-comparable system).

The GATT Panel ruled Belgium's family allowance levy illegal under Article I:1:

> 3. According to the provisions of paragraph 1 of Article I of the General Agreement, any advantage, favor, privilege or immunity granted by Belgium to any product originating in the territory of any country with respect to all matters referred to in paragraph 2 of Article III shall be granted immediately and *unconditionally* to the like product originating in the territories of all contracting parties. *Belgium has granted exemption from the levy under consideration to products purchased by public bodies when they originate in Luxembourg and the Netherlands, as well as in France, Italy, Sweden and the United Kingdom*. If the General Agreement were definitively in force in accordance with Article XXVI, it is clear that that exemption *would have to be granted unconditionally to all other contracting parties (including Denmark and Norway)*. *The consistency or otherwise of the system of family allowances in force*

[428] *See* II GATT B.I.S.D. (1st Supp.) 59 (1953) (adopted 7 November 1952).

> *in the territory of a given contracting party with the requirements of the Belgian law would be irrelevant* in this respect, and the Belgian legislation would have to be amended insofar as *it introduced a discrimination between countries having a given system of family allowances and those which had a different system or no system at all, and made the granting of the exemption dependent on certain conditions*.[429]

The italicized language indicates the Panel condemned the Belgian levy as discriminating against imports depending on family allowance schemes in an exporting country.

Stated differently, the Belgian measure amounted to conditional MFN treatment. Its imposition depended on the family allowance schemes of the exporting country. The Belgian tax distinguished among countries of origin, but veiled their distinctions with a characteristic supposedly attendant to a product, namely, family welfare benefits. There appeared to be no *de jure* discrimination against Danish or Norwegian goods, indeed the Belgian measure was prima facie neutral. But, the measure entailed *de facto* discrimination, namely, prejudicial treatment was the effect of enforcing the tax.

What Belgium sought was a distinction among goods based on characteristics of the country of origin of the goods. That must be forbidden. It is a form of conditionality. A succinct way to summarize the rule for which *Belgian Family Allowances* stands for is characteristics of goods themselves may be the basis for a distinction among goods. However, characteristics of the country of origin of those goods may not be the basis for differentiating among the goods. Lest there be doubt about the sagacity of this rule, consider the proverbial slippery slope that would occur without it.

IV. Scope of Application (Continued): Exportation

Nearly always, importation is the context for contemplating and applying the MFN rule. That is for good reason. If a WTO Member discriminates between or among foreign countries, then it typically does so by treating imports originating from one overseas producer-exporting nation less favorably than from others. Preferring American autos and auto parts to European and Japanese like products, as Canada did in the 2000 *Auto Pact* case, is an illustration. Moreover, it is understandable to think of the MFN rule in respect of imports. Surely, a Member would not want to prefer some export destinations over others, because every Member – given its almost atavistic mercantilist instinct – seeks to maximize aggregate exports.

Yet, to posit the possibility is to appreciate its likelihood. WTO Members have their preferences as to foreign markets they like, and ones they do not. Why they might not may be for reasons of politics or national security (consider America and Iran) or simply the difficulty of economically efficient in-country operation (*e.g.*, many SSACs). Military alliances (as between America and Japan) are another reason. The 2014 *LNG Exports* case

[429] Emphasis added.

illustrates the applicability of the MFN rule to exportation in a globally important market: NG.[430] To simplify, the U.S. granted automatic export licenses for Japan, but for all other countries with which the U.S. did not have an FTA mandating national treatment for trade in NG, the U.S. gave only non-automatic export licenses.[431]

The essence of the GATT Article I:1 violation was the manner in which DOE applied the 1938 *Natural Gas Act* (*NGA*). It did so in a *de facto* bifurcated analysis of applications for licenses to export LNG.[432] The result was a preference, which ironically arose thanks to a facially neutral statutory euphemism: the "Public Interest Test" under *NGA* Section 3. The Test rubric intimated even-handedness and protection of the common good when opining on requests for authorization to export energy. DOE administration of the Test proved different.

The DOE gave licenses for LNG exportation from Alaska to Japan and a handful of Pacific Rim countries nearly automatically. The licensee invariably was Phillips Petroleum Company and Marathon Oil (Phillips-Marathon). It underwent a trivial Public

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430 This discussion was part of a larger, paid consulting project for Cheniere Energy, Inc., Houston, Texas. Special thanks are owed to Daniel Belhuemer, former Vice President Tax and General Tax Counsel, Cheniere, who graduated from the University of Kansas School of Law, J.D. Class of 2007, and Andrew Ware, Director, Strategic Projects, Cheniere.

431 The U.S. FTA with Israel does not mandate national treatment in NG, nor does *CAFTA-DR* with respect to Costa Rica. All other U.S. FTAs – specifically, with Australia, Bahrain, Canada, and Mexico (under *NAFTA*), Chile, Colombia, Jordan, Korea, Morocco, Oman, Panama, Peru, and Singapore, plus *CAFTA-DR* – have this provision.

432 The *NGA* is 52 Stat. 821, 21 June 1938, 15 U.S.C. §§ 717 *et seq*. It was the first direct Federal regulation of the NG industry:

> Concern about the exercise of market power by interstate pipeline companies prompted the *NGA*, which gave the Federal Power Commission (FPC) (subsequently the Federal Energy Regulatory Commission (FERC)) the authority to set "just and reasonable rates" for the transmission or sale of natural gas in interstate commerce. …
>
> Section 3 of the *NGA* requires Federal approval by the Department of Energy for the import and export of natural gas, including liquefied natural gas (LNG), and approval by FERC for the siting, construction, and operation of onshore LNG import and export facilities.
>
> Regulatory functions under the *NGA* were originally delegated to the Federal Power Commission, and subsequently transferred to the Federal Energy Regulatory Commission and to the Department of Energy in 1977, by the *Department of Energy Organization Act*.
>
> The *NGA* does not apply to the production, gathering, or local distribution of natural gas.
> …
> The *Natural Gas Act* has had an enormous impact on the interstate natural gas market in the United States. Although the natural gas industry has undergone tremendous change since 1938, and pipeline companies no longer function as resellers of gas to local distribution companies (LDCs), the key principles continue to motivate natural gas regulation in the United States. Concern about market power continues to be a key driver of natural gas regulation and monitoring of the market.

U.S. Energy Information Administration, *Natural Gas Act of 1938*, www.eia.gov/oil_gas/natural_gas/analysis_publications/ngmajorleg/ngact1938.html.

Interest Test in short order. However, for countries with which the U.S. did not have an FTA, other than Japan – for example, Britain, France, India, Korea, and Spain – that seek LNG exports from the Lower 48 States, the DOE regime was one of non-automatic import licensing. Since 2011, the DOE imposed on applicants like Houston-based Cheniere Energy, Inc. ("Cheniere") a rigorous Public Interest Test for exports from the Lower 48 States that wrongly inverted the burden of proof and consumed years of time and expense. Permitting exports of a like product easily to one country, but with difficulty to another country, is impermissible discrimination among WTO Members.

About 35 other applicants in the U.S. sought to ship LNG overseas to non-FTA WTO Members other than Japan. Like Cheniere's customers, their NG would come from the Lower 48 States, in contrast to Japan, which received NG from Alaska. Yet, their applications with the DOE were backlogged: they sought DOE approval for their transactions under a discriminatory regime. Cheniere was the first to challenge the regime as inconsistent with America's MFN obligations under GATT Article I:1, but soon led a sizeable, growing group of energy-exporting firms and energy-importing countries. Discriminated against, they queued for an indeterminate time and an uncertain destiny. Ultimately, the DOE altered its practice, and by 2017 the U.S. exported LNG without the prior discriminatory constraint.

V. Scope of Application (Continued): WTO Members versus "Other" Countries

The MFN obligation not to discriminate against certain foreign imports, exports to certain foreign countries, or payments rendered for certain imports or exports, applies only if the foreign country at issue is a WTO Member. The like product at issue must originate from within the territory of that Member, and origination cannot be taken for granted in every instance. Neither Article I:1, nor the rest of GATT, offer specific rules to determine whether a product originates in another GATT territory. At both the 1946 and 1947 Preparatory Conferences in London and Geneva, respectively, the drafters consciously eschewed efforts to define the meaning of "originating in."

To do so, they feared, would be to compromise the overall project, as the topic was sure to be involved. The result is rules of origin are left to an importing country, *i.e.*, each retains sovereignty to determine whether a product comes from another. In turn, the potential for monstrous heterogeneity in rules of origin exists. Multilateral efforts to bring order, consistency, and predictability to non-preferential rules of origin (*i.e.*, where no preferential trading arrangement benefits are at stake) have met with modest success. The latest endeavor is under the auspices of the WTO *Agreement on Rules of Origin*.

Of course, depending on facts in a case, origin determinations can be not only technically intricate, but also politically explosive. Taken, then, a hypothetical case of dress shirts sewn from yarn spun in Libya, which is from cotton grown in Egypt. The shirts are designed in Lebanon, and cut and sewn in Syria. Final assembly occurs in Jordan, where buttons from Israel also are affixed to the shirts, as well as pockets from the West Bank and Gaza Strip. Is this shirt a product of a non-WTO Member (Lebanon, Libya, Palestine,

or Syria), or a Member (Egypt, Israel, or Jordan)? The answer depends on the applicable rule of origin for this apparel product. That rule is formulated and implemented by the country of importation. If that country has strategic interests in the Middle East, and if the differential between the MFN and non-MFN rate for dress shirts imported into that country is marked, then assuredly the origin determination, and the rule of origin itself, is seen as much for its political ramifications as technical accuracy.

That said, the political logic of using territory to measure the boundaries of the MFN obligation ought not to be doubted. There are not only rules to being a part of any club, but also benefits. One key benefit of being in the WTO club is receipt of MFN treatment. To extend this benefit to non-Members would be to allow them to free-ride on the club, in that they would not also be obliged to apply the MFN rule (or, for that matter, any other GATT obligation) to the Members. At the same time, MFN treatment may be required through legal vehicles other than GATT.

To take a hypothetical case involving Iran, which is not yet a WTO Member, suppose the U.S. agrees to drop its MFN duty on imported pistachios from 15 to 5%. The 5% rate applies to all pistachio-exporting countries that are WTO Members. But, Iran's pistachios (which are the world's best) still attract the 15% duty. A cursory reading of GATT Article I:1 would miss subtleties of this kind. Further, while the U.S. does not owe Iran MFN treatment under Article I:1, suppose the U.S. were to enter into a bilateral agreement with Iran, or to include Iran in a *MEFTA* – even though Iran has not acceded to the WTO. Under terms of the bilateral deal, or *MEFTA*, the U.S. agrees to a 10% tariff on pistachios from Iran. Is there any circumstance under which Iran, as a *MEFTA* country but not a WTO Member, could claim MFN benefits under Article I:1, *i.e.*, the 5% duty?

The answer is a qualified yes. If *MEFTA* contained an MFN clause, and if that clause does not exclude MFN treatment provided under GATT, then Iran could make the claim, albeit under *MEFTA*. Iranian pistachios then would be entitled to the MFN rate of 5%, yet Iran would not have had to provide any trade concession to WTO Members. That blatant free-riding surely would motivate the U.S. to insist on an MFN clause in *MEFTA* that would not incorporate Article I:1 benefits, and thereby ensure Iranian pistachios get the *MEFTA* rate of 10%.

To illustrate another subtlety, consider a variation in the hypothetical example. In multilateral trade negotiations, the U.S. agrees to drop its original MFN tariff on pistachios from 15 to 5%, but grants duty-free treatment to Iranian pistachios under *MEFTA*. This situation is the converse of the initial fact pattern: initially, the MFN rate was below the non-MFN rate, whereas now the MFN rate exceeds the *MEFTA* rate. Must the U.S. extend the zero-tariff treatment to pistachios from, say, Turkey (a WTO Member, but – hypothetically – not a party to *MEFTA*)? The answer is yes – indeed, not just "yes," but "yes, immediately, and unconditionally." The obligation implicates advantages, favors, privileges, and immunities extended to any other country, whether or not that other country is a WTO Member. In fact, at the 1947 Geneva Conference, the suggestion to limit MFN obligation only to contracting parties was rejected.

Because of Article I:1, Turkey's like product is entitled to the best treatment the U.S. gives to any other country, whether or not that other country is a WTO Member. Were that not true, then every WTO Member could undermine the multilateral trade liberalization process by giving MFN tariff concessions through rounds of WTO negotiations, but granting still better concessions to non-Members. To put the point differently, the MFN obligation ensures Members free ride on non-Members, but not the other way around. Here, then, is just one incentive to join the WTO.

Significantly, the Turkish pistachios are entitled to non-discriminatory treatment from the U.S., which means more than mere entitlement to the best treatment the U.S. gives to a like product from any other country. The word "unconditional" means what it says – Turkey need not have done, nor do, anything for its pistachios to receive MFN treatment. The U.S. cannot demand "effective access," or an "equivalent competitive opportunity," for a class of its exports to Turkey. Put differently, reciprocity is not permitted in this contextual dimension. So, for instance, if Turkey's MFN tariff rate on pistachios is 20%, then Turkish pistachio exports to the U.S. are entitled to America's MFN rate – notwithstanding Turkey's own 20% duty. That duty is irrelevant to the obligation of the U.S. to extend its MFN rate to Turkish exports.

Reciprocal granting of concessions on tariff and non-tariff barriers is the central feature of most negotiations on liberalizing trade in goods (and services). But, that is a matter to be dealt with at the bargaining stage, not at the subsequent stage of applying agreed-upon concessions. Negotiations are the opportunity for the U.S. to attempt to persuade Turkey to lower its 20% rate. If the U.S. is dissatisfied with the Turkish response, then it can elect not to finalize, or even offer, an unrequited concession. Of course, in that scenario, all pistachio exporting countries potentially suffer from Turkey's stubbornness, so Turkey may find itself pressured to liberalize access to its markets from more trading partners than the U.S. Again, the critical legal point about unconditionality is that when negotiations are done, and it is time to implement MFN treatment, it is illegal under Article I:1 to condition that treatment on any reciprocal concession.

Chapter 13

FIRST PILLAR (CONTINUED): THEORY AND CASE LAW[433]

I. Free Rider Problem

What justifies an MFN obligation, particularly one that is immediate and unconditional? The ineluctable free rider problem caused by the preclusion of conditions on extending MFN treatment to another WTO Member renders the question all the more poignant. For instance, once one Member – say, India – extracts reciprocal concessions from another Member – say China – in a negotiating session, India is not at liberty to limit its best tariff and non-tariff barrier treatment only to China. To the contrary, India must extend the same best treatment to all other Members automatically, regardless of whether they granted concessions to India.

Arguably, a conditional, and maybe gradual, extension of non-discriminatory treatment would be a savvy, and fair, basis on which to liberalize trade. After all, to continue with the illustration, other WTO Members – such as Malaysia – might hold back from offering concessions. Other Members might understate intentionally their willingness to "pay" for India's concessions, because they anticipate India will grant concessions in its negotiations with China. Why should Malaysia bother paying? In effect, Malaysia believes India cares so much about market access in China for the products under negotiation that India will make the concessions to China necessary to secure that access for Indian exporters, and India will do so not minding that Malaysian exporters will benefit from the same concessions India makes for Chinese exports.

But, consider the view from New Delhi. Suppose India perceives (or, better yet, foresees) Malaysia is free riding on its concessions to China. India might elect not to make concessions in the first instance – at least, not unless Malaysia enters into discussions too. Why not, then, relax the MFN obligation, so India is induced to make big concessions in its talks with China? China might be eager for this outcome, especially if it is an inefficient producer, in relation to other WTO Members, of merchandise subject to trade talks. From Beijing's vantage, any environment in which India grants relatively less efficient Chinese producers market access is positive, especially weighed against the possibility India refuses any concessions in order to thwart would-be free riders.

The free rider problem thus exemplified means a rationale for the immediate, unconditional MFN obligation is essential. The illustration suggests this obligation inhibits a WTO Member from offering trade concessions. A logical step would be to re-assess the methodology by which trade concession negotiations proceed. However, it is insufficient

[433] Documents References:
(1) *Havana (ITO) Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, XX, XXI, XXIV, and XXXV
(3) 1979 Tokyo Round *Enabling Clause*

to dismiss the problem by changing from a product-by-product method to an "across-the-board" method. True, the free rider problem is acute if WTO Members discuss tariff cuts on apples, then bananas, then cauliflower, then the (odious) durian fruit, and so on. It is less apparent if they agree to a linear approach whereby each nation cuts tariffs on all imports (or, at least, on large categories, such as all fruits and vegetables, or all primary agricultural commodities) by 50%.

Yet, the second methodology still manifests the problem. Members with higher initial average tariff levels are left with higher tariff levels even after the cuts. Suppose Malaysia's initial tariff on bananas is 30%, and China's is 20%. After the 50% reduction, the respective rates are 15 and 10%. Malaysia still has a relatively higher level of protection. Put differently, it free rides in the amount of 5% (the difference between its and China's banana tariff). An across-the-board methodology does not resolve the problem, if that method is not truly across-the-board in its coverage. If there are exceptions from the cuts, then Members with excepted products are free riders. The longer the list of their exceptions, the greater the free riding.

II. Three Justifications for MFN Obligation

● 1st: Preserving Concessions

Even if a trade negotiating methodology eliminates entirely the free rider problem, the need to justify the MFN obligation is not excused. One rather obvious justification is the central role the obligation plays in preserving the benefits of trade concessions. Indeed, a 1909 article on the MFN clause spells out this justification:

> Every state has a two-fold object in its international politico-commercial arrangements: to gain and to preserve the greatest possible advantages, and to *guard against present or future disadvantages and discriminations*. In making treaties with this object in view, the clause of the most-favored-nation has been found one of the most convenient and effective instruments, especially for the attainment of the latter end. …
>
> …
>
> Not only did this clause [when it entered into widespread use in the 17th Century] generalize previous provisions [contained in earlier negotiated commercial treaties], it performed a more important function, namely, to safeguard the state in whose treaties it appeared *against future discriminations*.[434]

Consider once again, trade negotiations between India and China.

Suppose the MFN obligation does not exist, and India grants concessions to China. Because China does not owe MFN treatment to India, once its deal with India is sealed, China could enter into a trade accord with Pakistan in which China grants lower duties,

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434 S.K. Hornbeck, *The Most Favored-Nation Clause*, 3 AMERICAN JOURNAL OF INTERNATIONAL LAW 395, 397, 399 422 (1909).

and more generous quotas, to Pakistani merchandise than China provides to like products from India under its agreement with India. From India's perspective, the value of the concessions India granted to China is eroded. India made concessions to get improved access to the Chinese market. Yet, Pakistan now has access on better terms (lower tariffs and larger quotas) than India. In contrast, if an MFN obligation exists, then India can rest assured the value of its concessions is preserved.

- **2nd: Historical and Political Rationales**

Satisfying as the "preservation of concessions" rationale may be, there are deeper justifications for the obligation. After all, savvy Indian trade negotiators could hedge against the risk of erosion by inserting a guarantee in their deal with China that ensures the value of their concessions are preserved. Of course, that guarantee might look uncannily like an MFN clause, and would presume the Indians could monitor all the future trade deals entered into by China.

In pursuit of a deeper justification, consider the history of the obligation, its implications for trade relations, and more generally for peace and security. What might occur if a different rule existed? In justifying legal doctrines, a common recourse is to tradition (*i.e.*, history). It is not simply the law always has been as such, but that the stability of the rule has meant certainty and predictability for parties governed by the rule. So, a way to rationalize the MFN obligation is to point out an embryonic version of it existed as early as 1417, namely, an agreement between King Henry V of England and Duke John of Burgundy, signed in Amiens on 17 August 1417, known as the *Treaty for Mercantile Intercourse with Flanders*. An even earlier version of the MFN clause existed in a treaty dated 8 November 1226. Through the clause in that *Treaty*, "the Emperor Frederick II conceded to the City of Marseilles the privileges previously granted to the citizens of Pisa and those of Genoa," apparently for "political" reasons.[435]

- **3rd: Economic Rationale**

There are two dimensions to an economic analysis of the MFN obligation in GATT Article I:1. First, countries stand to gain from the international economic order if they can realize their comparative advantages through trade, as distinct from suffering within their production possibilities frontier under autarky. Through trade, they can focus factors of production in the specialization of products in which they have a relative cost advantage, and export surplus production in exchange for imports of products in which they have a comparative disadvantage. Those imports allow citizens to consume large quantities of more products than would be possible under autarky. The political implication of specialized production and increased consumption is citizens, and their government, will see gains accruing from trade, and seek to preserve opportunities for further gains by avoiding military conflict with trading partners. Put bluntly, violent confrontation is based on country of origin (namely, of the troops), whereas unconditionality means country of origin is irrelevant to receiving MFN treatment (as long as the country is a party to GATT).

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435 *See* Hornbeck, *supra*, 398-99.

In respect of the second economic dimension, unconditional treatment is akin to insurance for the benefit of a bargain from concessions granted. Unconditionality gives a trading partner legal certainty the concessions it is granted (presumably, in exchange for reciprocal concessions) are not undermined by the grantor country subsequently offering better treatment to a third country. That certainty is commercially relevant when a third country exports to the same market, *i.e.*, to the grantor country. To take an example, because of Article I:1, India can rest assured if Australia offers it a tariff reduction on wheat from 30 to 15%, and thereafter offers Pakistan duty-free treatment for its wheat, then Indian wheat also will receive zero-tariff treatment.

Of course, this example is deceptively simple, because it implicates an important exception to the MFN obligation, namely, the GATT Article XXIV:5 authorization to form an RTA, specifically, a FTA or CU. If Australia and Pakistan are not in an RTA, then India's legal certainty is real. However, if the two nations form an FTA or CU, the accord covers wheat, and the coverage calls for duty-free two-way trade, then Indian wheat farmers will be disadvantaged compared to their Pakistani competitors. In other words, the specter of an RTA eroding the value of tariff concessions is a ubiquitous legal uncertainty.

III. 2000 *Canada Auto Pact* Case and *De Facto* Discrimination

● Three Key Tests to Qualify as "Manufacturer"

One of the few disputes in which MFN treatment was a central issue for the Appellate Body to adjudicate is the *Canada Auto Pact* case.[436] The facts of the case long pre-date the birth of the WTO. In January 1965, President Lyndon Johnson (1908-1973, President, 1963-1969) and 1957 Nobel Peace Prize winning Canadian Prime Minister Lester Pearson (1897-1972, PM, 1963-1968) signed an agreement to liberalize trade in autos and auto parts between the two countries.[437] Through this pact – formally known as the *Agreement Concerning Automotive Products Between the Government of Canada and the Government of the United States* (*Auto Pact*) – Canada sought to "Canadian-ize" the auto and auto parts market. Canada implemented the *Auto Pact* through the Motor Vehicles Tariff Order of 1965, and Tariff Item 950 Regulations. Both were replaced by the MVTO of 1988, and that was replaced by the MVTO of 1998.

The basic bargain was Canada agreed to grant duty-free treatment to vehicles and original equipment manufacturing parts (other than tires and tubes), but only if the importer of the cars or parts met the definition of a motor vehicles "manufacturer" set forth in the *Auto Pact*. The MVTO specified the terms of duty-free entry for imported cars and car parts. What was that all-important definition of "manufacturer" contained in the *Auto Pact* and given effect in the MVTO?

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[436] *See* Appellate Body Report, *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R and WT/DS142/AB/R (adopted 19 June 2000). [Hereinafter, *Canada Auto Pacts* Appellate Body Report.] This discussion draws on Raj Bhala, *Modern GATT Law* 295-303 (2nd ed., 2013).

[437] The *Auto Pact* is published at 4 INTERNATIONAL LEGAL MATERIALS 302 (1965). The American implementing legislation was the "*Automotive Products Trade Act of 1965*."

The definition was three tests that had to be met to qualify as a "manufacturer." First, the importer must have produced in Canada during the base year 1963-1964 motor vehicles of the category it imported. The importer had to have been established and made cars in Canada since before the *Auto Pact* entered into force. In effect, these importers were also foreign direct investors, such as General Motors of Canada, Ltd., Ford Motor Company of Canada, Ltd., and Chrysler Canada Ltd. – American companies that imported cars into Canada that they made in the U.S. (or elsewhere), and that also made cars in Canada. Not surprisingly, the "Big Three" – Chrysler, Ford, and GM – all satisfied this first prong of the definition. So, too, did American Motors.

Second, the importer must comply with a ratio of (1) the sales value of its locally (*i.e.*, Canadian) produced vehicles of that class of vehicle to (2) the sales it makes in Canada of that type of vehicle. This ratio is called a "production-to-sales ratio," because item (1) is the value of the importer's local production, and item (2) is the value of its local sales. Technically, item (1), which is the numerator in the ratio, is the net sales value of the vehicles produced in Canada. Item (2), which is the denominator, is the net sales value of all vehicles of that type sold in Canada.

Hence, the production-to-sales ratio was expressed as follows:

$$\text{Production-to-sales ratio} = \frac{\text{Net sales value of vehicles produced in Canada}}{\text{Net sales value of all vehicles of the same class sold in Canada}}$$

This ratio was measured on an annual basis.

Under the *Auto Pact*, to receive duty-free treatment, an importer had to keep the ratio above a certain minimum threshold. Why? Because the ratio is a gauge of the extent to which the importer is selling the cars it makes in Canada to Canadian consumers, *i.e.*, selling its local production locally, and selling the cars it makes locally to foreign countries. Put succinctly, the ratio is a measure of an importer's commitment to domestic (*i.e.*, Canadian) production. As a general matter, the American auto companies pledged to respect a 1-to-1, or 100% ratio, meaning that the net sales value of cars they produce in Canada at least equals the net sales value of the vehicles they sell in Canada. That is, they agreed to increase the number of cars they made in Canada so that the value of Canadian-produced cars would be no less than the value of cars they sold in Canada.

To see how this ratio helps "Canadian-ize" the auto industry, observe that an importer that also manufactures in Canada would have two sources (other than inventory) for the vehicles it sells in Canada: imported vehicles (*i.e.*, cars that it makes overseas) and locally-made vehicles. The production-to-sales ratio ensures that the importer does not get all of the vehicles it sells in Canada from abroad. Rather, the importer uses its local factories to source a sizeable percentage, if not all, of the local sales, and perhaps also to source exports from those factories.

For example, suppose an importer made $6 million worth of cars in Canada, and sold $8 million in Canada. This 75% (6/8) ratio indicates the remaining $2 million of sales would have to have been sourced from imports. Conversely, suppose the manufacturer made $8 million worth of cars in Canada, but sold only $6 million there. Unless the company accumulated the remaining $2 million of local production in inventories, then it must have sold the $2 million overseas. That is, the 133% (8/6) ratio suggests exportation of local product. In sum, the production-to-sales ratio simply is designed to ensure some production occurs locally.

How did the *Auto Pact* specify the production-to-sales ratio? The obvious way would have been to do so along the lines of the above example, namely, a straight percentage like 75% or 133%. However, the *Pact* used a different approach. It called for a comparison between the production-to-sales ratio in the current year with the production-to-sales ratio in a base year. The ratio in the current year had to be equal to or greater than the ratio in the base year.

Moreover, the *Auto Pact* specified that the ratio must never be lower than 75%-100%. The reason for the range is that the precise ratio differed depending on the beneficiary – it all depends on the ratio in the base year. For instance, for Ford, the ratio might be 83%, while for GM it might be 91%. The differences would reflect the individual production-to-sales ratios of the companies in the base year. In the example, GM's ratio presumably was higher than Ford's ratio.

Thus, suppose the base year was defined as 1964, and the production-to- sales ratio in 1964 was 80%. That ratio would mean that in 1964, of the cars the importer sold in Canada, 80% (measured in terms of net sales value) of them were produced in Canada. The *Pact* would demand that for the current year, the ratio be equal to or greater than 80%. Put differently, the importer cannot shift production out of Canada in a way that would cause the ratio to drop below the base year.

Third, the importer had to achieve a minimum amount of Canadian Value Added in its local production of vehicles (and, in certain instances, parts). That is, the importer's Canadian production facilities must not have been mere assembly operations (in contrast to a *maquiladora*, which is an assembly plant, often – though not always – located near the American border). There must have been significant economic activity going on. Thus, included in the CVA are (1) the cost of parts and materials that were of Canadian origin, (2) Canadian labor costs, (3) manufacturing overhead costs, (4) general and administrative expenses incurred in Canada that were attributable to the production of vehicles, (5) depreciation of machinery and permanent plant equipment located in Canada that was directly attributable to the production of vehicles, and (6) capital costs for land and buildings used in the production of motor vehicles.

The specific CVA requirement was not stated in terms of a simple percentage – for instance, like 35% of the value of the vehicle produced in Canada must have been derived from Canadian parts. Rather, it was set forth in terms of a comparison: (1) how much CVA existed in vehicles produced in the current year in comparison with (2) the CVA that

existed in vehicles produced in a defined base year? The requirement was that (1) could not fall below (2). That is, the CVA in the current year had to be at equal to or greater than the CVA in the base year.

As with the production-to-sales ratio, the precise CVA threshold differed for each importer that was a beneficiary of the *Auto Pact*. The threshold depended on the CVA level during the base year. That is not to say a simple CVA percentage was unimportant. In general, the American auto companies agreed to use in each car assembled in Canada a large portion of Canadian-made parts, specifically, a 50% regional content test. The companies pledged to increase the Canadian value content of cars and car parts by at least 60% of the growth in their car sales in Canada.

If an importer failed this three-pronged definition of "manufacturer," then it was liable for payment of the applicable customs duties on all vehicle imports (of the class in question) for the year in which it failed the tests. The loss of duty-free treatment was only for that year, and the importer did not lose its status as a beneficiary of the *Auto Pact*. (The duties were owed only on additional imports, not on vehicles already imported, because calculation of the production-to-sales ratio included only duty-free imports.)

Specific Remission Orders were important to the facts of the *Canada Auto Pact* case. To avoid losing duty-free treatment in any particular year, the importer had one recourse. It could request the Canadian government to grant it an exemption from one or more of the prongs, and thus get the benefit of duty-free treatment for the cars and car parts it imports. This grant was dubbed an "SRO."[438] Each SRO set forth a CVA and production-to-sales ratio.

Conceptually, these tests were no different from those mentioned above. But, the exact CVA levels and ratio tests varied from one SRO to another, *i.e.*, from one SRO grantee to another. As a general matter, SROs tended to have a CVA threshold of at least 40%, a production-to-sales ratio of 75 to 100, and laid down reporting obligations on the grantee. In other words, they could be reasonably strict.

- **March 1965 GATT Working Party Report**

As regards the MFN obligation, quite obviously, providing duty-free treatment only to manufacturers that satisfied the three prongs of this definition would violate Article I:1. American car companies in Canada, namely the Big Three, would get the benefit of duty-free treatment from Canada, but car companies from other countries would not. Indeed, in March 1965, a Working Party of the GATT issued a Report that the U.S. would violate the MFN obligation if it implemented the *Auto Pact*.

The GATT contracting parties did not reach a consensus on whether Canada would violate it, too. It is hard to see how it would not, and the WTO Appellate Body holding

[438] Under an SRO, Canada offered duty-free treatment through full duty remission, whereas under the three tests discussed above, Canada offered a complete exemption from duties.

confirms this hunch. The U.S. sought and obtained a waiver from Article I:1. In November 1996, the U.S. renewed the MFN waiver through 1 January 1998.

- **Motivations Underlying Auto Pact**

Why did Canada seek to "Canadian-ize" the auto and auto parts industry? In short, to protect jobs. Before the *Auto Pact*, over 90% of all cars made in Canada were manufactured by subsidiaries of American companies, and Canada imported far more automotive products from the U.S. than it exported to the U.S. The Canadian search was motivated partly by concerns about control over a vital economic sector, arguably one of strategic importance, and by a perceived need to develop a national economic identity.

Why, then, did the U.S. accept the idea of an *Auto Pact*? Probably out of fear the Canadian government might adopt unilateral measures unfavorable to American auto and auto parts companies. The U.S. also anticipated that while the relative market share of the Canadian market held by American companies might decline, because of economic growth in Canada, absolute sales volumes would not fall.

Significantly, Canada and the U.S. agreed to retain the *Auto Pact* under the 1988 *CUFTA* (which entered into force on 1 January 1988) and 1993 *NAFTA* (which took effect on 1 January 1994), with a few modifications. *CUFTA* made an important change to the first prong of the three-pronged definition of "manufacturer." The change was to close the list of eligible importers. Eligibility was listed to the *Auto Pact* manufacturers (*i.e.*, those that qualified already), manufacturers designated by the Canadian government as beneficiaries before the *CUFTA* was signed, and other firms that were expected to be designated as beneficiaries by the Canadian Government before 1989. That is, *CUFTA* closed the list of companies entitled to import autos and auto parts duty free into Canada.

As suggested above, the Canadian import duty exemption rules were continued in the *NAFTA*. Under *NAFTA*, all American automotive products began entering Canada duty-free as of 1 January 1998, and all Mexican automotive products began entering Canada duty-free as of 1 January 2003. Of course, the duty-free *NAFTA* rules apply only if the *NAFTA* ROOs for autos and automotive products are satisfied.

To be sure, the *Auto Pact* was touted, and sometimes still thought of, as a FTA. It was far from that. It is an overstatement to say each country agreed to eliminate its tariffs with respect to autos and auto parts from the other country. To see precisely what the *Pact* achieved, it is important to understand the *status quo ante*. Before 1965 (when the *Pact* took effect), Canada imposed a 17½% duty on car imports, and a duty of up to 25% on imports of parts. Furthermore, Canada imposed a content requirement on vehicle manufacturers located in Canada: their output had to contain at least 60% Canadian content. At that time, America had an import duty of 6½% on cars, and 8½% on parts. It did not impose any domestic content requirement.

As explained at the outset, under the *Auto Pact*, Canada agreed to abolish its tariffs on imports from the U.S. of certain finished vehicles, and on imports of certain parts for

use as original equipment in vehicles to be produced in Canada. Canada agreed that auto parts could be imported duty-free from not only the U.S., but also third countries. But, not everyone could benefit from the duty-free treatment for autos and auto parts – only qualifying persons could.

As the *Pact* defined, the qualifying persons were none other than the major American manufacturers, namely, Chrysler, Ford, and GM. They liked being relieved of burdensome tariffs when they exported cars and parts to Canada from their plants in the U.S. (Not surprisingly, the importers of such products generally were American car companies or their Canadian subsidiaries.) By 1998, Canada maintained its tariff on vehicles and parts from all other persons and countries – a 6.7% duty on finished cars, and a 6% duty on auto parts. Thus, a car dealer in North Dakota could not sell vehicles across the border duty free, and a Japanese parts producer could not export components to Canada duty free. (By 1999, Canada's car tariff had fallen to 6.1%.) Finally, Canada dropped its bar against the imports of used autos from the U.S.

What did America do for Canada in return? Under the *Auto Pact*, the U.S. extinguished its tariffs on imports from Canada of certain vehicles. For imports of cars from all other sources, the U.S. did not drop its tariff. (It applied a 2.5% tariff on non-Canadian car imports, which remains the applied MFN rate.) The U.S. also agreed to drop duties on imports from Canada of certain auto parts for use as original equipment in the manufacture of those designated vehicles. Because abolition of duties on parts applied only to imports going to a car manufacturer, an importer that planned to sell Canadian-made parts to car repair businesses or auto supply stores would have to pay a tariff.

In sum, while the 1965 *Auto Pact* was the first so-called FTA to which America was a party, that appellation is a misnomer. In fact, the deal liberalized trade for a chosen few in a particular industrial sector. Over time, particularly with the *CUSFTA* and *NAFTA*, that "liberalization" became even more dubious. Recall that, under the *CUSFTA*, it was agreed the benefits of the *Auto Pact* would continue to be limited to the manufacturers already enjoying its benefits. These qualifying *Auto Pact* companies were the Big Three plus CAMI Automotive Inc., a JV between GM and Suzuki.

Thus, potential Japanese competitors were excluded and could not acquire preferential status. Also in the *CUFTA*, it was agreed the local content rule would be 50%, and any components made in North America would qualify. (To calculate local content, "factory cost" – also called "direct cost of manufacturing" – that includes labor, materials, and processing, but not advertising or overhead, would be used.) With *NAFTA*, the regional value content threshold to qualify as a vehicle originating from within the *NAFTA* region rose to 62.5%.

Not surprisingly, for the intended beneficiaries, the positive results of the *Auto Pact* are indisputable. Consider Canada. The *Auto Pact* clearly helped to increase production and employment. Since the 1960s, aside from recession periods, Canadian car assembly plants have boomed, and thus so too has employment in that sector. Many American producers set up new production and assembly factories in southern Ontario. By 1999, the

auto and auto parts industry accounted for 12% of Canadian manufacturing. For every car that Canadians bought, they assembled 1.8 cars, mostly for the North American market. Since the early 1980s, Canada has enjoyed large surpluses in its trade in autos and auto parts with America.

- **Issue and Winning EU-Japanese Argument**

The key legal issue in the *Canada Auto Pact* case is about MFN treatment. In January 1998, the EU and Japan challenged the *Auto Pact* in the WTO, and in February 2000, a WTO Panel issued its final report, finding in favor of the complainants. Canada appealed, hence the issue for the Appellate Body: did Canada run afoul of the MFN obligation by giving duty-free treatment to motor vehicles imported from certain WTO Members, but not extending this advantage immediately and unconditionally to like products from all other Members? The Panel said "yes," and so did the Appellate Body.[439]

The facts of the case called for a rather straightforward application of Article I:1.[440] The EU and Japan could and did argue successfully the 1965 *Auto Pact* ran afoul of this obligation: it discriminated in favor of American car companies, and against all other car companies. Only the American companies could import cars and components duty free. In contrast, Canadian customs authorities imposed a duty on these imports by a Japanese or European car company. Thus, Ford and GM need not pay any duty on their imports, whereas Honda Canada, Inc. and Toyota Canada, Inc. had to pay a duty on their imports. (Recall the Canadian bound MFN duty rate on cars, set forth in its Uruguay Round Schedule of Concessions, was 6.1%.) In sum, qualified firms were allowed to import into Canada finished vehicles duty free, as long as they respected the three tests – production in Canada, the production-to-sales ratio, and the CVA.

To be sure, the discrimination might not be as broad in practice, given the consolidation in the world auto market. (In 1997, 16% of total EU vehicle exports benefited from duty-free treatment under the *Auto Pact*.) Ford owns Jaguar and Volvo, GM owns

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439 The Appellate Body reversed the Panel finding that Canada violated the MFN obligation applicable to trade in services contained in Article II:1 of the WTO *General Agreement on Trade in Services* (*GATS*). *See Canada Auto Pact* Appellate Body Report, ¶¶ 147-184, 185(e). The case was only the second instance in which the Appellate Body adjudicated a *GATS* issue. The first instance was the 1997 *Bananas* case. *See* Appellate Body Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R (adopted 25 September 1997); Raj Bhala, *The Bananas War*, 31 MCGEORGE LAW REVIEW 831-971 (Summer 2001).

In brief, in its *Canada Auto Pact* Report, the Appellate Body found the Panel failed to substantiate its conclusion that the exemption from import duties granted to a limited number of manufacturers under the *Auto Pact* was inconsistent with *GATS* Article II:1. The Appellate Body said the Panel had done a "goods analysis" of the exemption, and thus did not distinguish between (1) application of the exemption to vehicle manufacturers and (2) the effect of the exemption on suppliers of wholesale trade services for vehicles. That is, the Panel simply extrapolated the effects of the import duty exemption to the conditions of competition among wholesalers in their capacity as service suppliers. In this surmise, the Panel failed to show how the exemption affected trade in services, in particular, wholesale trade services and suppliers of wholesale trade services of motor vehicles. Absent a discussion of the facts about the wholesale trade services market, the Appellate Body said it was incorrect to declare a violation of the *GATS* MFN obligation.

440 *See Canada Auto Pact* Appellate Body Report, ¶¶ 64-86.

half of Saab, and Chrysler and Daimler-Benz merged. As a result, cars made by Jaguar, Volvo, Saab, and Daimler-Benz all enter Canada duty free. Put differently, Japanese, and some European, manufacturers are the pointed targets of the discrimination. Still, it is "black letter" GATT-WTO Law (manifest, for example, in the panel's report) that both *de facto* and *de jure* discrimination are unlawful. In this regard, both intra- and inter-firm trade in the auto industry are relevant.

- **Losing Canadian Defense**

What was the Canadian defense to the MFN claim? It distinguished between companies, on the one hand, and products that companies import, on the other hand. Canada urged Article I:1 does not prohibit a limit on importation that applies to companies, as distinct from products imported by the companies, as long as this limitation is origin-neutral. What did Canada mean by "origin-neutral"? It meant the limit does not discriminate with respect to the origin of the products that may be imported by the companies. Canada trumpeted the fact that, on its face, the *Auto Pact* does not impose any formal restriction on the origin of an imported motor vehicle or vehicle part.

In brief, Canada argued it could restrict companies *per se*, as long as it did not discriminate against the products imported by those companies on the basis of the national origin of those companies. So, it could put conditions on the entry and behavior of companies, as long as it did not tell those companies how to source the raw materials and intermediate goods they use in the production process. Canada thought its argument to be eminently sensible. If measures were imposed on products imported by companies, then the government imposing the measure would be making a decision for the company about sourcing of inputs.

Immediately the argument was suspicious. First, the term "origin-neutral" connotes *de facto* discrimination is tolerable, presumably on the ground Article I:1 does not distinguish between *de facto* and *de jure* discrimination. Second, the line seems rather thin between a company and the products it imports for use in production. Was Canada saying it is free to shut out Japanese and European car manufacturers, and is restrained only in that it cannot tell the manufacturers to which it gave entry where to import from? Third, surely discrimination against companies *per se* could be problematical.

- **Appellate Body Holding**

The Appellate Body was not deceived. How can the MFN obligation mean anything in practice if the distinction between companies and what they import is maintained? Agreeing with the Panel reasoning, the Appellate Body said Article I:1 applies to *de facto* discrimination. The terms of the *Auto Pact* did not create *de jure* discrimination against imports of autos and auto parts. But, that is not the only way to run afoul of the law. So long as there was *de facto* discrimination, that is enough for a finding of a violation.

In the North American auto market, the *de facto* discrimination was linked to the large amount of intra-firm trade that occurs. Most of the trade in this market between

America and Canada was within a firm, such as an export from GM in Michigan to GM in Ontario. That is, most of the auto firms in Canada import only their own make of motor vehicle and parts, or those from related companies. Thus, Chrysler imports from Chrysler, Ford from Ford, and GM from GM – and they get the benefit of duty-free treatment on these imports.

In contrast, Honda, Toyota, Nissan, Subaru, Mazda, BMW, Volkswagen, and Hyundai, all of which operated in Canada, and all of which import motor vehicles from only related companies, did not get the benefit of the import duty exemption. The fact the import duty exemption under the *Auto Pact* was limited to a small number of firms from certain third countries (namely, the U.S.) meant that, in practice, there was discrimination as to the origin of the products.

Put in the language of the Canadian defense, the distinction between companies and the products they import was a theoretical one. In practice, the restriction of duty-free treatment to car manufacturers from certain countries – a result of the three-pronged test for eligibility – led inexorably to discrimination in favor of autos and auto parts from certain countries. Herein was the *de facto* discrimination in breach of Article I:1. In practice, a motor vehicle (or vehicle component) imported into Canada got the "advantage" of duty-free treatment only if the vehicle came from one of the small number of countries in which the exporter of the vehicle is affiliated with the manufacturer/importer in Canada, and that manufacturer/importer qualified for duty-free treatment based on the three-part test of the *Auto Pact*.

Or, to state the violation in terms of the language of Article I:1, pursuant to the 1965 *Auto Pact*, Canada granted an "advantage" in the form of duty-free treatment. This advantage accrued to some products (autos and auto parts) from some WTO Members (principally the U.S.). Canada did not accord this advantage immediately and unconditionally to the like products that originate in all other Members. Quite the contrary, Canada imposed a three-part test that effectively prevented the extension of the advantage to all other Members, and after the *CUSFTA* took effect, Canada cut off the possibility of extension.

In support of this conclusion, the Appellate Body cited to the same statistical evidence that had impressed the Panel. That evidence showed the total number and proportions of motor vehicles imported into Canada from various countries. It was quite clear the import duty exemption was not accorded – in actual practice – on equal terms to like products of different origin. This evidence was unsurprising, because the whole point of the *Auto Pact* was to provide import duty exemptions to encourage American-owned manufacturers to expand their production operations in Canada.

That is, from the outset, the game was all about benefiting imports from particular sources (America) in exchange for boosting production and, therefore, employment, in the Canadian auto sector. How better to entice the American corporate chieftains to invest in Canada than offer them duty free treatment for the autos and auto parts they will import into Canada? Put less diplomatically, the Appellate Body was telling Canada its argument

was a *post hoc* euphemism: the Canadians were tying to say the *Auto Pact* was something different from what it really was.

Following the Appellate Body ruling, Canada appeared to have two options to remedy the MFN violation. Canada could apply a flat tariff on all imports regardless of source. Alternatively, Canada could abolish its existing tariff scheme, and extend duty-free status to all imports. How did it opt to comply?

- **Modest Discipline on FTAs**

Arguably, the *Canada Auto Pact* holding provides discipline on RTAs. The facts of the case are technical, but at bottom, the case is simple. Sports fans would call the *Auto Pact* a "fixed game," fixed for the benefit of the American and Canadian players. The fact that under *CUFTA*, Canada closed the list of manufacturers eligible for import duty exemption made the game all the more fixed, because no new players were admitted after 1989. The metaphor of a fixed game might well be applied to many FTAs. Are they not fixed games, in one way or the other, designed to benefit the admitted players?

The GATT-WTO system has been criticized for being limp-wristed in its approach to FTAs and CUs. The terms of GATT Article XXIV:5 hardly are worth the appellation "discipline." Accordingly, critics ought to cheer the Appellate Body decision in *Canada Auto Pact*. Absent an MFN waiver, a party to an RTA is now on notice that the Appellate Body will enforce this fundamental obligation with zeal. Interestingly, Canada mounted a defense against the MFN claim of Japan and the EU that was predicated on Article XXIV. The Panel rejected this effort to justify the inconsistency of the *Auto Pact* with Article I:1, and Canada did not appeal that finding.

- **Another *Vienna Convention* Decision**

A second critical point is the *Canada Auto Pact* decision is yet another *Vienna Convention* decision in the annals of Appellate Body jurisprudence. While the Appellate Body's ruling may please critics looking for restraints on the behavior of FTAs, it is a disappointment to critics in search of a stirring defense of the MFN obligation.[441] Here was an opportunity for the Appellate Body to hammer home the importance of the obligation to freer trade and global prosperity. Here was an opportunity for the Appellate Body to put fear in the heart of any trade policymaker in any WTO Member who thinks for even a moment of riding roughshod over the MFN obligation. After all, Article I:1 embodies a grand, time-honored principle at the core of multilateral trade liberalization. Without it, the world is the antediluvian one of bilateral trade agreements and regional trade fortresses.

Thus, critics might have expected the Appellate Body to write prose worthy of the principle it was applying to the case at bar. In a great First Amendment case, lawyers have a right to expect great turns of phrase ("clear and present danger" comes to mind). So, too, should it be with an MFN case.

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[441] Dr. Hafez is one who questions RTAs while examining this case. *See* Zakir Hafez, *Weak Discipline: GATT Article XXIV and the Emerging Jurisprudence on RTAs*, 79 NORTH DAKOTA LAW REVIEW 879 (2003).

Instead of a majestically worded report, what the international trade law community got was flat language, plenty of redundancies, and a competent dissection of the language of Article I:1. The Appellate Body stuck to its all-too-common approach of focusing on the language of the GATT provision of the hand, and showing no inclination (courage?) to move beyond linguistic analysis into the realm of policies and consequences. This *Vienna Convention* approach – referring to the 1969 *Vienna Convention on the Law of Treaties* – is a device by which the Appellate Body assures another group of critics, who fear the WTO and its "activist judiciary" is encroaching on national sovereignty, that all it does is technical treaty interpretation.

So, in the *Canada Auto Pact* case, the reader learns about the difference between "some" and "all," about the meaning of "immediately and unconditionally." Only in one short paragraph does the Appellate Body bother to refer to the object and purpose of the MFN principle – the prohibition of discrimination, and the incentive for negotiating concessions.[442] That was hardly the stuff worthy of the most important of GATT pillars.

IV. 2014 *Fur Seals* Case, "Immediate," and "Unconditional"

● Facts

The *Fur Seals* case triggered powerful emotions on all sides. Animal rights groups lambasted Canada for "promot[ing] the indefensible seal slaughter through misinformation," and pointed to "a half-century of veterinary evidence show[ing] the commercial seal hunt results in considerable and unacceptable suffering."[443] Inuit seal hunters countered that the "assertion that what we have been doing for thousands of years is so morally wrong as to justify a trade prohibition is very troubling," and that restriction was "blatant hypocrisy," because it allowed seal products, regardless of how the seals from which they were derived were killed, into Europe from Greenland.[444]

Celebrities such as Britain's Rhys Ifans and Jude Law and Canadian Baywatch star Pamela Anderson sided with the seals. The Americans did not have to: they banned imported seal products in 1972 via the *Marine Mammal Protection Act* – ironically, the same statute that got them in trouble in the famous *Tuna Dolphin* cases. They did anyway, grabbing the mantle of moral relativism. In the third-party submission to the *Fur Seals Panel*, the U.S.:

> criticized what it said was Canada's claim that the EU is required to accord equal concern to all animal species in order to have a valid public morals defense under [GATT] Article XX(a).

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442 *See Canada Auto Pact* Appellate Body Report, ¶ 84.

443 Daniel Pruzin, *WTO Appeal in EU Seal – Product Ban Case Stirs Trade Rules "Morality" Exception Debate*, 31 International Trade Reporter (BNA) 577 (27 March 2014) (*quoting* Rebecca Aldworth, Executive Director, Humane Society International (HIS) Canada). [Hereinafter, *WTO Appeal*.]

See WTO Appellate Body Report, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R and WT/DS401/AB/R (adopted 18 June 2014).

444 *WTO Appeal* (*quoting* Aglukkaq, native of Nunavut Territory, Canada).

> It "is not Canada's (or the WTO's) prerogative to decide for the EU, or for any other Member, which public morals objectives are the most important to that Member or its citizens. … Article XX(a) does not require some prescribed degree of consistency between public morals concerns in different situations."[445]

That was fair enough, as a matter of textual interpretation, but was it wise as a matter of legal policy? Was there an irony in the Americans grabbing the mantle of moral relativism? After winning the 2010 *China Audio Visual Products* case, would the U.S. want to see the likes of China or Russia take that same mantle?

Of course, industry had its say: with the explosion in the Canadian harp seal population from 2 million to 7 million on the East Coast, fish stocks were nearly extinct. So, seal hunters "should be championed," when in fact they had "only been condemned and vilified," even though they employed people, ensured seals were not simply shot and wasted, and stayed well within the Canadian government annual hunt limit: 100,000 of the 400,000 cap.[446] At these points, animal rights activists scoffed: "The idea that we need to – or, indeed, that we even can – manage the 'balance of nature has been refuted by ecologists for decades."[447] They would have done well to point out another irony: Canada and Norway, while generally known for being calm, environmentally friendly countries, were making GATT-WTO arguments to justify killing of cute seals.

Here, then, was another case illustrating an age-old point: for all the inter-disciplinary ballyhoo about economics, trade always has been about morality, too. These moral outrages were triggered in 2009, when – arguably – the EU tried to "do the right thing." The EU opted to ban the sale and importation of products from seals. As producer-exporters of such merchandise, neither Canada nor Norway was happy. Immediately, the irony of the case became apparent: two nations stereotypically viewed as well disposed to nature triggered one of the handful of animal rights cases in GATT-WTO jurisprudence. Ultimately, their claims against the EU ban ultimately would lead to a rare decision under the GATT Article XX(a) public morality exception – and the first recognition that animal rights qualify as a moral concern.

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445 *WTO Appeal* (*quoting* 17 March 2014 U.S. submission to Panel).

Perhaps not surprisingly, some legal academics endorse moral relativism in international trade law. *See, e.g., id*. (concerning the 29 January 2014 posting on the website of the American Society of International Law (ASIL) by Professor Robert Howse, noting the "widely differing political and social systems (from Saudi Arabia to the United States, Israel and Sweden [*sic*]), and counseling against "second-guessing" as to public morality content the "substantive choices of states" with "radically divergent" views). Query whether protections affecting women or other traditionally disadvantaged groups ought to be viewed through the lens of relativism.

446 *WTO Appeal* 577 (*quoting* Dion Dakins, Chairman, Seals and Sealing Network (Canadian industry group)).

447 *WTO Appeal* 577 (*quoting* Sheryl Fink, Director, Canadian Wildlife Campaigns, International Fund for Animal Welfare (IFAW)).

The EU is not alone among WTO Members in its concern for animal rights. Israel bans the sale and marketing of cosmetics tested on animals. In October 2014, India joined them: urged on by the People for the Ethical Treatment of Animals (PETA), the *Lok Sabha* passed the *Drugs and Cosmetics (Fifth Amendment) Rules of 2014*, which states: "No cosmetic that has been tested on animals … shall be imported into the country."[448] This ban complemented legislation earlier in 2014 forbidding animal testing for cosmetics, ending the use of animals in pharmacy courses, and striking a requirement that soaps and other surface-active agents be tested on animals to get approval for sale. India said computer-assisted modeling could substitute for animal testing.

China stands in stark contrast to the EU, Israel, and India. China explicitly requires cosmetics be tested on animals. Might that have to do with a cozy relationship between MNCs and the CCP? Consider the fact the Indian ban adversely affected MNCs with factories in India, such as America's Johnson & Johnson, England's Unilever, and France's L'Oréal S.A. Until the ban, they used India to manufacture animal-tested cosmetics, which they then exported to countries such as China. The European companies also sold those cosmetics in India – once the EU barred them from doing so in Europe.

In any event, the EU concern about animal rights has its own vulnerabilities: little in the way of its law is efficient, clear, or thoroughly defined. The rules at stake in the *Fur Seals* case were no exception. Rather than one simple, comprehensive measure, the EU used two legal instruments, with missing definitions and no resolute policy statement:

(1) Basic Regulation

On 16 September 2009, the European Parliament and Council passed Regulation (EC) Number 1007/2009 on trade in seal products. "Seal products" meant:

> all products, either processed or unprocessed, deriving or obtained from seals, including meat, oil, blubber, organs, raw fur skins and fur skins, tanned or dressed, including fur skins assembled in plates, crosses and similar forms, and articles made from fur skins.[449]

The Basic Regulation bans "the placing on the market" of seal products in all instances except one: where those products "result from hunts traditionally conducted by the Inuit and other indigenous communities and contribute to their subsistence."[450] So, there are three key criteria to qualify for the exception: (1) the hunters must be "Inuit" or "other indigenous communities;" (2) those hunters must traditionally engage in such hunting; and (3) the hunting must "contribute to their subsistence."

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448 *Quoted in* Madhur Singh, *India Bars Imports of Cosmetics Tested on Animals, Expanding Bans*, 31 International Trade Reporter (BNA) 1855 (16 October 2014).

449 Basic Regulation, Article 1, *quoted in Fur Seals* Appellate Body Report, ¶ 4.4.

450 Basic Regulation, Article 3(1), *quoted in Fur Seals* Appellate Body Report, ¶¶ 4.5, 4.6.

The Basic Regulation defines "Inuit" as:

> indigenous members of the Inuit homeland, namely those arctic and subarctic areas where, presently or traditionally, Inuit have aboriginal rights and interests, recognized by Inuit as being members of their people and includes Inupiat, Yupik (Alaska), Inuit, Inuvialuit (Canada), Kalaallit (Greenland) and Yupik (Russia).[451]

This Regulation does not define "other indigenous communities," but the Implementing Regulation (discussed below) does so. Collectively, the shorthand expression "ICs" refers to "Inuit" and "other indigenous communities." So, the above exception is called the "IC Exception." However, the Regulation fails to define "traditionally," "contribution" or "subsistence."

This ban applies at the time and point of importation of imported seal products. Does that mean the Basic Regulation bans imports of seal products, too? The answer is "yes," in all instances except two: personal use by travellers, or in support of Marine Resource Management. Each exception to the import ban has multiple criteria.

First, imports are allowed into the EU if the act of importation of seal products (1) is "occasional," and (2) they are for the "personal use of travellers or their families."[452]

The second exception technically is not to the import ban, but to the prohibition against placing seal products on the EU market. Presumably, it allows for such placement whether via domestic EU production or importation. Under this exception, seal products may be placed on the market if (1) they are a "by-product of hunting," (2) such hunting is "regulated by national law," (3) the purpose of that hunting is solely for the "sustainable management of marine resources," and (4) any sales are on a "non-profit basis."[453]

Both exceptions are subject to the same non-commercial limit: it must be clear from the "nature and quantity" of the seal products at issue that they are not being imported or placed on the market for "commercial" reasons.[454] Neither the Basic nor Implementing Regulation (discussed below) defines "commercial" or "commercial reasons."

Technically, the Seals Regime contains a third exception. It is an implicit one, for three types of transactions: transit through the EU of seal products, inward processing of those products, or their importation for auction and subsequent re-

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451 Basic Regulation, Article 3(1), *quoted in Fur Seals* Appellate Body Report, footnote 817 at ¶ 4.6.
452 Basic Regulation, Article 3(2)(a), *quoted in Fur Seals* Appellate Body Report, ¶ 4.5, 4.7.
453 Basic Regulation, Article 3(2)(a), *quoted in Fur Seals* Appellate Body Report, ¶ 4.5, 4.7.
454 *Fur Seals* Appellate Body Report, ¶ 4.7.

export. In sum, there are four exceptions in the Regime: IC, Travellers, MRM, or Implicit Transactions.

(2) Implementing Regulation

Almost a year later, on 10 August 2010, the European Commission promulgated Commission Regulation (EU) Number 737/2010. Its details amplify the Basic Regulation.

First, filling in for an omission from the Basic Regulation, the Implementing Regulation defined "other indigenous communities" as ones:

> in independent countries who are regarded as indigenous on account of their descent from the populations which inhabited the country, or a geographical region to which the country belongs, at the time of conquest or colonization or the establishment of present State boundaries and who, irrespective of their legal status, retain some or all of their own social, economic, cultural and political institutions.[455]

Second, the Implementing Regulation spells out the criteria for each exception, itemizing three criteria each for the IC, Travellers, and MRM Exception.

Three conditions allow for invocation of the IC Exception:[456]

(1) The IC conducted the seal hunt, and they have a "tradition of seal hunting in the community and in the geographical region.

(2) The ICs "at least partly use[], consume[], or process[]" the seal hunt products "within the communities according to their traditions.

(3) The seal hunt "contributes to the subsistence of the community."

All three conditions must be satisfied. For the Travellers Exception, there are three different criteria:[457]

(1) A traveller wears the seal product or carrier it in her personal luggage.

(2) The seal product belongs to a person changing residence, namely, moving from a third country to the EU.

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455 Basic Regulation, Article 3:1, *quoted in Fur Seals* Appellate Body Report, footnote 818 at ¶ 4.6.

456 Implementing Regulation, Article 3 (clarifying Basic Regulation Article 3(1)), *quoted in Fur Seals* Appellate Body Report, ¶ 4.9.

457 Implementing Regulation, Article 4 (clarifying Basic Regulation Article 3(2)(a)), *quoted in Fur Seals* Appellate Body Report, ¶ 4.10.

(3) A traveller buys the seal product in a third country and imports it into the EU later.

If any single criterion is met, then the Travellers Exception is available. For the MRM Exception, there are three, yet different, conditions:[458]

(1) The seal hunt was part of "a national or regional natural resources management plan that uses scientific population models of marine resources and applies the ecosystem-based approach."

(2) The number of seals killed did not exceed the Total Allowable Catch quota under the applicable MRM plan.

(3) Any by-product of the seal hunt can be put on the market only in a non-systematic, non-profit basis.

The MRM Exception applies only if each of these three conditions is satisfied.

Also with respect to the MRM Exception, "placing on the market on a non-profit basis" means selling them "for a price less than or equal to the recovery of the costs borne by the hunter, reduced by the amount of any subsidies received in relation to the hunt."[459] So, for example, if the seal product is sold for U.S. $100, but it cost the hunter $130 to capture and manufacture, then the sale would be non-profit. Using the same figures, if the hunter received a subsidy of $40, thus dropping net costs to $90, then the sale would be at a profit.

Logically following from the first and fourth exception, the terms "IC Hunt" and "MRM Hunt" signify the killing of seals in a manner conforming to the Basic and Implementing Regulation. Conversely, the term "Commercial Hunt" encompasses ones that do not. Norway argued this terminology conveyed a "moral judgment," but both the Panel and Appellate Body assured Norway they used the terms in a value free manner.

Together, the Basic and Implementing Regulations constitute the "measure," or "EU Seal Regime," in dispute in the *Fur Seals* case. In sum, the Regime bars the sale or importation of seal products, unless ICs traditionally hunt them for subsistence, travellers bring them into the EU for personal use, or unless hunters obtain them under hunting regulated for sustainable MRM and do not sell them at a profit.

Ironically, despite a *Preamble* (in the Basic Regulation) with 21 recitals, the EU Seal Regime does not identify its objective. But, by inference from those recitals, and from the aforementioned rules, there are two goals:

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458 Implementing Regulation, Article 5 (clarifying Basic Regulation Article 3(2)(b)), *quoted in Fur Seals* Appellate Body Report, ¶ 4.11.

459 Implementing Regulation, Article 2(2), *quoted in Fur Seals* Appellate Body Report, footnote 823 at ¶ 4.7.

(1) The European public cares about the welfare of seals, so some trade protection is needed to respond to this concern and promote the well-being of seals.

(2) The economic and social interests of IC must be preserved, because they rely for their livelihood on seal hunting.

In other words, the first goal is to protect animal rights, while the second is to protect indigenous peoples. The two goals need balancing via a set of rules that generally bans the placing on the market of seal products, but excepts those communities.

Conceptually, the easiest way to achieve those goals is to ban importation of seal products from "commercial" hunts, but permit sales from "non-commercial hunts." The EU opted for a more byzantine approach, eschewing the common-sense distinction between "commercial" and "non-commercial" (which, in practice, can be difficult enough to apply), and creating the IC, Travellers, and MRM Exceptions.

- **MFN Issue**

Did the Seal Regime violate the MFN rule? The Panel said yes, because the EU failed to extend the same advantage "immediately and unconditionally" to seal products from Canada and Norway (which are non-EU countries) that it gave to seal products originating in Greenland. The Appellate Body agreed. Whether of Greenlandic, Canadian, or Norwegian origin, the seal products were "like."[460] *The IC Exception was an "advantage," but the EU did not offer it to the non-EU originating like products.*

- **What is Greenland?**

In the excitement to get to the heart of a case, it is important not to rush past essential checks. They are akin to airport security screening before boarding. Similarly, in the move toward applying the MFN rule, whether that is the right rule to apply must be asked. Unfortunately, neither the Panel nor Appellate Body did so.

They should have asked two "security screening" questions: is Greenland part of the EU, and is Greenland a WTO Member? First, for GATT Article I:1 to be the right rule to apply to the facts, it must be true Greenland is not an EU state. Otherwise, the pertinent non-discriminatory obligation is national treatment under Article III:4. Second, for Article I:1 to be the appropriate rule, it also must be true either that Greenland is a WTO Member, or that it is an "other country" within the language of Article I:1.

In fact, on the first question, Greenland is part of the "Danish Kingdom," or "Danish Realm." Denmark is an EU state, but Greenland is not – or, at least, it might not be. In 1985, Greenland voted to withdraw from the European Economic Community, which was the predecessor to the EU. So, if priority is given to that withdrawal vote, on the

460 *Fur Seals* Appellate Body Report, ¶ 6.1(b)(ii).

presumption Greenland is distinct from the Danish Realm as to EU status, then it could be said Greenland is not an EU state. In turn, the Article III:4 national treatment rule is irrelevant.

On the second question, Denmark is a WTO Member, and an originating contracting party to GATT. But, Greenland is not a WTO Member, unless it is deemed so for being part of the Danish Realm. That is, Greenland can be viewed as a WTO Member because of its status as part of Denmark. The problem with that approach is it is inconsistent with saying Greenland is not part of the EU: if it is part of the Danish Realm for purposes of WTO Membership, then why not, also, for purposes of EU membership? The answer might turn in part on the significance given to the 1985 EEC withdrawal vote. Fortunately, the MFN rule still is relevant to the case, even if Greenland is not viewed as a WTO Member. That is because of the Article I:1 language concerning "any other country." The key issue in the case concerns discrimination against Canada and Norway (two WTO Members) on account of a favor or privilege, the IC Exception, which in a *de facto* sense Greenland received, but they did not. The MFN rule bars discrimination in favor of "any other country," to assure the Members of the WTO Club get the best of treatment, including treatment extended to non-Club countries.

So, what did the Appellate Body do in *Fur Seals*? The answer is it, like the Panel, failed to spot the issue. Without explanation, both adjudicatory entities treated Greenland as a non-EU state, yet confusingly peppered their discussion with references to Article III:4 alongside Article I:1, thereby intimating both national and MFN treatment were at stake. Moreover, both left the status of Greenland as WTO Member thanks to Denmark, or as a non-WTO Member "other country," ambiguous. That ambiguity was ironic, given that the Appellate Body said the faulted the EU for ambiguities in the IC Exception – ambiguities that ultimately doomed the Seal Regime under the Article XX *chapeau*.

- **Immediacy and Unconditionality**

The EU did not appeal the finding of the Panel that the Seal Regime violated the national treatment rule for non-fiscal measures set out in GATT Article III:4. Plainly, the Regime did treat domestic seal products (*e.g.*, from Finland and Sweden) more favorably than like ones from abroad (*e.g.*, from Canada and Norway). But, the EU appealed the Panel ruling that the Seal Regime violated the GATT Article I:1 MFN rule.

At issue was whether:

> Article I:1 prohibits: (i) a detrimental impact on competitive opportunities for like imported products; or (ii) only a detrimental impact on competitive opportunities for like imported products that does not *stem exclusively* from a *legitimate regulatory distinction*.[461]

The EU argued for the second option. That argument was doomed from the outset, as the EU was calling for an unprecedented restriction on the scope of the MFN rule. Had the

[461] *Fur Seals* Appellate Body Report, ¶ 5.84. (Emphasis added.)

Appellate Body accepted the EU argument, then it would have been rightly criticized for undermining free and fair trade by weakening the non-discriminatory framework essential for both. Equally bad, the Appellate Body would have been faulted for judicial activism in straying beyond the relevant textual language, plus a half-century of case law about that text.

The Appellate Body did just the opposite. Beginning with a brief, handy tutorial of the MFN obligation, and citing five of its precedents (1996 *Japan Alcoholic Beverages*, 1999 *Korea Alcoholic Beverages*, 2000 *Canada Auto Pact*, 2002 *Section 211*, and 2004 *EC Tariff Preferences*),[462] it resolutely affirmed the long-standing meaning and importance of the rule:

> 5.86 Article I:1 sets out a fundamental non-discrimination obligation under the GATT 1994. The obligation set out in Article I:1 has been described by the Appellate Body as "pervasive," a "cornerstone of the GATT," and "one of the pillars of the WTO trading system." Based on the text of Article I:1, the following elements must be demonstrated to establish an inconsistency with that provision: (i) that the measure at issue falls within the scope of application of Article I:1; (ii) that the imported products at issue are "like" products within the meaning of Article I:1; (iii) that the measure at issue confers an "advantage, favor, privilege, or immunity" on a product originating in the territory of any country; and (iv) that the advantage so accorded is not extended "immediately" and "unconditionally" to "like" products originating in the territory of all Members. Thus, *if a Member grants any advantage to any product originating in the territory of any other country, such advantage must be accorded "immediately and unconditionally" to like products originating from all other Members*.
>
> 5.87 Article I:1 thus prohibits discrimination among like imported products originating in, or destined for, different countries. In so doing, Article I:1 *protects expectations of equal competitive opportunities for like imported products from all Members*. … [I]t is for this reason that an inconsistency with Article I:1 is *not contingent upon the actual trade effects of a measure*. We consider that an interpretation of the legal standard of the obligation under Article I:1 must take into account the fundamental purpose of

[462] *See* the Appellate Body Reports in: *Japan – Taxes on Alcoholic Beverages*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R, 16 (adopted 1 January 1996); *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R, ¶¶ 119-120, 127 (adopted 17 February 1999); *Canada – Certain Measures Affecting the Automotive Industry*, WT/DS139/AB/R, WT/DS142/AB/R, ¶¶ 69, 84 (adopted 19 June 2000); *United States – Section 211 Omnibus Appropriations Act of 1998*, WT/DS176/AB/R, ¶ 297 (adopted 1 February 2002); and *European Communities – Conditions for the Granting of Tariff Preferences to Developing Countries*, WT/DS246/AB/R, ¶ 101(adopted 20 April 2004).

> Article I:1, namely, to *preserve the equality of competitive opportunities for like imported products from all Members*.[463]

What, then, was the MFN problem in the European Seals Regime?

The Panel found the EU did not "immediately and unconditionally" extend to like seal products of Canadian and Norwegian origin the same market access advantage it gave to seal products from Greenland. Discriminating in favor of Greenlandic products meant favoring one country, Denmark, over two others, Canada and Norway, in breach of Article I:1. The Appellate Body agreed, and upheld the Panel:

> the Panel concluded that the measure at issue, although origin-neutral on its face, is *de facto* inconsistent with Article I:1. The Panel found that, *while virtually all Greenlandic seal products are likely to qualify under the IC exception for access to the EU market, the vast majority of seal products from Canada and Norway do not meet the IC requirements for access to the EU market*. Thus, the Panel found that, "in terms of its design, structure, and expected operation," the measure at issue *detrimentally affects the conditions of competition for Canadian and Norwegian seal products as compared to seal products originating in Greenland*. Based on these findings, the Panel considered, correctly in our view, that the measure at issue is inconsistent with Article I:1 because it does not, "immediately and unconditionally," extend the same market access advantage to Canadian and Norwegian seal products that it accords to seal products originating from Greenland.[464]

Note the power of the MFN rule: it applies to *de facto* as well as *de jure* discrimination. The EU concocted its Seal Regime in a facially neutral manner, but the consistent and nearly exclusive beneficiaries of the "advantage" of the IC Exception were from Greenland.

- **Losing Argument on Non-Discrimination Obligations under GATT versus *TBT Agreement***

The losing appellate argument of the EU was interesting, but parlous at best. The EU argued the Panel misinterpreted both Article I:1 and III:4. The Panel was wrong to conclude that the legal standard for the non-discrimination obligations in Article 2:1 of the *TBT Agreement* does not "equally apply" to GATT Article I:1 and III:4 claims. The topic of how the non-discrimination obligations in the *TBT Agreement* and GATT relate to one another (if at all) arose because Canada and Norway made claims of non-discrimination

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463 *Fur Seals* Appellate Body Report, ¶¶ 5.86-5.87. (Emphasis added.)

464 *Fur Seals* Appellate Body Report, ¶ 5.95. *See also id*., ¶ 5.130.

under both accords. The Panel cited the 2012 *Tuna Dolphin II* and *U.S. Clove Cigarettes* Appellate Body Reports in support of the following legal points:[465]

(1) The test for "treatment no less favorable" under GATT Articles I:1 and II:4 is whether a measure "modif[ies] the conditions of competition in the marketplace" in favor of domestic like products to the detriment of imports.

(2) Under GATT Article XX, each Member has a right to derogate from these GATT non-discrimination obligations.

(3) The meaning of "treatment no less favorable" in Article 2:1 of the *TBT Agreement* is different from that in GATT in one respect: the *TBT Agreement* allows for a detrimental impact on imports that "stems exclusively from a legitimate regulatory distinction," as opposed to discrimination. After all, this *Agreement* contains the rules for legitimate technical regulations, and products from certain countries might not meet such regulations. Moreover, the *Agreement* does not have a general list of exceptions like GATT Article XX, which at least implicitly suggests it allows for disparate treatment of goods caused by application of a lawful technical regulation.

To these points, the Appellate Body added 4 further ones:

(4) The text of GATT Article III:4 expressly uses the "treatment no less favorable" test. The wording of Article I:1 is different. It expresses an obligation to extend any "advantage" a Member grants to any product originating in or destined to any other country "immediately and unconditionally" to the like product originating in or destined for all other Members.

(5) Notwithstanding the textual distinction, both GATT Articles are fundamental non-discrimination obligations. The national treatment rule of Article III:4 "proscribes … discriminatory treatment of *imported* products vis-à-vis like *domestic* products."[466] The MFN rule of Article I:1 "proscribes … discriminatory treatment *between and among* like products of different origins."[467] The obligations aim to forbid "discriminatory measures by requiring … *equality of competitive opportunities* for like imported products from all Members [the MFN rule] and equality of competitive opportunities for imported products and like domestic products

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465 *See Fur Seals* Appellate Body Report, ¶ 5.76-5.77; *Tuna Dolphin II* Appellate Body Report, ¶¶ 215; Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R, ¶¶ 180-182, 215 (adopted 24 April 2012).

466 *Fur Seals* Appellate Body Report, ¶ 5.79. (Emphasis original.)

467 *Fur Seals* Appellate Body Report, ¶ 5.79. (Emphasis original.)

[the national treatment rule]."[468] Given their goal, neither "require[s] a demonstration of the *actual* trade effects of a specific measure."[469]

(6) That the two GATT non-discrimination obligations "overlap in … scope" is clear from the MFN rule. It incorporates all matters refereed to in paragraphs 2 and 4 of Article III. So, an internal matter within the scope of Article III:4 also may be in the purview of the MFN obligation.

(7) The MFN proscription against granting an "advantage" to imports from certain origins has 2 explicit conditions: time and manner.[470] As to time, a Member must extent any "advantage" "immediately" to all other like products. As to manner, the Member must extend any "advantage" "unconditionally," *i.e.*, "without conditions." The discipline does not forbid a Member from attaching conditions to the "advantage." It simply means the Member must attach the same conditions to all like products, regardless of origin and thus now skew the marketplace, *i.e.*, the conditions must not have a "detrimental impact on the competitive opportunities for any Member."

Despite these points, the EU insisted on appeal the non-discrimination obligations in the *TBT Agreement* apply equally to claims under GATT. The logic of the EU position was that if its Seal Regime was a legitimate technical regulation, then under the *Agreement*, that Regime could have a detrimental impact on foreign seal products. In turn, if the same allowance under the *Agreement* for detrimental impact applied to GATT, then the Seal Regime was excused from such an impact under GATT, too.

If there was going to be any force in an argument about disparate impact, then it might have been in a different context: GATT Article XI:1. Suppose Canada and Norway had sued the EU claiming its Seal Regime was a forbidden quantitative restriction. The EU might have defended its measure under Article XI:2(b) as an "[i]mport … prohibition[] or restriction[] necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade." Canada and Norway did not make that claim, probably anticipating the defense.

So, on appeal, the EU was left arguing that a proper Article I:1 analysis of detrimental impact on competitive opportunities requires an investigation into the "rationale for such impact … specifically, whether it stems exclusively form a legitimate regulatory distinction." In other words, the EU tried to shoe-horn into the MFN rule the standard in Article 2:1 of the *TBT Agreement*. The EU had no jurisprudence under Article I:1 to support its arguments. Hence, the Appellate quickly and easily rejected the attempt, repeating that "where a measure modifies the conditions to competition between like imported products to the detriment of the third-country imported products at issue, it is

468 *Fur Seals* Appellate Body Report, ¶ 5.82 (Emphasis added.)
469 *Fur Seals* Appellate Body Report, ¶ 5.82 (Emphasis original.)
470 *Fur Seals* Appellate Body Report, ¶ 5.88 (Emphasis original.)

inconsistent with Article I:1."[471] No more study is needed. Under the MFN rule, a Panel does not need to see if a differential competitive impact from a measure stems from a legitimate regulatory distinction.

V. Mutual Denial of MFN Treatment by India and Pakistan

Notwithstanding the GATT obligation to accord immediate, unconditional MFN treatment to fellow contracting parties, and the 1948 case, *India – Tax Rebates on Exports*, India and Pakistan refused to grant MFN status to each other.[472] Each side could have invoked the national security exception in GATT Article XXI, and would have done so if pressed, to justify its hardline position.

Before the British Partition of the Subcontinent on 15 August 1947, and for a few years thereafter, considerable trade occurred across the Indo-Pakistani border.

> Trade between India and Pakistan is as old as the two countries are, but the volume of trade between them is minuscule relative to the size of their economies. However, this has not always been the case. After 1947, Pakistan's exports and imports with India remained quite significant for several years, as high as 30 percent of exports and 10 percent of imports. Later on both of them declined to less than 5 percent (on average). In the 1990s, the volume of trade began to improve again when the average exports ($85 million) doubled the average of the past two decades.[473]

But, as the years wore on, the countries warred. They fought in 1947, at Partition, and again in 1965 (over Kashmir), 1971 (over Bangladesh), and (unofficially) in 1999 (over Kargil, in Kashmir).

In 1996, a year after the birth of the WTO, India granted Pakistan MFN status. Pakistan did not reciprocate, citing continuing security worries, though it also sought to protect infant and inefficient industries (especially autos and electronics) from established Indian competitors. Pakistan maintained a positive list of 1,933 products that could be imported from India; it banned all other merchandise originating in India. (In contrast, Pakistan imported over 6,000 types of goods from other countries.) By September 2011, bilateral trade between the two countries was just $2.7 billion, a fraction of the potential value given the size of their respective economies.

Finally, in November 2011, Pakistan approved MFN status for India, and concomitantly replaced the positive list with a negative list – any kind of merchandise,

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471 *Fur Seals* Appellate Body Report, ¶ 5.90.

472 *See* II GATT B.I.S.D. 12 (1948), *Application of Article I:1 to Rebates on Internal Taxes*, Ruling by the Chairman on 24 August 1948.

473 Abid Qamar, *Trade between India and Pakistan: Potential Items and the MFN Status*, 1 STATE BANK OF PAKISTAN (SBP) RESEARCH BULLETIN, no. 1, 46 (2005), www.sbp.org.pk/research/bulletin/2005/Opinion-1.pdf. *See also WTO Hopes Regional Integration from Pak-India Trade Boost*, GULF TIMES (Doha, Qatar), 24 September 2012.

unless expressly prohibited, could be imported from India.[474] Powerful Pakistani export interests, such as T&A manufacturers, supported the move. Moreover, the security calculation among some officials in Islamabad had changed: the sagging economic performance of Pakistan was both partly due to, and fueled, terrorism and civil unrest. Closer trade relations with India might be the kind of fillip Pakistan's economy needed. For example, Pakistan could import petrol and electricity from India to alleviate power disruptions, sometimes lasting 10 hours a day. India not only was willing to export energy, but also invest in the Pakistani power sector. Pakistan's decision not only satisfied GATT Article I, but also advanced the interests of *SAARC* and *SAFTA*. By September 2012, India and Pakistan agreed to an ambitious trade liberalization plan: by 2020, they would drop all tariffs to a maximum duty rate of 5%, and eliminate NTBs.

India also suggested the countries could apply the model of Sino-Indian commercial relations: China and India were rivals in the T&A sector, but JV partners in African oil businesses. Likewise, Pakistan and India were T&A competitors, but could partner in African energy resource projects. Or could they?

In February 2019, India revoked MFN treatment on all merchandise originating in Pakistan, and levied duties of up to 200% on Pakistani goods. Practically speaking, total Indo-Pakistani trade is small: $2.27 billion in 2016-2017, and $2.41 billion in 2017-2018, with India exporting to Pakistan merchandise worth $1.92 billion in 2017-2018 (mainly chemicals, cotton, dyes, iron, steel, and vegetables) in 2017-2018, and importing from Pakistan $488.5 million worth of goods (mainly cement, chemicals, fruit, leather, and spices).[475] The cause of India's withdrawal was its long-standing dispute with Pakistan over Kashmir, depicted in Map 13-1, the Muslim-majority region that in 1947 the British partitioned to India, over which both countries claimed in entirety, but over which each controls only in part.[476]

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474 Reportedly, as of February 2019, Pakistan had not actually provided reciprocal MFN treatment to India. *See India Withdraws Most-Favored Nation Status To Pakistan After Pulwama Attack*, BLOOMBERG QUINT (Mumbai), 15 February 2019, www.bloombergquint.com/politics/india-withdraws-most-favoured-nation-status-to-pakistan-after-pulwama-attack. [Hereinafter, *India Withdraws*.]

475 *See India Withdraws*.

476 *See Pulwama Attack: Pakistan Warns India Against Military Action*, BBC NEWS, 19 February 2019, www.bbc.com/news/world-asia-india-47290107; *Pulwama Attack: Nine India Soldiers Killed in Kashmir Gun Battle*, BBC NEWS, 18 February 2019, www.bbc.com/news/world-asia-india-47275072 (reporting "a vehicle packed with explosives ram a convoy of 78 buses carrying Indian security forces," and the suicide bomber was a local Kashmiri age 19-21) [hereinafter, *Pulwama Attack*]; *India Withdraws* (reporting the "*Jaish* [*JeM*] suicide bomber rammed a vehicle carrying over 100 kg of explosives" onto a bus carrying Indian Central Reserve Police Force (CPRF) personnel).

Maps exist that show control of the entire Kashmir region held by – or, at least, claimed by – one side or the other. Such maps, though they may reflect the international legal position of a claimant, do not reflect reality on the ground, and ignore competing claims. Thus, they are not relied upon herein.

Map 13-1:
Political Map of Kashmir[477]

Three countries administer different zones in Kashmir.[478] India governs Jammu and Kashmir, its northernmost state. Pakistan has two Kashmiri provinces, Gilgit-Baltistan (*i.e.*, the Northern Areas), and Azad Kashmir (*i.e.*, independent Kashmir, a self-governing administrative area). China rules over Aksai Chin and the Trans-Karakoram Tract. Pakistan ceded the Tract to China in an agreement they began negotiating on 13 October 1962 (just before the 16-28 October Cuban Missile Crisis and the 20 October-21 November Sino-Indian War in Aksai Chin and the North East Frontier Agency), and signed on 2 March 1963, but which India does not recognize as lawful.[479] The percentage of what once was

477 Nations Online Project, www.nationsonline.org/oneworld/map/Kashmir-political-map.htm.

478 *See* Nations Online Project, www.nationsonline.org/oneworld/map/Kashmir-political-map.htm.

479 *See Sino-Pakistan Agreement*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sino-Pakistan_Agreement. This deal is variously referred to as the *Sino-Pakistan Agreement*, *Sino-Pakistan Frontier Agreement*, and *Sino-Pak Boundary Agreement*. *See id*. The short, seven-Article *Agreement* is at

the Princely State of Jammu and Kashmir, that is, of all of Kashmir during the British *Raj* – (Jammu, Kashmir Valley, Ladakh, and the Siachen Glacier) – that each control is India, 60%, Pakistan, 30%, and China, 10%.

India alleged the government of Pakistan was complicit in the horrific 14 February 2019 terrorist attack in Pulwama, a district near Srinagar in Indian-administered Kashmir. Forty Indian paramilitary troops were killed by a suicide car bomb for which the *Jaish-e-Mohammed* ("Army of Muhammad"), or "*JeM*," terrorist group, based in Bahawalpur, in the Pakistani Punjab, took credit. India suffered nine more casualties (including four troops and a policeman) in a subsequent gun battle with militants. The bombing was "the deadliest attack against Indian forces since an Islamist-led insurgency began in 1989."[480] Though vulnerable to the charge of using excessive force in its hunt for violent extremists among local Kashmiris, India could justify its MFN withdrawal under the national security provision in GATT Article XXI. India also vowed to isolate Pakistan from the international community. Indeed, in notifying the WTO of its withdrawal, that is precisely what India said.[481]

For its part, Pakistan denied any responsibility, and seemed unlikely to bring *JeM* to justice. On the one hand, its leader already was in "protective custody." A serious crackdown might provoke a backlash by *JeM* against the government. On the other hand, wary of certain factions in the government forging close ties with India and thus undermining their *raison d'être*, Pakistani intelligence services – the Inter-Services Intelligence (ISI) – found *JeM* a useful tool to stir up trouble in Kashmir. On 26 February, the Indian Air Force bombed a suspected *JeM* training camp operating in Balakot, in Pakistan's north-western Khyber Pakhtunkhwa (NWFP).[482] It was the first time India had launched air strikes across the Line of Control (LOC) since the 1971 Indo-Pakistani War. Perhaps seeking to invoke an argument of self-defense under Article 51 of the U.N. *Charter*, the Indian Foreign Secretary, Vijay Gokhale, said the strikes were "pre-emptive," noting that credible intelligence showed *JeM* was planning to launch more suicide attacks against India from its Balakot base.

Thereafter, Pakistan struck back, and each side downed fighter jets from the other, and traded artillery fire.[483] The conflict doomed MFN treatment for the foreseeable future.

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https://web.archive.org/web/20120211132925/http://www.law.fsu.edu/library/collection/LimitsinSeas/IBS085.pdf.

480 *Pulwama Attack*.

481 *See* Archana Chaudhary, *India to Inform WTO on Withdrawing Pakistan MFN Status: Official*, , 15 February 2019, https://news.bloomberglaw.com/international-trade/india-to-inform-wto-on-withdrawing-pakistan-mfn-status-official.

482 *See Balakot: Indian Airstrikes Target Militants in Pakistan*, BBC NEWS, 26 February 2019, www.bbc.com/news/world-asia-47366718.

483 For coverage of the spiraling cross-border violence, see, e.g., *India Pakistan: Kashmir Fighting Sees Downed India Aircraft*, BBC NEWS, 27 February 2019, www.bbc.com/news/world-asia-47383634; James Mackenzie & Alasdair Pal, K*ashmir Conflict Heats Up as India, Pakistan Claim to Down Each Other's Jets*, REUTERS, 27 February 2019, www.reuters.com/article/us-india-kashmir/india-pakistan-down-each-others-jets-as-kashmir-conflict-heats-up-idUSKCN1QG0IR. Tensions eased modestly with the return by Pakistan of a captured Indian Air Force Wing Commander, Abhinandan Varthaman, though shelling across the LOC continued. *See* Abu Arqam Naqash & Fayaz Bukhari, *India Refuses to Share Proof of Strikes in Pakistan*

VI. Revocation of MFN Treatment after February 2022 Russian Invasion of Ukraine

In March 2022, Russia joined Cuba as the only WTO Member to which the U.S. did not extend MFN treatment, and one of the few countries in the world – along with Iran and North Korea – to which America did not extend that treatment. The cause was Russia's brutal, unprovoked invasion of Ukraine on 24 February 2022, and its continued escalation of its war – which included potential war crimes such as targeting and killing civilians. Invoking the 1977 *IEEPA*, the U.S., had imposed an enormous array of trade sanctions and export controls (discussed in a separate Chapter) against Russia. So, too, did America's allies around the world, including Canada (which was the first ally to do so), the EU, Japan,[484] and the U.K. Indeed, "the leaders of the G-7 major industrial nations issued a statement in which they announced they would strip Russia of most-favored nation status in regard to key products," so as to "'revoke important benefits of Russia's membership of the World Trade Organization.'"[485]

But, President Vladimir Vladimirovich Putin (1952-, President, 2000-2008, 2012-) persisted with a war for which he was solely to blame. To put further pressure on the Russian President and his oligarch-dominated economy, on 11 March, President Joseph R. Biden (1942, President, 2021-) asked Congress to revoke Russia's NTR status, which it had held since acceding to the WTO in August 2012.[486] Said the President, "Putin is an

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Amid Doubts of Militant Deaths, REUTERS, 2 March 2019, www.reuters.com/article/us-india-kashmir-pakistan/pakistan-and-india-step-back-from-the-brink-tensions-simmer-idUSKCN1QJ044. There was no immediate likelihood of reciprocal grants of MFN treatment, much less of a resolution to the underlying territorial dispute.

484 *See* Rurika Imahashi, *Japan Revokes Russia's "Most Favored" Status Over Ukraine*, NIKKEI ASIA, 16 March 2022, https://asia.nikkei.com/Politics/Ukraine-war/Japan-revokes-Russia-s-most-favored-status-over-Ukraine (reporting: "Japan will revoke Russia's 'most favored nation' status over its invasion of Ukraine, Prime Minister Fumio Kishida announced…. 'Russia's invasion of Ukraine is an atrocity that should be recorded in history,' Kishida told reporters. 'We denounce it in defense of the values of freedom, human rights and the rule of law.' … With that status revoked, Russia will face higher tariffs on exports to Japan, thereby rendering its products less cost-competitive and attractive. United Nations data show Japan was Russia's 12th largest export destination in 2020 and that its exports to Japan that year were valued at $9 billion, of which oil and other fuel made up nearly 70%. Kishida said Japan will put more diplomatic and economic pressure on Russia in coordination with Western countries. As part of additional sanctions, the country will ban the export of luxury goods as well as the import of some items from Russia. … Japan will also expand the list of targets subject to having their assets frozen to additional oligarchs and others close to Vladimir Putin. … Japan relies on Russia for around 9% of its LNG imports, according to 2021 customs data. The G-7 countries have agreed to 'make further efforts to reduce our reliance on Russian energy, while ensuring that we do so in an orderly fashion and in ways that provide time for the world to secure alternative and sustainable supplies.' Kishida said each country has its own energy mix and its own degree of vulnerability in regard to energy supplies. Countries also differ on whether they are net energy importers or net exporters, he added. 'We will strive to bring our [unique situation] in line with the sanctions [announced by the G-7] as much as possible while pursuing our country's energy security,' Kishida said."). [Hereinafter, *Japan Revokes Russia's*.]

485 *Quoted in Japan Revokes Russia's*.

486 *See U.S. to Ban Russian Diamond and Vodka Imports*, BBC NEWS, 11 March 2022, www.bbc.com/news/business-60712902 (hereinafter, *U.S. to Ban Russian*); Jenny Leonard & Josh Wingrove, *Biden Bans Iconic Russian Imports, Calls for Trade Downgrade*, BLOOMBERG, 11 March 2022,

aggressor. Putin is the aggressor. And Putin must pay a price."[487] His action followed that by Canada, which a week earlier had "imposed tariffs of 35% on all products coming from Russia and its compliant ally, Belarus."[488]

Under the Foreign Commerce Clause of the U.S. Constitution (Article I, Section 8, Clause 3, discussed in a separate Chapter), which gives Congress – not the President – the power to regulate foreign trade, both chambers must approve the revocation legislation. They easily approved the MFN revocation: the House, on 17 March 2022, by a 424-8 vote;[489] and the Senate a few days later in a lop-sided vote. (The legislation was H.R. Bill 7109, *Suspending Normal Trade Relations with Russia and Belarus Act*, 19 U.S.C. § 2434.[490]) Russia's war against Ukraine had (*inter alia*) given Congress one more topic, along with China, for bipartisan agreement. So, practically, speaking, all Russian-origin merchandise became subject to the "Column 2, Special" tariffs in the HTSUS. They average about 32%, as distinct from the "Column 1, General" duties, which are the MFN rates, and which average about 3%.[491] (As discussed in a separate Chapter, under this *Act*, the suspension of Column 1 rates took effect on 9 April 2022, and the new Column 2 duty – 35% – took effect on 29 July.)

On the one hand, the commercial significance of America revoking Russia's MFN status was not that great, because of the limited value and volume of Russo-American merchandise trade outside of the energy sector. Russia (as of 2019) "was the 26th largest goods trading partner of the United States, with some $28 billion exchanged between the

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www.bloomberg.com/news/articles/2022-03-11/biden-calls-for-an-end-to-russia-s-preferred-trading-status?sref=7sxw9Sxl (hereinafter, *Biden Bans Iconic Russian*); Steve Holland & Susan Heavey, *Biden, G7 Hit Russian Trade in Latest Ukraine Retaliation*, REUTERS, 11 March 2022, www.reuters.com/world/us-lift-russias-most-favored-nation-status-pelosi-2022-03-11/ (hereinafter, *Biden, G7 Hit Russian*); James Politi, Aime Williams & Andy Bounds, *G7 Moves to End Normal Trade Relations with Russia*, FINANCIAL TIMES, 11 March 2022, www.ft.com/content/135f54b0-dfdc-4966-aea9-89ca04f3abab?shareType=nongift.

487 *Quoted in Biden, G7 Hit Russian.*

488 *U.S. to Ban Russian* (also reporting the President amped up sanctions with a new "ban U.S. investment in Russia beyond the energy sector," and the "G7 nations would move to block Russia from funds from the International Monetary Fund and World Bank.").

489 *See* Patricia Zengerle, *U.S. House Backs Removal of "Most-favored" Trade Status for Russia, Belarus*, REUTERS, 18 March 2022, www.reuters.com/business/us-house-backs-removal-most-favored-trade-status-russia-belarus-2022-03-17/.

490 *See* H.R.7108 – 117th Congress (2021-2022), Public Law 117-110, www.congress.gov/bill/117th-congress/house-bill/7108/text?format=txt. This legislation authorized the President to increase the duty rates above Column 2 rates via Presidential *Proclamation* through 1 January 2024.

491 *See* James Politi & Aime Williams, *What Targets Are Left for U.S. Sanctions in Russia?*, FINANCIAL TIMES, 11 March 2022, www.ft.com/content/2816fa54-6dc7-417c-bb99-a0bc9493fe2d?shareType=nongift (reporting: "According to analysis by Chad Bown of the Peterson Institute, the removal of the normal trade relationship status will boost the average U.S. tariff on Russian goods from around 3 per cent to around 32 per cent across all goods.").

Recall that the "Column 2 Special" non-MFN rates were set under the *Tariff Act of 1930*, and are commonly called the "Smoot-Hawley Tariff" rates. So, as to heights of non-MFN duties, they were "notoriously high." Indeed, the Smoot-Hawley rates are the second-highest in American history, after the 1828 "Tariff of Abominations," which harkens back to the antebellum era and the Presidencies of John Quincy Adams and Andrew Jackson (and which is discussed in a separate Chapter).

two countries."[492] Thanks mostly to energy items, Russia was "among the world's top exporters of oil, natural gas, copper, aluminum, palladium, and other important commodities, and accounted for 1.9% of global trade in 2020."[493] In contrast, the action of U.S. allies mattered, because "Russia is far more dependent on the EU for trade than the U.S., selling about one-third of its exports to the bloc, versus just 5% to the U.S. in 2020."[494] Indeed, "[t] rade made up about 46% of Russia's economy [*i.e.*, GDP composition] in 2020, much of that with China or linked to energy exports that European nations depend on for heat and electricity…."[495] China was Russia's "biggest export destination."[496]

Consider the importance of transition rules for traffic in transit. What should happen to Russian-origin merchandise shipped and in transit to the U.S., but not yet entered into a port of entry and liquidated by CBP? Suppose it was shipped before the 24 February Russian invasion of Ukraine, or before the date the shift to non-MFN rates or import ban entered into force? Should that traffic in transit enter under the pre-war regime, *i.e.*, MFN rates and no QR? Or, should the new regime apply retroactively to such merchandise?

On the other hand, legally, the significance was great. Russia will join Cuba as the only other WTO Member to which America denies MFN treatment. The ironies of history never cease: the American denial of MFN treatment to Cuba, I believe, dates back to other Russian-inspired events, the Castro Revolution and Cuban Missile Crisis. As for non-WTO Members, the only other countries to which the U.S. denies MFN treatment are Iran and North Korea. Though (as discussed earlier) India and Pakistan long denied each other MFN treatment from the time they were originating GATT contracting parties in October 1947 (only recently granting it to each other), there were few cases (other than Cuba), if any, in which one WTO Member has revoked that treatment for another Member, after that other Member had joined the WTO. It just was not done, as MFN treatment was such a foundation of non-discriminatory world trade.

Politically, the revocation was significant, too. It was another death knell in the coffin of multilateralism. As indicated, many WTO Members joined the U.S. in its action. The U.S. was no more effective in disciplining its Members as was the U.N. Security Council enforcing collective security under Chapter 7 of the U.N. Charter. Action, if there was to be any, was through coalitions of like-minded countries.

Indubitably, the U.S. revocation of MFN treatment, though violating the GATT Article I:1 MFN clause, was entirely defensible under the Article XXI national security exemption (discussed in a separate Chapter). Arguably, the U.S. also could invoke the Article XX(a) public morality exception to defend its denial of MFN treatment to Russia.

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492 *Biden, G7 Hit Russia*. *See also U.S. House Backs Removal* (noting: "According to World Bank data, the biggest non-petroleum imports from Russia [into the U.S.] in 2020 were palladium, raw 'pig' iron, rhodium, unwrought aluminum alloys, plywood, and fertilizers. Palladium and rhodium are used in automotive catalytic converters."). [Hereinafter, *U.S. House Backs Removal*.]

493 *Biden, G7 Hit Russia*.

494 *Biden Bans Iconic Russian*.

495 *Biden, G7 Hit Russian*.

496 *Biden, G7 Hit Russia*.

"Public morality" could be extended to include war crimes, of which Russia stood accused of several. President Biden had dubbed President Putin a "war criminal."

For its part, Russia banned the export of over 200 types of products.[497] They included agricultural, auto, electrical, forestry, medical tech, and telecom equipment. Russia had that right under GATT Article XI:2 (discussed in a separate Chapter), specifically, the exception for temporary export bans for critical items in short supply – but to the extent its move was "in retaliation" for the MFN revocation, it did not. The fact Russia opted for the ban was circumstantial evidence the sanctions were putting considerable pressure on Russia. Further evidence of that fact was a threat by President Putin to nationalize western businesses that were abandoning Russia.[498]

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[497] *See Russia Bans Export of 200 Products After Suffering Sanctions Hit*, BLOOMBERG, 10 March 2022, www.bloomberg.com/news/articles/2022-03-10/russia-bans-export-of-200-products-after-suffering-sanctions-hit?sref=7sxw9Sxl (reporting: "Russia announced an export ban for more than 200 products after the economy was hit by sanctions over the invasion of Ukraine. It stopped short of curbing sales of energy and raw materials, the country's biggest contribution to global trade. The restrictions cover items previously imported into Russia, from medical equipment and agricultural machinery to railway cars and turbines, the government said on its website. It said the measure is 'necessary to maintain stability on the Russian market.' The ban applies until the end of this year [2022]. There may be a waiver for members of the Eurasian Economic Union – a bloc of Russia's regional allies – though Russia also imposed a temporary halt on grain exports to EEU countries until Aug. 31. … Other Russian products (in addition to energy) that play a significant role in world trade include wheat, precious and industrial metals, and wood. The government said Thursday that it has "suspended the export of several types of timber and timber products to states that are undertaking hostile actions against Russia.").

[498] *See* Anton Troianovski, *Facing Economic Calamity, Putin Talks of Nationalizing Western Businesses*, THE NEW YORK TIMES, 10 March 2022, www.nytimes.com/2022/03/10/world/europe/russia-economy-ukraine.html?referringSource=articleShare (reporting: "Besieged by an onslaught of sanctions that have largely undone 30 years of economic integration with the West in the space of two weeks, President Vladimir V. Putin on Thursday opened the door to nationalizing the assets of Western companies pulling out of Russia and exhorted senior officials to "act decisively" to preserve jobs. … 'I have no doubt that these sanctions would have been implemented no matter what," Mr. Putin said …, arguing that his intervention in Ukraine served merely as a pretext for the West to try to wreck Russia's economy. 'Just as we overcame these difficulties in years past, we will overcome them now, too.' But the sanctions imposed in the two weeks since the invasion – combined with multinational companies that employ tens of thousands of Russians voluntarily deciding to withdraw amid the global outrage – dwarf any other economic pressure that Russia has faced under Mr. Putin. With the ruble having lost nearly half its value in the last month [dating to 10 March 2022], prices of basic goods have risen sharply, causing panic buying at supermarkets. The central bank, which has kept the Moscow stock exchange closed since the war began, has introduced new capital controls, preventing companies from withdrawing more than $5,000 in cash for the next six months. … The Institute of International Finance, a Washington-based association of financial firms, predicted that Russia would see a 15-percent decline in its gross domestic product this year, which would wipe out much of the economic growth that Mr. Putin has presided over since taking office in 1999. … The alarm with which Russian planners view the downturn is reflected in the radical measures they have proposed to arrest it. Of particular concern are Western companies that once symbolized post-Soviet Russia's integration into the world economy, like McDonald's and Ikea, that have now shuttered hundreds of stores and factories. Mr. Putin told officials in the televised meeting that the assets of such companies should be put under 'external management' and then transferred 'to those who want to work.' Dmitri A. Medvedev, the Vice Chairman of Mr. Putin's Security Council, said the Kremlin could respond to Western companies leaving the Russian market with the seizure of their assets 'and their possible nationalization.' The prospect of the Kremlin seizing private assets rattled Russia's business community. Vladimir Potanin, a metals magnate who is one of Russia's richest men, released a statement warning that such nationalization would 'bring us back 100 years, to 1917' – the year of the Russian Revolution, when the Bolsheviks forcibly took over private enterprises.").

One obvious inference from the MFN revocation that all businesses were well-advised to perform a "legal audit" of their supply chains to sanitize them from any Russian goods or services. They likely were familiar with this self-examination, having gone through it with respect to China owing to the Sino-American Trade War (discussed in a separate Chapter). Likewise, businesses needed to be aware of the risk of circumvention: as seen with respect to Chinese merchandise, unscrupulous producer-exporters and customs brokers could try to obfuscate the origin of Russian merchandise through trans-shipment and other devices. That is illegal and carries serious penalties, and CBP would be on the lookout for circumvention.

Finally, complementing America's MFN revocation was an (1) embargo on imports of several iconic Russian goods, particularly non-industrial diamonds, seafood, and vodka, (2) a ban on U.S. exports of luxury goods coveted by Russian elites, such as antiques, high-end apparel and watches, jewelry, spirits, tobacco, and vehicles, to Russia, and (3) a prohibition on dollar bank note shipments to Russia.[499] Both measures (which are discussed in a separate Chapter) violated GATT Article XI:1 pillar against QRs. But, they could be defended under various GATT provisions, again including the Article XXI national security exception. Commercially, the import embargo cost Russia $1 billion in revenue, out of the overall "roughly $28bn worth of trade the U.S. and Russia exchanged in 2019," while the export ban was involved $550 million worth of goods.[500]

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499 The White House, *Executive Order on Prohibiting Certain Imports, Exports, and New Investment with Respect to Continued Russian Federation Aggression*, 11 March 2022, www.whitehouse.gov/briefing-room/presidential-actions/2022/03/11/executive-order-on-prohibiting-certain-imports-exports-and-new-investment-with-respect-to-continued-russian-federation-aggression/; *U.S. to Ban Russian*; *Biden Bans Iconic Russian*; *Biden, G7 Hit Russia*; *Fact Box: Biden Throttles Trade Between the U.S. and Russia*, REUTERS, 11 March 2022, www.reuters.com/business/biden-throttles-trade-between-us-russia-2022-03-11/.

500 *U.S. to Ban Russian*.

Chapter 14

SECOND PILLAR: GATT ARTICLE II AND TARIFF BINDINGS[501]

I. Bound versus Actual Rates

The second foundational legal rule in, or pillar of, GATT, is found in Article II. In its entirety, this Article states:

> **Article II**
> **Schedules of Concessions**
>
> 1. (a) Each contracting party [per GATT 1947, *i.e.*, WTO Member per GATT 1994] shall accord to the commerce of the other contracting parties treatment no less favorable than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.
>
> (b) The products described in Part I of the Schedule relating to any contracting party, which are the products of territories of other contracting parties, shall, on their importation into the territory to which the Schedule relates, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for therein. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with the importation in excess of those imposed on the date of this Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.
>
> (c) The products described in Part II of the Schedule relating to any contracting party which are the products of territories entitled under Article I to receive preferential treatment upon importation into the territory to which the Schedule relates shall, on their importation into such territory, and subject to the terms, conditions or qualifications set forth in that Schedule, be exempt from ordinary customs duties in excess of those set forth and provided for in Part II of that Schedule. Such products shall also be exempt from all other duties or charges of any kind imposed on or in connection with importation in excess of those imposed on the date of this

[501] Documents References:
(1) *Havana (ITO) Charter* Article 31
(2) GATT Articles I, II, XI

Agreement or those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date. Nothing in this Article shall prevent any contracting party from maintaining its requirements existing on the date of this Agreement as to the eligibility of goods for entry at preferential rates of duty.

2. Nothing in this Article shall prevent any contracting party from imposing at any time on the importation of any product:

(a) a charge equivalent to an internal tax imposed consistently with the provisions of paragraph 2 of Article III***** in respect of the like domestic product or in respect of an article from which the imported product has been manufactured or produced in whole or in part;

(b) any anti-dumping or countervailing duty applied consistently with the provisions of Article VI;*****

(c) fees or other charges commensurate with the cost of services rendered.

3. No contracting party shall alter its method of determining dutiable value or of converting currencies so as to impair the value of any of the concessions provided for in the appropriate Schedule annexed to this Agreement.

4. If any contracting party establishes, maintains or authorizes, formally or in effect, a monopoly of the importation of any product described in the appropriate Schedule annexed to this Agreement, such monopoly shall not, except as provided for in that Schedule or as otherwise agreed between the parties which initially negotiated the concession, operate so as to afford protection on the average in excess of the amount of protection provided for in that Schedule. The provisions of this paragraph shall not limit the use by contracting parties of any form of assistance to domestic producers permitted by other provisions of this Agreement.*****

5. If any contracting party considers that a product is not receiving from another contracting party the treatment which the first contracting party believes to have been contemplated by a concession provided for in the appropriate Schedule annexed to this Agreement, it shall bring the matter directly to the attention of the other contracting party. If the latter agrees that the treatment contemplated was that claimed by the first contracting party, but declares that such treatment cannot be accorded because a court or other proper authority has ruled to the effect that the product involved cannot be classified under the tariff laws of such

contracting party so as to permit the treatment contemplated in this Agreement, the two contracting parties, together with any other contracting parties substantially interested, shall enter promptly into further negotiations with a view to a compensatory adjustment of the matter.

6. (a) The specific duties and charges included in the Schedules relating to contracting parties members of the International Monetary Fund, and margins of preference in specific duties and charges maintained by such contracting parties, are expressed in the appropriate currency at the par value accepted or provisionally recognized by the Fund at the date of this Agreement. Accordingly, in case this par value is reduced consistently with the Articles of Agreement of the International Monetary Fund by more than twenty *per centum*, such specific duties and charges and margins of preference may be adjusted to take account of such reduction; *Provided* that the CONTRACTING PARTIES (*i.e.*, the contracting parties acting jointly as provided for in Article XXV) concur that such adjustments will not impair the value of the concessions provided for in the appropriate Schedule or elsewhere in this Agreement, due account being taken of all factors which may influence the need for, or urgency of, such adjustments.

(b) Similar provisions shall apply to any contracting party not a member of the Fund, as from the date on which such contracting party becomes a member of the Fund or enters into a special exchange agreement in pursuance of Article XV.

7. The Schedules annexed to this Agreement are hereby made an integral part of Part I of this Agreement.

Ad Article II

Paragraph 2(a)

The cross-reference, in paragraph 2(a) of Article II, to paragraph 2 of Article III shall only apply after Article III has been modified by the entry into force of the amendment provided for in the Protocol Modifying Part II and Article XXVI of the General Agreement on Tariffs and Trade, dated September 14, 1948.

Paragraph 2(b)

See the note relating to paragraph 1 of Article I.

Paragraph 4

Except where otherwise specifically agreed between the contracting parties which initially negotiated the concession, the provisions of this

> paragraph will be applied in the light of the provisions of Article 31 of the Havana Charter.[502]

Essentially, the tariff binding rule commands each WTO Member to "keep its promises." Once it has granted a concession on an MFN duty, it must not retract it (not, at least, without paying a compensatory adjustment).

Tariffs may be *ad valorem* (*i.e.*, imposed on the value of an article), specific (*i.e.*, imposed on the units of an article, such as its weight), hybrid (*i.e.*, a combination of *ad valorem* and specific), or mixed (*i.e.*, variable per entry or per entry price range, such as a TRQ). A 25% tariff is an *ad valorem* duty, a levy of $25 per kilo is a specific duty, and an imposition of 25% plus $25 per kilo is a hybrid duty.

Regardless of the type of tariff imposed, a distinction exists between an "applied" and "bound" tariff. An "applied" tariff is an "actual" tariff. Neither term exists in Article II or Article XXVIII *bis*. Rather, the relevant portions of Article II, Paragraph 1(b)-(c), speak of "ordinary customs duties." Likewise, Article II:1(b)-(c) does not say "bound" duty, but rather a wordier formulation about duties set forth in a Schedule of Concessions of an importing country. Article XXVIII:2(a) *bis* employs the term "binding." In practice, the nearly universally used terms are "applied" (or "actual") and "bound."

What is the legal distinction between these two tariffs? An "applied" rate is what a WTO Member actually imposes on a category of imported merchandise, whereas a "bound" tariff is a level of protection a Member has agreed not to exceed. That is, assuming a WTO Member commits to a particular level of protection, such as Bangladesh setting forth a 90% tariff on luxury passenger cars in its Schedule of Concessions, that commitment is the "bound" rate. The rubric is apt. The Member is bound to keep the rate as a maximum level of protection. (There are exceptions.) The Member has made a promise and is legally bound by it not to withdraw its commitment. In brief, a bound rate is the highest level of protection the country may impose on an import category.

"GATT speak" distinguishes between "bound" and "binding." All tariff lines listed in a Schedule of Concessions, for which a contracting party or WTO Member made a concession, are "bound." Any individual tariff commitment is a "binding."

That suggests another reason the word "bound" is apt. It connotes the Calculus concept of an upper bound, or the architectural feature of a ceiling. So, "bound" rates are sometimes colloquially referred to as maximum, or ceiling, rates (though in Calculus an upper bound is the "maximum" only if it is a member of the set that is in question). For producer-exporters and importers, to know the bound rate is to be certain about the "worst case scenario" level of protection. Of course, in terms of commercially meaningful market access, it is the applied rate that matters. On that metric, the general trend has been a modest decline. In its 2023 *World Tarff Profiles*, the WTO reported:

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[502] https://kansas.sharepoint.com/:w:/t/WheatLawLibrary-Documents/EaCECtiEA7hDvm7vo1ab4MoBOXNmkCMVOtnjIrFHUVzFAQ?e=eoeBe6.

Trade opening in terms of most-favored nation (MFN) tariffs – *i.e.*, a non-discriminatory tariff – has been largely modest over this 16-year period following significant trade opening from 1995 to 2005 during implementation of the WTO's founding *Marrakesh Agreement*. The share of duty-free products and tariff peaks also saw modest liberalization between 2006 and 2021.

The average MFN tariff for all products declined from 10.1 per cent in 2006 to 8.9 per cent in 2021…. This modest decline can be attributed to the fact that significant tariff reduction resulting from the Uruguay Round and some other unilateral decisions had already been implemented. These actions had resulted in about a 32 per cent reduction in the MFN applied tariff by WTO members between 1996 and 2005.

Tariffs for agriculture and non- agriculture products both declined, with a slightly larger reduction in non-agriculture tariffs. The trend has been constant, with decreasing average tariffs almost every year, indicating progress towards a more open and interconnected global economy. *The level of tariffs applied for agriculture products is higher than for non-agriculture products. In 2021, the average MFN tariff for agriculture products was 14.8 per cent compared to 8.0 per cent for non-agriculture products.*

…

Bound tariffs – the maximum MFN tariff level for a particular product – have remained almost unchanged from 2006 to 2021. The bound rates are significantly higher than the MFN tariff rates … that are actually applied. On average, bound rates are more than three times higher than applied tariff rates. For example, in agriculture, the global average bound rate is 54.4 per cent whereas the global average MFN applied rate is 14.8 per cent. The ceiling levels for bound tariffs in many developing economies contribute to this difference as some have very high ceilings, *e.g.*, around 100 per cent.

Countries and customs territories decide unilaterally to reduce their MFN tariffs for economic and social reasons – for example, to have access to low-cost, high-quality food and other products. They often want to keep bound rates higher to maintain "policy space", allowing them the opportunity to increase the applied rates in the future if they wish.

The MFN applied tariffs have declined in developed, developing and least-developed economies…. Developed economies started from the lowest base in 2006 (6.9 per cent) and have also had the sharpest decline, falling to 5.2 per cent in 2021. Developing and least-developed economies have maintained somewhat higher MFN tariffs, on average 8.7 per cent and 12.1 per cent respectively in 2021. There are many reasons for this, including a

> dependence on tariff revenue for some developing and least-developed economies.
>
> *Applied MFN tariffs vary significantly by region*, with *Africa* having the *highest* average applied tariffs at almost 12.4 per cent, and *Europe and Oceania* having the *lowest* at 5.4 per cent and 6.2 per cent respectively in 2021. …[503]

One question (among many) to ask based on the average of an 8.9% applied rate across all WTO Members is whether, and to what degree, Members offset modest tariff declines with NTBs (that is, behind-the-border measures), as well as trade remedies (e.g., AD-CVD and safeguard cases) to protect domestic industries.

II. Tariff Overhang (Water)

Bound rates reflect MTNs in which a balance of reciprocal concessions is struck by WTO Members, and prior to the 1 January 1995 birth of the WTO, by GATT contracting parties. Any difference between a bound and applied rate, in GATT-WTO speak, is called a "tariff overhang," or "water" in a tariff schedule. A Member may grant a bound rate of 30% on hot-rolled steel, yet set an applied rate of 12%. That "water" (18%) gives the Member policy space to raise its applied rate up to, but not above, the 30% binding. The binding itself gives all other Members the certainty and predictability that the Member will not impose a tariff above 30% on their steel exports to the Member.

The existence, indeed, intentional persistence, of tariff overhangs in the Schedules of many WTO Members suggests a reality about tariff negotiations: not every tariff concession is equally valuable. Understanding the extent to which tariff concessions result in commercially meaningful market access is one issue. Consider three cases. It is one scenario to lower an applied MFN rate (*e.g.*, from 20% to 10%), but leave the bound rate untouched (*e.g.*, at 30%). The specter of raising back up the applied rate to the higher bound rate (*e.g.*, up to 30%) remains.

It is another scenario to eliminate the "overhang," or "water," in a Tariff Schedule by cutting a bound rate (*e.g.*, 45%) to a lower level at which the corresponding applied rate sits (*e.g.*, 35%). That locks in the reality of the applied rate. Yet, it grants no new market access. Exporters get the certainty and predictability the applied rate (*e.g.*, at 35%) will not be raised (*e.g.*, beyond 35%), but they face the same applied rate as they did before the bound rate was equated with the applied rate.

It is quite another scenario to cut the bound rate (*e.g.*, 10%) to below the existing corresponding applied rate (*e.g.*, to a binding of 3%, below the applied rate of 7%). Here, exporters get enhanced market access (because the applied rate, 7%, must be cut to the

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[503] World Trade Organization (WTO), International Trade Center (ITC) & United Nations Conference on Trade and Development (UNCTAD), *World Tariff Profiles 2023* 220 (July 2023) www.wto.org/english/res_e/booksp_e/world_tariff_profiles23_e.pdf. (Emphasis added.)

new, lower bound rate level, 3%). They also get the certainty and predictability this access will endure (because of the binding).

III. Should Tariff Concessions Sunset?

In May 2018, American Secretary of Commerce Wilbur Ross declared that the "the U.S. [wanted] to take back some of the trade concessions it granted over the past seven decades [since the 30 October 1947 founding of GATT], because they don't fit today's reality."[504] Specifically, he said:

> The WTO mind set, in my mind, is simply wrong. It doesn't fit the way the world is today. It is an overly simplistic version of trade and what goes on.
>
> Concessions that were perfectly appropriate for the U.S. to make to Europe, Asia, everywhere in the immediate years after World War II are no longer appropriate.
>
> The concessions were not time-denominated. They were permanent concessions.
>
> That is a real structural problem and it leads to lots of inequities, lots of trade barriers that are quite asymmetrical – both tariff and non-tariff. So, there is a lot to complain about.[505]

What accounts for the asymmetries?

Recall the concepts (discussed in an earlier Chapter) of tariff "peak" and tariff "dispersion." In respect of tariffs, the Secretary seems to refer to these concepts, and call for leveling of the peaks within the Schedules of WTO Members, and addressing the High-Low Problem both within the Schedule of individual Members, and across the Membership. Recall also the post-Second World War history of GATT-WTO MTNs. Is it the different levels of participation in MTNs since 1947, with developed countries agreeing to progressive reductions in industrial tariffs, and in the Uruguay Round, on agricultural duties, whereas many developing and LDCs did not do so, because they were not GATT contracting parties until the Kennedy and Tokyo Round eras, and because they adopted infant industry, and even Socialist-style, trade measures to which some still cling today?

The Secretary's solution to deal with asymmetries is to eliminate a pillar of GATT by putting a time limit – that is, an end date, or an automatic "sunset" – on tariff bindings. (The solution also included getting rid of another pillar, the MFN rule, and dispensing with S&D treatment.) Should there be a "Sunset Rule" for each tariff concession, and/or each trade agreement, so that a WTO Member would not have to undergo the laborious process

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504 Rick Mitchell, *Macron Seeks Trade Cooperation as Trump Threatens Tariffs*, 35 International Trade Reporter (BNA) 754 (7 June 2018).

505 *Quoted in* Bryce Baschuk, *Ross Says WTO Dispute System Delays are "No Good," "a Joke,"* 35 International Trade Reporter (BNA) 755 (7 June 2018).

(discussed below) of modifying its tariff schedule if it wanted to increase one (or more) of its bound rates? The Administration of President Donald J. Trump sought a five-year Sunset Rule on *NAFTA*, in the *NAFTA* renegotiations it launched in August 2017. Canada and Mexico, and the American business community, rejected the idea in favor of permanent stability. They explained that business planning and multibillion dollar investments in cross-border supply chains cannot be done in the span of a few short years, only to be put at risk by the sunset of expected tariff concessions.

But what America's trading partners, and the American business community did not reject was the proposition that GATT-WTO rules need to be revised in light of modern realities. WTO Director General, Roberto Azevêdo expressed their sentiment:

> When the WTO was created in 1995, the internet barely existed. E-commerce was non-existent. Today it is the biggest, fastest growing sector of the economy.
>
> …
>
> The system clearly needs updates. There is no doubt about that. How deep, how fast, what kind – that's the kind of conversation they need to have.

Likewise, French President Emmanuel Macron called for a "complete update of global competition rules," and identified IP protection, trade-distorting subsidies, protection against climate, and social rights as topics the WTO needed to address.

Note, then the difference in strategy: throw out or update? The rest of the WTO Membership wanted to identify the most pressing challenges, and negotiate new GATT-WTO disciplines to meet them. As said Canadian Trade Minister Francois-Philippe Champagne put it:

> Our job here is to seek to modernize and improve the institutions. Taking what is good, understanding that those are the key pillars, and trying to work with that and make the institutions relevant for the 21st century.[506]

The U.S. approach was to remove GATT-WTO rules, even pillars, it did not like. If that meant the end of the GATT-WTO system, and perhaps its replacement with bilateral FTAs, then so be it. Such FTAs could more easily put America's interests first, as they would be negotiated simply and directly, with one other country, on a take-it-or-leave-it manner, to advance an "America First" agenda.

IV. Schedules of Concessions

● Tariff Schedules

Regardless of the manifestation of tariff a WTO Member imposes on a category or merchandise, every Member sets forth its bound tariffs (of whatever type, including TRQs)

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[506] *Quoted in* Bryce Baschuk, *Trump's Metal Tariffs Provide a Wake-Up Call for WTO*, 35 International Trade Reporter (BNA) 757 (7 June 2018).

in a document called the "Schedule of Concessions." (The adjective "every" is subject to a modest qualification, discussed below, implicating Article XXVI:5(c), about the accession of a dependent customs territory and succession.) This document is better known as a "Tariff Schedule" or "Tariff List." After all, the document contains an item-by-item list of product categories (harmonized according to the "Harmonized System" run by the World Customs Organization), followed by the tariff imposed on that product. However, the label "Schedule of Concessions" – and, in particular, the word "Concessions" – is technically more accurate than the casual term.

The Schedule of Concessions of each WTO Member records its bound tariffs. A tariff list could be a separate document providing actual, but not bound, tariffs. In other words, a Member's Schedule reveals the maximum (not minimum, and not necessarily actual) rates the Member possibly may apply to a particular product. For example, following the Uruguay Round, and as of January 2017, the average bound tariff for the United States is 6.4% for agricultural products, and 1.9% for non-agricultural products.

- **Publication, Updating, and Legal Significance**

Once reciprocal tariff concessions are agreed, the WTO publishes the Schedules of Concession of all Members in what, not surprisingly given the 10,000 plus HS product classification scheme and the 166 Members (as of March 2024), are thick volumes. The Schedules are freely available and downloadable from the WTO website (www.wto.org).

The WCO – which has 182 Members (three-fourths of which are developing countries or LDCs) representing over 98% of world trade – adjusts this scheme to accommodate new products (for example, high-technology items). As the WCO makes these adjustments, and as WTO Members negotiate reductions in bound rates, the WTO updates the Schedules.

The published Schedules have real legal significance. They are an integral part of GATT. They are made so by Article II:7. In other words, Paragraph 7 incorporates by reference the Schedules into GATT, ensuring the bound rates are not only promises to be kept, but also international legal obligations.

- **GATT Article XXVI:5(c)**

The statement "every" WTO Member has a Tariff Schedule needs a modest qualification. Under Article XXVI:5(c) of GATT, some geopolitical entities that were not sovereign states became contracting parties. At the time of their accession to GATT, they were customs territories, and they had full autonomy in the conduct of their external commercial relations. But, they were, in one way or another, dependent territories of existing contracting parties.

Typically, these territories had a colonial link to a "mother" country. An existing contracting party accepted GATT on behalf of a territory, and when the territory gained full independence, its membership in GATT continued. That is, it succeeded as a

contracting party. (Accordingly, Article XXVI:5(c) sometimes is referred to as the provision by which accession is by "route of succession."[507]) When the existing contracting country sponsored them for GATT membership, they acceded with the Schedule of their sponsor. That is to say, they did not have a separate Schedule for themselves.

However, upon independence, they published a Schedule in their own right based on what their sponsor had negotiated for them. One instance stands out as an exception. Upon its independence, Gabon repudiated the Schedule France had negotiated for it when it was a dependent territory.

- **Organization and Appearance**

Two more relevant topics concerning Schedules of Concessions are how they are organized and what they "look like." On the first question, bound series of volumes, published by the WTO, set out the Schedules. The sizeable Membership of the WTO means many commodious volumes are needed to accommodate the Schedules of all Members. The Schedule of each Member is identified with a Roman numeral. The Roman numerals are assigned to the Schedules in a logical fashion, namely, the order of accession of each Member. Thus, the newest Member of the WTO will have its Schedule published in the volume with the highest Roman numeral. If two or more Members accede simultaneously, then the numerals are assigned in alphabetical order of the country names of these new Members.

As for what a Schedule looks like, it is comprised of four basic Parts. The first two Parts have compromised a Schedule ever since GATT was founded. The third and fourth Parts were added after 1947:

(1) Part I covers MFN concessions. This Part contains the bound MFN tariff rates to which a WTO Member has committed to all other Members.

(2) Part II contains preferential concessions. This Part lists preferences, most notably the S&D tariff treatment given by developed country Members to certain developing and least developed country Members.

(3) Part III chronicles concessions on non-tariff measures, including QRs.

(4) Part IV, added as a result of the WTO *Agreement on Agriculture* reached during the Uruguay Round, states the binding commitments of each Member on the level of domestic support it will provide to its farmers and farm products (most notably, its Amber Box subsidies, which relate to its Total Aggregate Measure of Support (AMS), less its Blue and Green Box subsidies), and the level of export subsidies it will provide to its primary and processed agricultural goods.

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[507] ANWARUL HODA, TARIFF NEGOTIATIONS AND RENEGOTIATIONS UNDER THE GATT AND THE WTO ¶ C.5 at 19 (2001).

In any Part of a Schedule, there may exist for a particular product, group of products, or as a generally applicable statement, an insertion known as a "Note." Essentially, a Note is a reservation negotiated specially by a WTO Member to clarify, modify, or qualify in some way a concession granted by that Member.

If Schedules of Concessions contain bound rates, then what document sets out applied rates? The answer is (somewhat confusingly, given the overlapping labels) is a "Tariff Schedule." However, this Schedule is published not by the WTO. Rather, each individual Member puts out its list of actual rates in a Schedule.

V. Reciprocity, Tariff Dispersion (Across Countries), and "Unfair" Trade

Bound tariff rates reflect give-and-take sessions among Members in which reciprocal trade offs occur. But, what does "reciprocity" mean?

> "Reciprocity in tariff negotiations has never been officially defined, but the State Department has said that in striking "a mutually satisfactory balance of concessions," weight is given to the amount of existing trade affected, the amount of trade expansion likely to be stimulated, the depth of the tariff cuts, the timing of the tariff cuts, and other (unnamed) factors. It is common practice, after the completion of tariff negotiations, to cite the total value of existing trade on which concessions were given and received, but this is presumably shorthand for a more complicated balance of advantages.
>
> In multilateral across-the-board tariff negotiations, one measure of "reciprocity" might be equal *percentage* increases in the imports of all the negotiating countries, although this would not, of course, guarantee that the exports of all participants would rise proportionately.[508]

The trade-offs that occur during MTNs are, in fact, concessions granted to one another. They reflect an overall pattern of tariff cuts, across all products traded. Thus, it is simplistic, if not misleading, to say that trade is "unfair" – that there was not mutually agreeable, mutually beneficial, reciprocity – because (to use a real example about which the U.S. complained in 2017-2018) the U.S. charges a 2.5% tariff on car imports, while the EU charges 10% and China 25%.

These differences – tariff dispersion across countries on the same merchandise – reflect years, indeed decades, of trade negotiations in which American negotiators agreed they were reasonable in consideration of concessions granted by the other countries – for instance (hypothetically), the EU dropped its tariff on consumer electronics, and China cut its tariffs on dried fruit and nuts, to below those of the U.S. These differences also mask differential absolute and percentage reductions: the Chinese 25% tariff on autos is 10 times that of the U.S., but China slashed that tariff from 100% during its WTO accession

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[508] Richard N. Cooper, *Tariff Dispersion and Trade Negotiations*, 72 JOURNAL OF POLITICAL ECONOMY issue 6, 597-603, footnote 4 at 597-598 (1964), https://dash.harvard.edu/bitstream/handle/1/13580987/Cooper_TariffDispersion.pdf. (Emphasis original.)

negotiations (discussed in a separate Chapter). So, it is important to examine the historical pattern of tariff concessions before attacking bilateral tariff differences as "unfair."

VI. Tariff Levels, Illicit Trade, and 2016 *Colombia Money Laundering* Case

● Colombia's Compound Tariff

T&A, along with footwear, classified under HTS Chapters 61-64, were the merchandise exported by Panama affected by a measure Colombia adopted that led to the 2016 *Colombia Money Laundering* case.[509] That measure was a compound tariff Colombia introduced by *Presidential Decree Number 456* of 30 March 2014. This *Decree* was extended through 30 July 2016, and in turn was the replacement for previous two-year *Decrees* dating back to 23 January 2013. The Compound Tariff worked as follows:

(1) An *ad valorem* levy (*i.e.*, percentage of the customs value of merchandise) of 10%, plus

(2) A specific levy (*i.e.*, a duty in units of currency per measurement), which depended on the type of merchandise and its declared free on board (f.o.b.) price, namely:

For Merchandise in Chapters 61-63 (that is, T&A), and for merchandise in Chapter 64, under the 6-digit Sub-Heading 6406.10 (that is, "parts of footwear … uppers and parts thereof, other than stiffeners") –

A specific levy of U.S. $5.00 per kilogram ("kg") if the price is $10 kilos or less, or a specific levy of $3.00/kg if the price is greater than $10/kg.

For all other merchandise classified in Chapter 64 (that is, Footwear), except for the 4-digit Heading 64.06 (that is, "parts of footwear (including uppers whether or not attached to soles other than outer soles); removable insoles, heel cushions and similar articles; gaiters, leggings and similar articles, and parts thereof:") –

A specific duty of $5 per pair of footwear if the price is $7 per pair or less, and a specific duty of $1.75/pair if the price exceeds $7 per pair.

Expressed algebraically, the Compound Tariff formula was:

Compound Tariff for T&A and Footwear Uppers:

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

or

509 *See* WTO Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel, and Footwear*, WT/DS461/AB/R (adopted 22 June 2016).

	+	$3/kg, if price > $10/kg

Compound Tariff for Footwear

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

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

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

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

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

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

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

Suppose multiple articles of merchandise subject to the Compound Tariff were imported in the same shipment, with some articles above, and others below, the price

threshold. Then, Colombia applied the 10% *ad valorem* tariff along with the highest specific levy applicable ($5/kg or $5/pair) to the entire shipment.

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

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

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

- **Colombia's Losing Anti-Money Laundering Argument**

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

> Each contracting party shall accord to the commerce of the other contracting parties *treatment no less favorable* than that provided for in the appropriate Part of the appropriate Schedule annexed to this Agreement.[510]

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

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

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

[510] Emphasis added.

> those directly and mandatorily required to be imposed thereafter by legislation in force in the importing territory on that date.[511]

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

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

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

The Panel further held the Compound Tariff was an OCD that exceeded Colombia's bound tariffs in its Schedule of Concessions, and thus violated Article II:1(b), and violated the Article II:1(a) MFN rule by according treatment less favorable than envisaged by that Schedule to Panamanian merchandise. To reach this result, the Panel had to compute the *Ad Valorem* Equivalent of the Compound Tariff, which it did, and found the AVE exceeded Colombia's bound rates in five instances, summarized in Table 14-1.

- **Appellate Body Holding and Rationale on Article II:1: Do Not Use Tariff Policy to Fight Money Laundering**

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

Colombia argued unsuccessfully that the terms "commerce" in Article II:1(a) and "importation" in Article II:1(b) do not include illicit trade. It also said GATT Articles VII:2(a)-(b), and provisions of other WTO agreements, such as Article 1:1 of the *Customs*

511 Emphasis added.

Valuation Agreement, support its view that those terms refer to lawful trade. Likewise, Colombia pointed to decisions of investment tribunals that refused to extend protection of bilateral and regional FDI treaties to illegal investments. And, Colombia urged, the point of GATT as reflected in the *Preamble* is to encourage licit trade. In other words, these three points Colombia offered followed from Articles 31-32 in the 1969 *Vienna Convention on the Law of Treaties*: text; context; and object and purpose.

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

Table 14-1
Five Instances in which AVE of Colombia's Compound Tariff Exceeded Bound Rate, Thus Violating Article II:1(b) Binding and Article II:1(a) MFN Rule

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

First, does the text of Article II:1(a)-(b) exclude illicit trade? No, nothing in that text suggests a distinction between legal and illegal trade, or that its MFN and tariff binding obligations apply only to lawful trade. "Commerce" and "importation" are used in Article II:1(a) and (b), respectively, without qualification. Predictably, the Appellate Body turned to the *Shorter Oxford English Dictionary*, which defines "commerce" as "buying and selling; the exchange of merchandise or services, especially on a large scale."[512] All exchanges count as "commerce," and their nature, type, reason, or function – licit or illicit – is irrelevant. Likewise, the *Shorter OED* teaches that "importation" refers to "the action of importing or bringing in something, specifically goods from another country." [513] Under this definition, stuff is imported, plain and simple, whether that stuff is legal or illegal to produce or consume, buy or sell.

Second, does the context of Article II:1(a)-(b) suggest exclusion of illegal trade from these obligations? No. GATT Articles II:2 and VII:2 provide that context. Article II:2 states:

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

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

> Article II:2 of … GATT … provides immediate context for the obligations contained in Article II:1 by setting out instances in which the obligations of Article II:1 do not apply. Article II:2 provides that nothing in Article II, including Article II:1(b), shall prevent a Member from imposing on the importation of a product: (i) a charge equivalent to an internal tax imposed consistently with Article III:2 of … GATT … in respect of a like domestic product; (ii) an anti-dumping or countervailing duty applied consistently with Article VI of … GATT …; or (iii) fees or other charges commensurate with the cost of services rendered. *The three instances identified in Article*

512 *Colombia Money Laundering* Appellate Body Report, footnote 100 at ¶ 5:34.
513 *Colombia Money Laundering* Appellate Body Report, footnote 102 at ¶ 5:35.

> *II:2, in which the obligations set out in Article II:1 do not apply, constitute a closed list. … [T]he fact that Article II:2 sets out a closed list of instances in which bound tariff rates may be exceeded provides further support for a reading of Article II:1 that does not exclude what Colombia considers to be illicit trade.*[514]

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

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

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

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

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514 *Colombia Money Laundering* Appellate Body Report, ¶ 5:36. (Emphasis added.)

country of importation adjusted in accordance with the provisions of Article 8 [of the *Agreement*]."

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

> While Article VII:2 of … GATT … provides that the value of a product for customs purposes should be based on "actual value" and not on "arbitrary or fictitious values" or sales on other than "fully competitive conditions," these provisions do not support a reading of Article II:1 of … GATT … that excludes from its disciplines transactions that are at "artificially low prices," "do not result from market operations," or are otherwise classified as illicit trade. Rather, *Article VII:2 of … GATT … and the Customs Valuation Agreement have a different focus than Article II:1 of the GATT … in that they set out conditions in which customs authorities may adjust or reject the declared value of goods and instead rely upon alternative methods for determining the value of those goods for customs purposes*. Thus, where a declared value of a transaction is rejected because it is unduly low, the result under the *Customs Valuation Agreement* would be that the value for customs purposes would be adjusted or determined in an alternative manner. This value would subsequently serve as the basis for any imposition of a tariff in accordance with Article II:1 of … GATT…. *The existence of such alternative methods for determining the customs value under these provisions confirms that the underlying transaction remains subject to the bound tariff rates pursuant to Article II:1 of … GATT … and the relevant part of a Member's Schedule*. This further supports our understanding that the scope of Article II:1(a) and (b) … does not exclude what Colombia considers to be illicit trade.[515]

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

Third, do object and purpose of GATT suggest the scope of Article II:1(a)-(b) should be circumscribed to exclude illegal trade? No. Quite the contrary, the pillar obligation of tariff bindings, and the extension of them to all WTO Members on an MFN basis, are vital to promote trade:

> 5:40. Colombia further contends that the object and purpose of … GATT …, as reflected in the *Preamble*, supports its interpretation of Article II:1(a) and (b). Specifically, Colombia points out that the criminal activities associated with illicit trade reduce standards of living, generate economic distortions that hurt employment, and reduce real

[515] *Colombia Money Laundering* Appellate Body Report, ¶ 5:39. (Emphasis added.)

> income. … *[T]he Appellate Body has previously stated that … GATT … strikes a balance between Members' obligations, on the one hand, and their rights to adopt measures seeking to achieve legitimate policy objectives, on the other hand*. [The Appellate Body cited Paragraph 156 of its 1998 *Turtle Shrimp* Report.[516]] To effectuate such a balance, Article XX of … GATT … contains a number of exceptions that reflect important societal objectives other than trade liberalization, which may be relied upon in seeking to justify an otherwise GATT-inconsistent measure. … GATT … thus preserves the right of Members to pursue legitimate policy objectives, including addressing concerns relating to, *in casu* [in this case], money laundering, through the general exceptions set out in Article XX.
>
> 5:41. … [C]olombia's interpretation would allow a Member to exclude from the scope of Article II:1(a) and (b) of … GATT … trade activities that it has *unilaterally* determined to be illicit under its domestic law. Such an interpretation would mean that, in respect of concessions inscribed in a Member's Schedule, the scope of a Member's obligation could vary depending on what is defined as illicit or asserted to be illicit under that Member's domestic law. … [S]uch an approach to the interpretation of Article II:1(a) and (b) would *create uncertainty* as to the scope of coverage of tariff concessions undertaken by Members.[517]

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

- ***Vienna Convention* Methodology, Yet Radically Different Interpretations**

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

In sum, Colombia sought to write a law enforcement exception into Article II that simply does not exist, and has no justification. Moreover, a WTO Member seeking to

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516 *See* WTO Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted 6 November 1998) (discussed in a separate Chapter).

517 *Colombia Money Laundering* Appellate Body Report, ¶¶ 5:41-5:42. (Emphasis added.)

address money laundering concerns can avail itself of the general exceptions in Article XX. In the *obiter dicta* of the Appellate Body:

> [W]e wish to remark that our analysis set out above should not be understood to suggest that Members cannot adopt measures seeking to combat money laundering. This aim, however, cannot be achieved through interpreting Article II:1 of … GATT … in a manner that excludes from the scope of that provision what a Member considers to be illicit trade. A Member's right to adopt and pursue measures seeking to address concerns relating to money laundering can be appropriately preserved when justified, for example, in accordance with the general exceptions contained in Article XX of … GATT….[518]

This *dicta* is redolent of what the Appellate Body stated at the conclusion of its 2000 *Foreign Sales Corporation* case, namely, that it was not telling the United States to abolish its unitary (worldwide) taxation system and adopt a European-style VAT; rather, it was merely instructing America to avoid tax measures that are Red Light subsidies.[519] The problem with that *dicta*, in that case and the case at bar, is that it is mildly disingenuous.

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

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

VII. Specific Minimum Duties and 1998 *Argentina Footwear* Case

WTO APPELLATE BODY REPORT, *ARGENTINA – MEASURES AFFECTING IMPORTS OF FOOTWEAR, TEXTILES, APPAREL AND OTHER ITEMS*, WT/DS56/AB/R (ADOPTED 22 APRIL 1998)

I. Introduction: Statement of the Appeal

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518 *Colombia Money Laundering* Appellate Body Report, ¶ 5:47.

519 *See* Appellate Body Report, *United States – Tax Treatment for "Foreign Sales Corporations,"* WT/DS108/AB/R (adopted 20 March 2000), analyzed in the *WTO Case Review 2000*.

1. … The Panel was established to consider a complaint by the United States against Argentina concerning certain measures maintained by Argentina affecting imports of textiles, apparel, footwear and other items, in particular, measures imposing specific duties on various textile, apparel or footwear items allegedly in excess of the bound rate of 35 per cent *ad valorem* provided in Argentina's Schedule LXIV….

2. Argentina approved the results of the Uruguay Round of multilateral trade negotiations through Law No. 24.425, promulgated on 23 December 1994, and the bound rate of 35 per cent *ad valorem* included in its Schedule LXIV became effective on 1 January 1995. This binding was generally applicable to imports, with a number of exceptions that are not relevant in this case. In parallel, Argentina maintained a regime of Minimum Specific Import Duties ("*DIEM*") [in Spanish, *Derechos de Importación Específicos Mínimos*] as from 1993 in respect of textiles, clothing and footwear through a series of resolutions and decrees commencing with Resolution No. 811/93 of 29 July 1993 (concerning textiles and apparel) and Resolution No. 1696/93 of 28 December 1993 (concerning footwear), with subsequent extensions and modifications. The *DIEM* were revoked in respect of footwear on 14 February 1997 through Resolution No. 225/97 of the Argentine Ministry of Economy and Public Works and Services, and the Panel decided not to review the consistency with the *WTO Agreement* of the *DIEM* with respect to footwear. ... [The stated purpose of the minimum specific import duties was to counteract injury allegedly suffered by Argentine manufacturers as a result of imports of T&A, and footwear, at prices lower than the production costs in the countries of origin or lower than international prices. In brief, the system worked as follows: For each relevant HS tariff line of T&A, and footwear, Argentina calculated an average import price. Once it had determined this price for a particular category, Argentina multiplied that price by the bound rate of 35 per cent, resulting in a specific minimum duty for all products in that category. Upon the importation of covered textiles, apparel, or footwear, depending on the customs value of the goods concerned, Argentina applied either the specific minimum duty applicable to those items or the *ad valorem* rate, whichever was higher.]

…

IV. Interpretation of Article II of the GATT 1994

A. The Type of Duty

…

41. Argentina appeals …, arguing that the Panel erred in its interpretation that Article II of the GATT 1994 does not permit a Member to apply a type of duty other than that provided for in that Member's Schedule. Argentina maintains that the Panel should have taken into account whether the level of protection to domestic products ensuing from the application of the actual duty imposed is, or is not, higher than the level of protection resulting from the duty bound in the Member's Schedule. In Argentina's view, a Member is free to choose the type of duty applied, provided that the maximum level of protection specified in that Member's Schedule is not exceeded.

…

44. The legal issue before us here is whether the application by a Member of a type of duty other than that provided for in its Schedule is, in itself, inconsistent with Article II of the GATT 1994. We now turn to an examination of this question, first, in the light of the

terms of Article II:1 of the GATT 1994 and, second, in the context of Argentina's *DIEM* system at issue in this case.

45. The terms of Article II:1(a) require that a Member "accord to the commerce of the other Members treatment no less favorable than that provided for" in that Member's Schedule. Article II:1(b), first sentence, states, in part: "The products described in Part I of the Schedule … shall, on their importation into the territory to which the Schedule relates, ... be exempt from ordinary customs duties in excess of those set forth and provided therein." Paragraph (a) of Article II:1 contains a general prohibition against according treatment less favorable to imports than that provided for in a Member's Schedule. Paragraph (b) prohibits a specific kind of practice that will always be inconsistent with Paragraph (a): that is, the application of ordinary customs duties in excess of those provided for in the Schedule. Because the language of Article II:1(b), first sentence, is more specific and germane to the case at hand, our interpretative analysis begins with, and focuses on, that provision.

46. A tariff binding in a Member's Schedule provides an upper limit on the amount of duty that may be imposed, and a Member is permitted to impose a duty that is less than that provided for in its Schedule. The principal obligation in the first sentence of Article II:1(b), as we have noted above, requires a Member to refrain from imposing ordinary customs duties *in excess of* those provided for in that Member's Schedule. However, the text of Article II:1(b), first sentence, does not address whether applying a *type* of duty different from the *type* provided for in a Member's Schedule is inconsistent, in itself, with that provision.

47. In accordance with the general rules of treaty interpretation set out in Article 31 of the *Vienna Convention*, Article II:1(b), first sentence, must be read in its context and in light of the object and purpose of the GATT 1994. Article II:1(a) is part of the context of Article II:1(b); it requires that a Member must accord to the commerce of the other Members "treatment no less favorable than that provided for" in its Schedule. … [A]pplication of customs duties *in excess of* those provided for in a Member's Schedule, inconsistent with the first sentence of Article II:1(b), constitutes "less favorable" treatment under the provisions of Article II:1(a). A basic object and purpose of the GATT 1994, as reflected in Article II, is to preserve the value of tariff concessions negotiated by a Member with its trading partners, and bound in that Member's Schedule. Once a tariff concession is agreed and bound in a Member's Schedule, a reduction in its value by the imposition of duties in excess of the bound tariff rate would upset the balance of concessions among Members.

48. We turn next to examine whether, by applying the *DIEM* instead of the *ad valorem* duties provided for in its Schedule, Argentina has acted inconsistently with Article II:1(b), first sentence, of the GATT 1994.

49. … [T]he Argentine methodology of determining the *DIEM* is, first, to identify a representative international price for each relevant tariff category of textile and apparel products. Once this representative international price has been established, Argentina then

multiplies that price by the bound rate of 35 per cent, or by the actually applied rate of less than 35 per cent, to arrive at the *DIEM* for the products in that category. Customs officials are directed, in a specific transaction, to collect the higher of the two values: the applied *ad valorem* rate or the *DIEM*.

50. To grasp the meaning and implications of the Argentine system, it is important to keep in mind that for any specific duty, there is an *ad valorem* equivalent deduced from the ratio of the absolute amount collected to the price of the imported product. Thus, the *ad valorem* equivalent of a specific duty varies with the variation in the price of imports. It is higher for low-priced products than for high-priced products. To illustrate, a specific duty of $10 collected on all imported products in a certain tariff category, is equivalent to 10 per cent *ad valorem* if the price of the imported product is $100; however, it is equivalent to 20 per cent *ad valorem* if the price is only $50.

51. Thus, under the Argentine system, whenever the amount of the specific duty is determined by applying the bound rate of 35 per cent to the representative international price in a certain tariff category, the *ad valorem* equivalent of the specific duty is greater than 35 per cent for all imports at prices below the representative international price; it is less than 35 per cent for all imports at prices above the representative international price. Therefore, collecting the higher of the two values means applying the bound tariff rate of 35 per cent *ad valorem* to the range of prices above the representative international price, and applying the minimum specific import duty with an *ad valorem* equivalent of more than 35 per cent to the range of prices below the representative international price.

52. In cases where the amount of the *DIEM* is determined by applying a rate of *less than* 35 per cent – for example, 20 per cent – to the representative international price in a certain tariff category, the result would be as follows. For the range of prices *above* the representative international price, the *ad valorem* equivalent of the specific duty would be less than 20 per cent. With respect to the range of prices *below* the representative international price, a distinction should be made between two zones. As to a certain zone of prices immediately below the representative international price, the *ad valorem* equivalent of the specific duty would be greater than 20 per cent but less than 35 per cent. However, for products at prices below that zone, the *ad valorem* equivalent of the specific duty would be greater than 35 per cent.

53. In the light of this analysis, we may generalize that under the Argentine system, whether the amount of the *DIEM* is determined by applying 35 per cent, or a rate less than 35 per cent, to the representative international price, there will remain the possibility of a price that is sufficiently low to produce an *ad valorem* equivalent of the *DIEM* that is greater than 35 per cent. In other words, the structure and design of the Argentine system is such that for any *DIEM*, no matter what *ad valorem* rate is used as the multiplier of the representative international price, the possibility remains that there is a "break-even" price below which the *ad valorem* equivalent of the customs duty collected is in excess of the bound *ad valorem* rate of 35 per cent.

[The Appellate Body would have done well to provide a simple example of how Argentina's *DIEM* could result in an applied rate exceeding the bound 35% ceiling. So, to be clear, here is such an illustration. Assume the representative international price equals $100. Argentina applies its bound rate of 35% to this $100 price, resulting in a minimum tariff liability of $35. Now consider three scenarios. First, a shipment of subject merchandise arrives at an Argentine port and costs $100: the actual (transaction) value and the representative international price are equal. Argentina applies its bound rate of 35% to this actual (transaction) value of $100, resulting in a tariff liability of $35. Because $35 is 35% of $100, the applied rate does not exceed the bound rate. Second, suppose the actual price of a shipment equals $200: here, the actual price exceeds the benchmark. Again, Argentina applies its bound rate of 35% to this actual price, $200. The result is a tariff liability of $70 (35% of $200). Why? Because under the *DIEM*, Argentina charges the importer the higher of the tariff liability using the (1) representative international price versus (2) actual price of the subject merchandise, *i.e.*, the higher of a tariff of $35 versus $70 – obviously, $70. Third, suppose the actual value of subject merchandise is $50 – clearly, it is lower than the representative price. Once again, Argentina applies its 35% bound rate to the price of the shipment, *i.e.*, it multiplies 35% times $50. The tariff liability thus is $17.50. And, again, Argentina applies the higher of the tariff liability using its standard international price of $100 versus the tariff liability from the actual price of $50. That is a choice between $35 and $17.50, so the choice obviously the higher figure is $35. Why, in this third scenario, is there a violation of GATT Article II:1(b) tariff binding obligation? Argentina says it used its 35% bound rate. True. But, that is a losing argument. Argentina obfuscates the fact the denominator it associates with the 35% tariff liability computation (tariff rate times price) is the international representative price of $100. In truth, the denominator should be the actual (transaction) value of $50, not the representative price. What is a tariff liability of $35 divided by a price of $50? The answer is a whopping 70%: the actual tariff rate Argentina applies is 70%, not 35%, when the correct price is accounted for:

$$70\% \text{ Actual applied tariff} = \frac{\$35 \textit{ DIEM} \text{ minimum tariff liability}}{\$50 \text{ actual (transaction) value}}$$

Indeed, whenever the actual price of merchandise is below the Argentine benchmark, Argentina violates it tariff binding commitment. What, then, is the incentive the *DIEM* tries to create? The answer is to compel the importer of subject merchandise to price its shipments at or above the international representative price, *i.e.*, to import at $100 or more. Put differently, the representative price is one at which Argentine like product manufacturers want their foreign competitors to charge so they, the domestic companies, are not under-sold. In Antitrust Law lingo, the *DIEM* trickily incentivizes the creation of a price cartel. Who is hurt? Argentine consumers, who seek the widest array of consumption options at the cheapest prices.]

54. … [I]t is possible, under certain circumstances, for a Member to design a legislative "ceiling" or "cap" on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the *ad valorem* duties provided

for in the Member's Schedule. However, no such "ceiling" exists in this case. The measures at issue here, as we have already noted, specifically and expressly require Argentine customs officials to collect the *greater* of the *ad valorem* or the specific duties applicable, with no upper limit on the level of the *ad valorem* equivalent of the specific duty that may be imposed. Before the Panel, Argentina argued that its domestic challenge procedure (*recurso de impugnación*), in combination with the precedence and direct effect of international treaty obligations in the Argentine national legal system, operated as an effective legislative "ceiling" to ensure that a duty in excess of the bound rate of 35 per cent *ad valorem* could never actually be imposed. The Panel did not accept this argument, and Argentina has not appealed from that finding of the Panel. In this case, therefore, there is no effective legislative "ceiling" in the Argentine system which ensures that duties in excess of the bound rate of 35 per cent *ad valorem* will not be applied.

55. We conclude that the application of a type of duty different from the type provided for in a Member's Schedule is inconsistent with Article II:1(b), first sentence, of the GATT 1994 to the extent that it results in ordinary customs duties being levied in excess of those provided for in that Member's Schedule. In this case, we find that Argentina has acted inconsistently with its obligations under Article II:1(b), first sentence, of the GATT 1994, because the *DIEM* regime, by its structure and design, results, with respect to a certain range of import prices in any relevant tariff category to which it applies, in the levying of customs duties in excess of the bound rate of 35 per cent *ad valorem* in Argentina's Schedule.

56. We modify the Panel's findings … accordingly. [The Appellate Body upheld the Panel finding that the U.S. adduced sufficient evidence for a *prima facie* violation of GATT Article II:1 for 940 relevant tariff categories of T&A products in the *Nomenclatura Común MERCOSUR* ("N.C.M.") of Argentina, even though the U.S. submitted average calculations for 118 tariff categories. The Appellate Body agreed with the Panel that data submitted by the U.S. on the average import price of certain products in relation to the total amount of duties collected "…provides *reliable information* that, on a tariff line basis, duties above the bound rate of 35 per cent *ad valorem* have been imposed." (Emphasis added.) Appellate Body Report, ¶ 61. The Appellate Body also agreed with the Panel and U.S. that "… if an average calculation shows duties above 35 per cent, this is *evidence of a sufficient number of transactions* which were subject to duties imposed above the 35 per cent *ad valorem*." (Emphasis added.) *Id*.]

VIII. Legitimate Expectations, Tariff Bindings and 1998 *EC LAN* Case

WTO APPELLATE BODY REPORT, *EUROPEAN COMMUNITIES – CUSTOMS CLASSIFICATION OF CERTAIN COMPUTER EQUIPMENT*, WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R (ADOPTED 22 JUNE 1998)

I. INTRODUCTION

1. … The Panel was established to consider complaints by the United States against the European Communities, Ireland and the United Kingdom concerning the tariff

treatment of Local Area Network ("LAN") equipment and personal computers with multimedia capability ("PCs with multimedia capability"). The United States claimed that the European Communities, Ireland and the United Kingdom accorded to LAN equipment and/or PCs with multimedia capability treatment less favorable than that provided for in Schedule LXXX of the European Communities ("Schedule LXXX") and, therefore, acted inconsistently with their obligations under Article II:1 of the *General Agreement on Tariffs and Trade 1994* (the "GATT 1994").

…

V. "LEGITIMATE EXPECTATIONS" IN THE INTERPRETATION OF A SCHEDULE

74. The European Communities ... submits that the Panel erred in interpreting Schedule LXXX, in particular, by:

(a) reading Schedule LXXX in the light of the "legitimate expectations" of an exporting Member; and
(b) considering that Article II:5 of the GATT 1994 confirms the interpretative value of "legitimate expectations". ...

75. Schedule LXXX provides tariff concessions for ADP [automatic data processing] machines under [HS] Headings 84.71 and 84.73 and for telecommunications equipment under Heading 85.17. The customs duties set forth in Schedule LXXX on telecommunications equipment are generally higher than those on ADP machines. … Schedule LXXX does not contain any explicit reference to "LAN equipment" and … the European Communities currently treats LAN equipment as telecommunications equipment. The United States, however, considers that the EC tariff concessions on ADP machines, and not its tariff concessions on telecommunications equipment, apply to LAN equipment. The United States claimed before the Panel, therefore, that the European Communities accords to imports of LAN equipment treatment less favorable than that provided for in its Schedule, and thus has acted inconsistently with Article II:1 of the GATT 1994. The United States argued that the treatment provided for by a concession is the treatment reasonably expected by the trading partners of the Member which made the concession. On the basis of the negotiating history of the Uruguay Round tariff negotiations and the actual tariff treatment accorded to LAN equipment by customs authorities in the European Communities during these negotiations, the United States argued that it reasonably expected the European Communities to treat LAN equipment as ADP machines, not as telecommunications equipment.

…

80. We disagree with the Panel's conclusion that the meaning of a tariff concession in a Member's Schedule may be determined in the light of the "legitimate expectations" of an exporting Member. First, we fail to see the relevance of the *EEC – Oilseeds* [*i.e.*, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-Feed Proteins*, GATT B.I.S.D. (37th Supp.) at 86 ¶ 148 (adopted 25 January 1990)] Panel Report with respect to the interpretation of a Member's Schedule in the context of a violation complaint made under Article XXIII:1(a) of the GATT 1994. The *EEC – Oilseeds* panel report dealt with a non-violation complaint under Article XXIII:1(b) of the GATT 1994, and is not legally relevant to the case before

us. Article XXIII:1 of the GATT 1994 provides for three legally-distinct causes of action on which a Member may base a complaint; it distinguishes between so-called *violation* complaints, *non-violation* complaints and *situation* complaints under paragraphs (a), (b) and (c). The concept of "reasonable expectations," which the Panel refers to as "legitimate expectations," is a concept that was developed in the context of *non-violation* complaints. As we stated in *India – Patents*, for the Panel to use this concept in the context of a violation complaint "melds the legally-distinct bases for 'violation' and 'non-violation' complaints under Article XXIII of the GATT 1994 into one uniform cause of action," and is not in accordance with established GATT practice. [*See* Report of the Appellate Body, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R. ¶¶ 36, 41-42 (adopted 16 January 1998).]

81. Second, we reject the Panel's view that Article II:5 of the GATT 1994 confirms that "legitimate expectations are a vital element in the interpretation" of Article II:1 of the GATT 1994 and of Members' Schedules. It is clear from the wording of Article II:5 that it does not support the Panel's view. This Paragraph recognizes the possibility that the treatment *contemplated* in a concession, provided for in a Member's Schedule, on a particular product, may differ from the treatment *accorded* to that product and provides for a compensatory mechanism to re-balance the concessions between the two Members concerned in such a situation. However, nothing in Article II:5 suggests that the expectations of *only* the exporting Member can be the basis for interpreting a concession in a Member's Schedule for the purposes of determining whether that Member has acted consistently with its obligations under Article II:1. In discussing Article II:5, the Panel overlooked the second sentence of that provision, which clarifies that the "contemplated treatment" referred to in that provision is the treatment contemplated by *both* Members.

82. Third, we agree with the Panel that the security and predictability of "the reciprocal and mutually advantageous arrangements directed to the substantial reduction of tariffs and other barriers to trade" is an object and purpose of the *WTO Agreement*, generally, as well as of the GATT 1994. However, we disagree with the Panel that the maintenance of the security and predictability of tariff concessions allows the interpretation of a concession in the light of the "legitimate expectations" of exporting Members, *i.e.*, their *subjective* views as to what the agreement reached during tariff negotiations was. The security and predictability of tariff concessions would be seriously undermined if the concessions in Members' Schedules were to be interpreted on the basis of the subjective views of certain exporting Members alone. Article II:1 of the GATT 1994 ensures the maintenance of the security and predictability of tariff concessions by requiring that Members not accord treatment less favorable to the commerce of *other* Members than that provided for in their Schedules.

83. … [W]e do not agree with the Panel that interpreting the meaning of a concession in a Member's Schedule in the light of the "legitimate expectations" of exporting Members is consistent with the principle of good faith interpretation under Article 31 of the *Vienna Convention*. [Article 31(1) of the *Vienna Convention* provides that "[a] treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose."] Recently, in *India*

– *Patents*, the panel stated that good faith interpretation under Article 31 required "the protection of legitimate expectations." We found that the panel had misapplied Article 31 of the *Vienna Convention* and stated that:

> The duty of a treaty interpreter is to examine the words of the treaty to determine the intentions of the parties. This should be done in accordance with the principles of treaty interpretation set out in Article 31 of the *Vienna Convention*. But these principles of interpretation neither require nor condone the imputation into a treaty of words that are not there or the importation into a treaty of concepts that were not intended. [*See* Appellate Body Report, *India – Patents* at ¶ 45.]

84. The purpose of treaty interpretation under Article 31 of the *Vienna Convention* is to ascertain the *common* intentions of the parties. These *common* intentions cannot be ascertained on the basis of the subjective and unilaterally determined "expectations" of *one* of the parties to a treaty. Tariff concessions provided for in a Member's Schedule – the interpretation of which is at issue here – are reciprocal and result from a mutually-advantageous negotiation between importing and exporting Members. A Schedule is made an integral part of the GATT 1994 by Article II:7 of the GATT 1994. Therefore, the concessions provided for in that Schedule are part of the terms of the treaty. As such, the only rules which may be applied in interpreting the meaning of a concession are the general rules of treaty interpretation set out in the *Vienna Convention*.

85. Pursuant to Article 31(1) of the *Vienna Convention*, the meaning of a term of a treaty is to be determined in accordance with the ordinary meaning to be given to this term in its context and in the light of the object and purpose of the treaty. Article 31(2) of the *Vienna Convention* stipulates that:

> The context, for the purpose of the interpretation of a treaty shall comprise, in addition to the text, including its *Preamble* and Annexes:
>
> (a) any agreement relating to the treaty which was made between all the parties in connection with the conclusion of the treaty;
> (b) any instrument which was made by one or more parties in connection with the conclusion of the treaty and accepted by the other parties as an instrument related to the treaty.

Furthermore, Article 31(3) provides that:

> There shall be taken into account together with the context:
>
> (a) any subsequent agreement between the parties regarding the interpretation of the treaty or the application of its provisions;
> (b) any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation;

> (c) any relevant rules of international law applicable in the relations between the parties.

Finally, Article 31(4) of the *Vienna Convention* stipulates that:

> A special meaning shall be given to a term if it is established that the parties so intended.

86. The application of these rules in Article 31 of the *Vienna Convention* will usually allow a treaty interpreter to establish the meaning of a term. However, if after applying Article 31 the meaning of the term remains ambiguous or obscure, or leads to a result which is manifestly absurd or unreasonable, Article 32 allows a treaty interpreter to have recourse to:

> ... supplementary means of interpretation, including the preparatory work of the treaty and the circumstances of its conclusion.

With regard to "the circumstances of [the] conclusion" of a treaty, this permits, in appropriate cases, the examination of the historical background against which the treaty was negotiated.

87. In Paragraphs 8.20 and 8.21 of the Panel Report, the Panel quoted Articles 31 and 32 of the *Vienna Convention* and explicitly recognized that these fundamental rules of treaty interpretation applied "in determining whether the tariff treatment of LAN equipment … is in conformity with the tariff commitments contained in Schedule LXXX." … [T]he Panel, after a textual analysis, came to the conclusion that:

> … for the purposes of Article II:1, it is impossible to determine whether LAN equipment should be regarded as an ADP machine purely on the basis of the ordinary meaning of the terms used in Schedule LXXX taken in isolation.

Subsequently, the Panel abandoned its effort to interpret the terms of Schedule LXXX in accordance with Articles 31 and 32 of the *Vienna Convention*. In doing this, the Panel erred.

88. … [T]he Panel referred to the *context* of Schedule LXXX as well as to the *object and purpose* of the *WTO Agreement* and the GATT 1994, of which Schedule LXXX is an integral part. However, it did so to support its proposition that the terms of a Schedule may be interpreted in the light of the "legitimate expectations" of an exporting Member. The Panel failed to examine the context of Schedule LXXX and the object and purpose of the *WTO Agreement* and the GATT 1994 in accordance with the rules of treaty interpretation set out in the *Vienna Convention*.

89. We are puzzled by the fact that the Panel, in its effort to interpret the terms of Schedule LXXX, did not consider the *Harmonized System* and its *Explanatory Notes*. …

[D]uring the Uruguay Round negotiations, both the European Communities and the United States were parties to the *Harmonized System*. … [T]he Uruguay Round tariff negotiations were held on the basis of the *Harmonized System's* nomenclature and that requests for, and offers of, concessions were normally made in terms of this nomenclature. Neither the European Communities nor the United States argued before the Panel that the *Harmonized System* and its *Explanatory Notes* were relevant in the interpretation of the terms of Schedule LXXX. We believe, however, that a proper interpretation of Schedule LXXX should have included an examination of the *Harmonized System* and its *Explanatory Notes*.

90. A proper interpretation also would have included an examination of the existence and relevance of subsequent practice. … [T]he United States referred, before the Panel, to the decisions taken by the Harmonized System Committee of the WCO in April 1997 on the classification of certain LAN equipment as ADP machines. … The European Communities observed that it had introduced reservations with regard to these decisions and that, even if they were to become final as they stood, they would not affect the outcome of the present dispute for two reasons: first, because these decisions could not confirm that LAN equipment was classified as ADP machines in 1993 and 1994; and, second, because this dispute "was about duty treatment and not about product classification." … [T]he United States agrees with the European Communities that this dispute is not a dispute on the *correct* classification of LAN equipment, but a dispute on whether the tariff treatment accorded to LAN equipment was less favorable than that provided for in Schedule LXXX. However, we consider that in interpreting the tariff concessions in Schedule LXXX, decisions of the WCO may be relevant; and, therefore, they should have been examined by the Panel.

91. We note that the European Communities stated that the question whether LAN equipment was bound as ADP machines, under Headings 84.71 and 84.73, or as telecommunications equipment, under Heading 85.17, was *not* addressed during the Uruguay Round tariff negotiations with the United States. We also note that the United States asserted that:

> In many, perhaps most, cases, the detailed product composition of tariff commitments was *never* discussed in detail during the tariff negotiations of the Uruguay Round ... (Emphasis added.)

and that:

> The U.S.-EC negotiation on Chapter 84 provided an example of how two groups of busy negotiators dealing with billions of dollars of trade and hundreds of tariff lines relied on *a continuation of the status quo*. (Emphasis added.)

This may well be correct and, in any case, seems central to the position of the United States. Therefore, we are surprised that the Panel did not examine whether, during the Tokyo Round tariff negotiations, the European Communities bound LAN equipment as ADP machines or as telecommunications equipment.

[The Appellate Body also faulted the Panel for the way in which it examined EC classification practice, during the Uruguay Round, of LAN equipment. This practice is a supplementary means of interpretation, within the meaning of Article 32 of the *Vienna Convention*. But, said the Appellate Body, the Panel did not treat the practice as a supplement. The purpose of treaty interpretation is to establish a common intention of the parties, yet the practice the Panel examined was that only of the EC. The Panel erroneously determined American classification practice, during the Uruguay Round, of LAN equipment to be irrelevant. Thus, the Panel wrongly based its conclusion about common intention on just one party's practice – the EC.]

Chapter 15

SECOND PILLAR (CONTINUED): TARIFF CHANGES[520]

I. Modifying Tariff Schedules and Withdrawing Concessions under GATT Article XXVIII

The reduction or elimination of tariffs is the classic device to promote free trade. Article II of GATT, Article 302 of *NAFTA*, and other tariff provisions of FTAs embody the principle of tariff concessions and binding tariff commitments. No doubt these provisions are significantly responsible for major decreases in levels of protection. The Uruguay Round MTAs yielded an average tariff reduction of 40%, and *NAFTA* resulted in the creation of a cross-border duty-free market. Both regimes cover agricultural as well as industrial products. Thanks to MTNs and FTAs, the tariff levels of major average in the single digits: 0.8% for Canada; 3.5% for China; and 1.6% for the U.S. and EU.

Setting aside problems of tariff overhang, tariff peaks, and tariff dispersion (both within and across countries), once MFN rates are bound, the issue of exceptions to the bindings arises. As Professor Kenneth W. Dam (1932-2022) pointed out long ago in *The GATT* (1970), tariff concessions are subject to various limitations. Consequently, the cause of free trade is rarely promoted through a dramatic, immediate, and comprehensive reduction or elimination of tariffs on all imports. Rather, trade relations among countries often are managed through tariff reductions that are carefully calculated and circumscribed, and often undermined.

Exceptions to and limitations on tariff bindings suggest an important tip when beginning an inquiry into the provisions of a trade-liberalizing agreement. Do not be mesmerized by a grand, market-opening provision ballyhooed by free-trade oriented politicians. Wait to see what exceptions exist. Consider carefully the extent to which the grand provision is eroded by exceptions (sometimes, a veritable laundry list of them).

II. GATT Article XXVIII Procedures

● Agreement versus No Agreement Scenarios

Perhaps the most obvious limit to – or crack in – the GATT tariff bindings pillar is in Article XXVIII. Following the procedures laid out in that Article, a WTO Member may modify or even withdraw permanently the tariff concessions bound in its schedule.

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[520] Documents References:
(1) *Havana (ITO) Charter* Article 31
(2) GATT Articles I, II, XI

Article XXVIII:1 lays out those procedures in brief. It calls for a negotiation and agreement between, on the one hand, A WTO Member seeking to modify or withdraw its tariff concession (known as the "applicant") and, on the other hand, the Member with which the concession initially was negotiated, plus any other Member with a "principal supplying interest" in the product. Consultation is required with any Members deemed by the WTO Membership to have a "substantial interest in … [the] concession."

Article XXVIII:2 indicates that the negotiations and agreement may include provisions for compensatory adjustments with respect to other products.[521] So, for example, setting aside concerns about equivalence in volume or value of trade, Egypt might be permitted to withdraw a tariff binding on papyrus, resulting in an increase from 5% to 10%, if it agrees to reduce its bound rate on dates from 20% to 10%. Article XXVIII:2 also sets forth the key criterion for modification or withdrawal: the Members "shall endeavor to maintain a general level of reciprocal and mutually advantageous concessions not less favorable to trade than that provided for" before the negotiation. In other words, the overall level of protection is not supposed to rise.

Suppose no agreement is reached. Then, under either Article XXVIII:3(a) or 4(d), the applicant Member is free to modify or withdraw its concession unilaterally. But, the other concerned Members can withdraw "substantially equivalent concessions" from the applicant. (Whether Article XXVIII:3(a) or 4(d) is relevant depends on the exact procedure used by the applicant. If the normal three-year cycle contemplated in Article XXVIII:1 is used, then Paragraph 3(a) is relevant. If the application for modification or withdrawal is made at any other time in special circumstances, then Paragraph 4 is applicable.)

Likewise, even if an agreement is reached, if a particular Member has a substantial interest that has not been satisfied, then it may act under Article XXVIII:3(b) or 4(b), *i.e.*, withdraw substantially equivalent concessions *vis-à-vis* the applicant. Finally, observe Article XXVIII:5 enables Members to reserve the right to modify or withdraw concessions, and authorizes other Members to counter with modifications or withdrawals of their own.

- **Brexit Case Study**

Brexit (discussed in separate Chapters) provided an illustration of the need for GATT Article XXVIII compensatory adjustment negotiations. John A. Clarke, the Director for International Affairs, European Commission Directorate General for Agriculture and Rural Development, wrote a particularly clear, insightful analysis of what happened and why.[522] On the one hand, the tariff changes associated with the U.K. leaving the EU were straightforward, because there were none:

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[521] Interestingly, due to Brexit, the USTR divided the TRQs the U.S. previously applied to all EU goods between the EU and U.K. *See* Office of the United States Trade Representative, *Modification of U.S. Tariff-Rate Quotas and the Harmonized Tariff Schedule of the United States*, 86 Federal Register number 126, 35560-35561 (6 July 2021), www.govinfo.gov/content/pkg/FR-2021-07-06/pdf/2021-14344.pdf.

[522] *See* John A. Clarke, *"Breaking Up is Hard to Do," or How the EU and the U.K. Renegotiated Their WTO Quotas to Reflect Brexit*, 27 INTERNATIONAL TRADE LAW & REGULATION issue 3, 167-176 (2021). [Hereinafter, *"Breaking Up is Hard to Do."*]

> Where bound tariff concessions were concerned, the U.K. simply copy-pasted the EU MFN tariff schedule, so as to ensure there would be no changes in terms of access to its market. For example, the U.K. maintained in its own new bound schedule the EU's current 10 percent import tariff on cars, as well as the EU's MFN tariff of 16 percent on honey. This provided the necessary guarantees to other WTO Members that access opportunities to the U.K. would not in any way diminish following its withdrawal from the EU. Nothing, of course, will stop the U.K. from reducing, on an MFN basis, its applied tariff to below those bound levels, should it choose to do so in the future, or indeed reduce its bound tariffs.[523]

On the other hand, TRQs required detailed consideration. That is, how the EU and U.K. were to deal with the 143 pre-Brexit TRQs bound in the EU's schedule was "[a] less simple question:"[524]

> The majority of these 143 TRQs were negotiated and agreed as a result of the Uruguay Round negotiations on agriculture and fisheries, where for sectors such as beef, poultry, sugar, or rice, to name just the most sensitive, prohibitive duties or outright import prohibitions were replaced by controlled access via TRQs. Several of these quotas have been modified subsequently to reflect successive enlargements of the EU, or to compensation other Members of the WTO for the introduction of higher duties in cases where the TRQs did not achieve their purported aim of managing imports at an acceptable level.[525]

Note GATT Article XIII "permits the replacement of unlimited tariff concessions by triaff quotas, but requires that in doing so," the Member introducing the TRQ "maintain[] the general level of trade that existed prior to the quota being introduced."[526]

How, then, did the post-Brexit EU modify its 143 TRQs in its Schedule of Concessions "to reflect the contraction of its customs union, or in GATT terms, the substitution of two customs territories for one"?[527] There were two historical parallels, but neither yielded a legal precedent: the 1947 British Partition of India and Pakistan, and the 1991 Velvet Revolution that produced the division of Czechoslovakia into two independent WTO Members, the Czech Republic and Slovakia.[528] Essentially, in early 2017, the U.K. and EU agreed to a three-point plan. The "political message" of this plan sent by them to the rest of the WTO was, "these will be our new Schedules form 1 January 2021. We believe they preserve your rights and obligations, but if you have doubts, we are ready to negotiate with you according to the principles of GATT Article XXIV and XXVIII."[529]

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523 *"Breaking Up is Hard to Do,"* 168.
524 *"Breaking Up is Hard to Do,"* 168.
525 *"Breaking Up is Hard to Do,"* 168.
526 *"Breaking Up is Hard to Do,"* footnote 1 at 168.
527 *"Breaking Up is Hard to Do,"* 168.
528 *See "Breaking Up is Hard to Do,"* 168-169.
529 *"Breaking Up is Hard to Do,"* 171.

First, the U.K. and EU agreed the U.K. would keep the same set of TRQs in its Schedule of Concessions.[530] The U.K. made a few tariff cuts in the TRQs, which as an independent WTO Member following Brexit it was free to do.

Second, the two sides agreed to minimize the risk of a legal challenge under the *DSU* by ensuring that third-country Members holding rights in a TRQ would not be diminished.[531] That is, the pre-existing terms of trade – the volumes and duties of concessions offered by the pre-Brexit EU customs union – would remain the same for third countries, albeit spread across two separate post-Brexit customs territories, the U.K. and EU. There were 22 affected third countries: Argentina, Australia, Brazil, Canada, Chile, China, Costa Rica, Cuba, Egypt, India, Indonesia, Malaysia, Mexico, New Zealand, Norway, Pakistan, Russia, Switzerland, Taiwan, Thailand, Uruguay, and U.S.[532] The U.K. and EU sent individual notifications, through the WTO Secretariat, to all of them.

Third, the U.K. and EU agreed to a methodology embodying the GATT Article XXVIII principle that the overall level of concessions across the two (U.K. and EU) post-Brexit Schedules of Concessions be maintained *vis-à-vis* the single (EU) pre-Brexit Schedule. That methodology involved "splitting," or "apportioning," every TRQ "to reflect the share that was imported into and consumed in the U.K. and the proportion consumed in the [post-Brexit] EU-27."[533] This apportionment proved difficult, because of the "Rotterdam Effect." The place of importation into the EU single market, say the Port of Rotterdam, is not necessarily the place of final consumption, which could be Dijon. Also in keeping with Article XXVIII, the U.K. and EU used data for a representative reference period, typically the most recent three-year period for which statistics were available. That was 2013-2015, the three years just before the 23 June 2016 Brexit referendum.

Alas, the U.K.-EU solution "proved controversial."[534] Several WTO Members "disagreed with the apportionment methodology, contending that the EU and U.K. should not simply apportion the existing TRQ volumes, but that the EU-27 should maintain the EU-28 volumes, and the U.K. should open the same volumes, or at least open up a new volume reflecting its historical consumption."[535] Australia, Chile, New Zealand, Russia, and the U.S. "were vehement in claiming … the apportionment approach not only had no basis in WTO law, but that it would reduce their market access by removing the current flexibility to circulate goods freely across the EU-28 single market."[536] That was because importers no longer could redirect consignments to the U.K. if they were not sold in Luxembourg, or *vice versa*, because the U.K. no longer was part of the EU. In essence, the third country Members argued "EU-28 was better than EU-27 + 1," hence they should be compensated.[537] For example, "Australia argued that the loss of EU-28 customs union flexibility represented the equivalent in commercial terms of a 13-14 percent reduction in

530 *"Breaking Up is Hard to Do,"* 170.
531 *"Breaking Up is Hard to Do,"* 170-171.
532 *"Breaking Up is Hard to Do,"* footnote. 8 at 171.
533 *"Breaking Up is Hard to Do,"* 170-171.
534 *"Breaking Up is Hard to Do,"* 172.
535 *"Breaking Up is Hard to Do,"* 172.
536 *"Breaking Up is Hard to Do,"* 172.
537 *"Breaking Up is Hard to Do,"* 173.

the volume of each TRQ and that the EU and the U.K. should thus each compensate Australia through a corresponding increase on its apportioned volumes."[538] The EU countered it could not verify that calculation. Moreover, said the EU, it could have – but did not – demand compensation from third country Members every time the EU previously had enlarged, because those Members had received from the EU "more market flexibility by virtue of the expansion of the borderless [EU] market."[539]

Note that Article 18 of the 24 December 2020 *Trade and Cooperation Agreement* (*TCA*), *i.e.*, the *Brexit Deal* (discussed in a separate Chapter), the U.K. and EU each renounced the right of access to the WTO TRQs of the other party. This mattered because if they had not done so, then third-country Members would have had to compete with the U.K. and EU for their TRQs, and hence would have been partly crowded out.[540] For instance, Australia would have contested with the U.K. for access to an EU TRQ, and the U.S. likewise would have fought with the EU for a portion of a U.K. TRQ.

Across 2019-2020, in seven negotiating rounds, the U.K., EU, and third country WTO Members struggled with post-Brexit TRQs.[541] Ultimately, by mid-2021, most of those Members (*e.g.*, Argentina, Australia, Canada, Costa Rica, Cuba, Egypt, Indonesia, Mexico, Norway, Pakistan, Switzerland, Thailand, and the U.S.) concluded individualized agreements. Any third country holding rights in an EU-28 TRQ that did not reach a negotiated settlement would have been subject to the U.K.-EU apportionment method based on 2013-2015 trade data. Interestingly, a provision in these agreements stated the principles and methodology used for the allotments did not set a precedent. Yes, they did, said Director Clarke: "in classical GATT-speak, each party formally preserve[d] its position, even though in reality a precedent *has* been set. Because on what basis would the EU, in the (one hopes unlikely) event of another secession, wish to change the approach to TRQs grounded on GATT Article XXVIII principles that it has applied in the case of the U.K.'s withdrawal?"[542]

III. Differences between GATT Articles XXVIII and XIX

It is important to appreciate the differences between modification or withdrawal under GATT Article XXVIII, on the one hand, and an escape clause action under GATT Article XIX, the safeguard remedy, on the other hand. There are four principal differences: scope; duration; timing; and substantive standards.

1st: Through Article XXVIII a Member can renegotiate several unrelated concessions, or conceivably even its entire tariff schedule. In contrast, Article XIX is episodic. A WTO Member can invoke it only one concession at a time, or perhaps a few concessions relating to a single industry. Thus, an Article XXVIII action could potentially affect a greater volume of trade

538 *"Breaking Up is Hard to Do,"* 173.
539 *"Breaking Up is Hard to Do,"* 172.
540 *See "Breaking Up is Hard to Do,"* 173.
541 *See "Breaking Up is Hard to Do,"* 173, 176
542 *"Breaking Up is Hard to Do,"* 176. (Emphasis original.)

than an Article XIX action. However, Article XIX allows for the suspension of not only tariff concessions, but also other types of GATT obligations. Indeed, this possibility applies to both an initial Article XIX action and subsequent retaliation. Article XXVIII is limited to the suspension of tariff concessions.

2nd: An Article XXVIII action results in a permanent change in a tariff schedule. In contrast, an Article XIX action leads to a temporary remedy.

3rd: It is not possible for a Member to resort to Article XXVIII whenever it likes. It can do so only at a point that is a transition between successive periods of continued application (unless "special circumstances" justify "out-of-season" negotiations). In contrast, a Member can bring an Article XIX remedial action anytime.

4th: Article XXVIII contains none of the substantive standards set forth in Article XIX. The safeguard provision, of course, has important prerequisites regarding import volume, causation, and injury.

To be sure, there are some similarities between Articles XXVIII and XIX.

For example, neither provision mandates that an importing-country Member compensate exporting-country Members. Article XXVIII:2 states that an agreement between the Member that takes an Article XXVIII and other affected Members may include a compensation arrangement. It also urges Members to maintain the general level of concessions that existed among them before the Article XXVIII action. Similarly, compensation is a voluntary matter under Article XIX and Article 8 of the Uruguay Round *Agreement on Safeguards* (though the *Agreement* provides a right of retaliation, waived for the first 3 years a safeguard action is in effect, if affected Members are not compensated for trade displaced by the safeguard action).

IV. Surcharges, Specific Duty Conversions, and Reciprocity

In spite of tariff bindings achieved under GATT Article II, GATT contracting parties succeeded in applying tariff surcharges. The inflation-devaluation provision in GATT Article II:6 is another limitation on tariff bindings. Still another instance in which protection can rise is when a WTO Member converts a specific duty to an ad valorem tariff. The answer to the question "what is the *ad valorem* equivalent (AVE) that matches the level of protection of the specific duty?" is the distinction among more, less, or the same amount of protection.

The principle of reciprocity is a practical limitation on reducing tariff barriers. A WTO Member is discouraged from reducing its tariffs without – to use contract law terminology – adequate, bargained-for consideration. The disincentive is reinforced by the fact that any reduction will apply to all Members by virtue of Article I. Of course,

reciprocity is both a shield against and a sword for cutting tariffs: when consideration is received, benefits spread on a multilateral basis under the MFN principle.

Limitations on *NAFTA* Article 302 (and analogous provisions in other FTAs) exist as well. First, it is not true all tariffs on all goods imported by the U.S., Canada, and Mexico automatically were eliminated. Duty-free treatment applies only to originating goods, that is, goods that originate from one of the *NAFTA* parties. Rules of origin, set forth in Chapter 4 of *NAFTA*, distinguish originating from non-originating goods. They effectively set strict limits on the scope of duty-free treatment. Second, even for many originating goods, duty-free treatment did not begin immediately with the entry into force of *NAFTA* on 1 January 1994. Rather, goods were placed into one of four categories. Depending on the category of the good, either the applicable tariff was eliminated immediately, or phased out over a 5-, 10-, or 15-year period.

V. Tariff Surcharges versus Quota Rents in BOP Restrictions Context, and 1989 *Korea Beef* Case

GATT PANEL REPORT, *REPUBLIC OF KOREA – RESTRICTIONS ON IMPORTS OF BEEF (COMPLAINT BY THE UNITED STATES)*, B.I.S.D. (36TH SUPP) AT 268, 270-271, 273-278, 301, 304-306 (1988-1989) (ADOPTED 7 NOVEMBER 1989)

FACTUAL ASPECTS

…

(a) General

12. Since its accession in 1967, Korea has maintained balance-of-payments (BOP) measures on various products. Since that year, and to date, Korea's BOP restrictions have been subject to regular review by the BOP Committee. During this period, Korea had abandoned or relaxed restrictions on some products. By 1988, restrictions for which Korea claimed BOP cover were still maintained on 358 items, including beef. In 1979, the Korean tariff on beef was reduced from 25 per cent to 20 per cent and bound at that level. Korean beef imports increased from 694 tons (product weight) in 1976 to 25,316 tons in 1981, 42,329 tons in 1982 and 51,515 tons in 1983. Increased beef supplies, due to rising domestic production and the higher level of beef imports, resulted eventually in falling prices on the Korean domestic market and mounting pressures from Korean beef farmers for protection from the adverse effects of beef imports.

13. In October 1984, Korea ceased issuing tenders for commercial imports to the general market, and in May 1985 orders for imports of high-quality beef for the hotel market also ceased, leading to a virtual stop of commercial beef imports. These measures were neither notified to, nor discussed in, the BOP Committee. Between May 1985 and August 1988, no commercial imports of beef took place. Korea partially reopened its market in August 1988, permitting up to 14,500 tons (product weight) of beef to be imported before the end of the year. For 1989, a quota of up to 39,000 tons had been announced.

(b) Korea's Balance-of-Payments Consultations

14. At the last meeting of the BOP Committee in December 1987, "the Committee took note with great satisfaction of the improvement in the Korean trade and payments situation since the last full consultation." "The prevailing view expressed in the Committee was that the current situation and outlook for the balance of payments was such that import restrictions could no longer be justified under Article XVIII:B. …"

15. Therefore, the BOP Committee "stressed the need to establish a clear timetable for the early, progressive removal of Korea's restrictive trade measures maintained for balance-of-payments purposes. It welcomed Korea's willingness to undertake another full consultation with the Committee in the first part of 1989. …"

16. Economic indicators in Korea since its latest BOP consultations showed a continuation of the favorable economic situation of the recent past. …

…

(d) Korean Beef Import Regime

…

(ii) *Current Import System*

22. On 1 July 1987, [Korea enacted] … the *Foreign Trade Act*. A new organization was established by the Korean Government, the Livestock Products Marketing Organization (LPMO). … This organization administered on an exclusive basis the importation of beef within the framework of quantitative restrictions set by the Korean Government. According to its current by-laws ... the LPMO was to:

– stabilize the prices of livestock products through smooth adjustment of supply and demand, supporting thereby, and at the same time, both livestock farmers and consumers; and
– contribute to improving the balance of payments.

The main function of the LPMO was the administration of the quota restrictions set by the government. …

23. Under the current import arrangements, the MAFF [Ministry of Agriculture, Forestry, and Fisheries] sets a maximum import level on the basis of various criteria such as estimated domestic beef production and estimated domestic consumption. In 1988, the LPMO imported the beef through a system of open tenders and resold a major part of it by auction to the domestic market.

24. Before reselling the imported beef either through the wholesale auction system (61.2 per cent of total volume) or directly (38.8 per cent), for instance to hotels, the LPMO added its costs and a profit margin. Between August and October 1988, the LPMO imposed an announced base price under which the meat was not sold at the wholesale auction. Since October, no explicit base price had been announced on the understanding that a certain base price level had to be respected. After having deducted its overhead, the difference

between the import contract price and the auction price (or derived direct sale price) was paid into the Livestock Development Fund. This difference varied from one month to another, and also for different types of beef, but was on average approximately 44 per cent of the contract price in the period August to November 1988.

MAIN ARGUMENTS

General

…

Article II

34. The *United States* claimed that the LPMO was levying surcharges on imported beef, which averaged 36 per cent, for the purpose of equalizing import prices with high domestic prices. After negotiations with the United States, Korea bound its tariff on meat during the Tokyo Round of Multilateral Trade Negotiations. The concession was set out in Schedule LX. By agreement with the United States, Korea reduced its tariff on meat of bovine animals (0201.01) from 25 per cent to 20 per cent *ad valorem* and bound it at that rate. The imposition of surcharges on imported meat was plainly inconsistent with Article II:1(b).

35. The United States also argued that the LPMO appeared to have as its purpose, and had taken concrete steps to afford, protection for Korean beef farmers. As such, it was fundamentally inconsistent with Article II:4. Article II:4 barred a contracting party from using import monopolies to restrict trade or afford protection in excess of a bound tariff concession. As shown by the *Canadian Liquor Boards Panel* report [*see Canada – Import, Distribution and Sale of Alcoholic Drinks by Canadian Provincial Marketing Agencies*, B.I.S.D. (35th Supp.) 37 (1989) (adopted 22 March 1988) (focusing on alleged violations of GATT Articles II:4 and XI:1); *see also Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, B.I.S.D. (39th Supp.) 27 (1993) (adopted 18 February 1992) (focusing on alleged violations of GATT Articles III:4 and XI:1], a government-sponsored import monopoly was not permitted to charge differential mark-ups on imported goods, much less generalized import surcharges. The imposition of such mark-ups constituted additional protection in violation of Article II:4. A state-trading organization was limited by Article II:4 to charging the landed costs, plus transportation, distribution, and other expenses incident to the purchase, sale or further processing, plus a reasonable margin of profit. In particular, the margin of profit charged was limited to a margin that would prevail under normal conditions of competition and had to be the same on average for domestic and imported goods.

36. The United States believed that the LPMO's practices fell squarely within the rule adopted in the *Canadian Liquor Boards* case. The LPMO was setting minimum bid prices that involved mark-ups of up to 56 per cent on United States boxed beef and up to 136 per cent for Australian carcass beef. These surcharges were far in excess of the "reasonable profits" permitted by Article II:4 and nullified or impaired the 20 per cent Tokyo Round tariff binding negotiated by the United States. In the view of the United States, the clear purpose and intent of the surcharges imposed by the LPMO was to afford extra protection to Korean beef farmers over and above the GATT-bound tariff in violation of Article II:4.

37. *Korea* replied that the United States reliance on the *Canadian Liquor Board Panel* case was misplaced. In that case, the Panel was not concerned with the administration of a GATT-consistent import restriction. Rather the Panel reviewed the import, distribution and sales practices of a state-trading monopoly that operated independently from any restriction. Canada did not impose any quantitative restrictions which its liquor boards were supposed to administer. In respect of beef products, the operation of the LPMO in no way resulted in surcharges that were far in excess of the "reasonable profits" permitted by Article II:4.

…

39. … Korea recalled that virtually all imported beef was resold through wholesale market auctions or at prices that were equivalent to or lower than an auction-based priced average for imported beef. Korea argued that the real grievance of the United States was that the auction-based system operated by the LPMO in buying and reselling imported beef allowed Korea to capture the "quota rents." Quota rents were the price increases produced by the quantitative restrictions on imported beef. The United States mistakenly referred to these price increases as mark-ups or surcharges. Yet, quota rents simply represented the economic impact of quantitative restrictions. They did not constitute additional trade restraints, such as surcharges or mark-ups that were impermissible under Article II. Nothing in the GATT, particularly Article XIII, prevented the importers (or the foreign suppliers, as the case might be) from collecting these price increases. Moreover, it had long been recognized that the auction method was superior to any other in achieving a non-discriminatory allocation of quota shares, consistent with Article XIII.

40. Consequently, assuming that Korea was entitled to maintain quantitative restrictions under Article XVIII:B, then the LPMO's administration of these restrictions was subject to two GATT requirements: first, the LPMO had to administer these consistent with Article XIII; second, the LPMO could not impose surcharges on beef imports that exceeded Korea's tariff on beef which had been bound pursuant to Article II. These were the relevant standards, according to Korea, for this Panel's review of the LPMO's operation. Korea explained that quota shares were allocated to the foreign suppliers who submitted the lowest bid to the tender which the LPMO had issued. When the successful bidder then exported the beef to Korea, it was subject to the bound customs duty of 20 per cent. In addition, 2.5 per cent was levied pursuant to the *National Defense Tax Law*. This extra levy was not inconsistent with the GATT because the levy applied across the board, to foreign and domestic goods alike, and even to the income of wage earners. No other taxes, levies or charges were applied on imports of beef. Thus, in Korea's view, the LPMO's operation was also consistent with Article II. In conclusion, because it met the requirements of both Article II and Article XIII, the LPMO's operation was consistent with the General Agreement.

…

FINDINGS AND CONCLUSIONS

…

Article II

124. The Panel noted that the LPMO was a beef import monopoly established in July 1988, with exclusive privileges for the administration of both the beef import quota set by

the Korean Government and the resale of the imported beef to wholesalers or in certain cases directly to end users such as hotels. The Panel examined whether the mark-ups imposed on imported beef, in combination with the import duties collected at the bound rate, afforded "protection on the average in excess of the amount of protection provided for" in the Korean Schedule in violation of the provisions of paragraph 4 of Article II, as claimed by the United States. The Panel noted Korea's view that the operation of the LPMO was consistent with the provisions of Article II:4.

125. The LPMO bought imported beef at world market prices through a tender system and resold it either by auction to wholesalers or directly to end users. A minimum bid price at wholesale auction, or derived price for direct sale, was set by the LPMO with reference to the wholesale price for domestic beef.

126. In examining Article II:4, the Panel noted that, according to the interpretative note to Article II:4, the Paragraph was to be applied "in the light of the provisions of Article 31 of the *Havana Charter*." Two provisions of the *Havana Charter,* Articles 31:4 and 31:5 were relevant. Article 31:4 called for an analysis of the import costs and profit margins of the import monopoly. However, Article 31:5 stated that import monopolies would "import and offer for sale such quantities of the product as will be *sufficient to satisfy the full domestic demand* for the imported product…." (Emphasis added.) In the view of the Panel, Article 31:5 clearly implied that Article 31:4 of the *Havana Charter* and by implication Article II:4 of the General Agreement were intended to cover import monopolies operating in markets not subject to quantitative restrictions.

127. Bearing in mind Article 31:5 of the *Havana Charter*, the Panel considered that, in view of the existence of quantitative restrictions, it would be inappropriate to apply Article II:4 of the General Agreement in the present case. The price premium obtained by the LPMO through the setting of a minimum bid price or derived sale price was directly afforded by the situation of market scarcity arising from the quantitative restrictions on beef. The Panel concluded that because of the presence of the quantitative restrictions, the level of the LPMO's mark-up of the price for imported beef to achieve the minimum bid price or other derived price was not relevant in the present case. Furthermore, once these quantitative restrictions were phased out, as recommended by the Panel in Paragraph 131 below, this price premium would disappear.

128. The Panel stressed, however, that in the absence of quantitative restrictions, an import monopoly was not to afford protection, on the average, in excess of the amount of protection provided for in the relevant schedule, as set out in Article II:4 of the General Agreement. Furthermore, in the absence of quantitative restrictions, an import monopoly was not to charge on the average a profit margin which was higher than that "which would be obtained under normal conditions or competition (in the absence of the monopoly)." … The Panel therefore expected that once Korea's quantitative restrictions on beef were removed, the operation of the LPMO would conform to these requirements.

129. The Panel then examined the United States contention that Korea imposed surcharges on imported beef in violation of the provisions of Paragraph 1(b) of Article II

and noted that Korea claimed that it did not impose any surcharges in violation of Article II:1(b). The Panel was of the view that, in the absence of quantitative restrictions, any charges imposed by an import monopoly would normally be examined under Article II:4 since it was the more specific provision applicable to the restriction at issue. In this regard, the Panel recalled its findings in Paragraph 127 above. It concluded, therefore, that it was not necessary to examine this issue under Article II:1(b).

…

RECOMMENDATIONS

131. In the light of the findings above, the Panel suggests that the CONTRACTING PARTIES recommend that:

(a) Korea eliminate or otherwise bring into conformity with the provisions of the General Agreement the import measures on beef….

(b) Korea hold consultations with the United States and other interested contracting parties to work out a timetable for the removal of import restrictions on beef justified since 1967 by Korea for balance-of-payments reasons and report on the result of such consultations within a period of three months following the adoption of the Panel Report by the Council.

Chapter 16

THIRD PILLAR: GATT ARTICLE III:1-2 AND NATIONAL TREATMENT FOR FISCAL MEASURES[543]

I. Golden Rule

The national treatment rule is the second of the two great non-discrimination obligations in GATT, the first being MFN rule. In its entirety, the national treatment rule states:

> **Article III***
> **National Treatment on Internal Taxation and Regulation**
>
> 1. The contracting parties [per GATT 1947, *i.e.*, WTO Members per GATT 1994] recognize that internal taxes and other internal charges, and laws, regulations and requirements affecting the internal sale, offering for sale, purchase, transportation, distribution or use of products, and internal quantitative regulations requiring the mixture, processing or use of products in specified amounts or proportions, should not be applied to imported or domestic products so as to afford protection to domestic production.*****
>
> 2. The products of the territory of any contracting party imported into the territory of any other contracting party shall not be subject, directly or indirectly, to internal taxes or other internal charges of any kind in excess of those applied, directly or indirectly, to like domestic products. Moreover, no contracting party shall otherwise apply internal taxes or other internal charges to imported or domestic products in a manner contrary to the principles set forth in paragraph 1.*****
>
> 3. With respect to any existing internal tax which is inconsistent with the provisions of paragraph 2, but which is specifically authorized under a trade agreement, in force on April 10, 1947, in which the import duty on the taxed product is bound against increase, the contracting party imposing the tax shall be free to postpone the application of the provisions of paragraph 2 to such tax until such time as it can obtain release from the obligations of such trade agreement in order to permit the increase of such duty to the

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543 Documents References:
(1) *Havana (ITO) Charter* Articles 18-19, 29, 46-54
(2) GATT Articles III, XV:4, XV:9, XVII, and XXIV:12, and Interpretative Notes, *Ad Article III* and *Ad Article XV*
(3) WTO *TRIMs Agreement* Articles 2-3, and Annex
(4) WTO *GPA*, Article III
(5) *NAFTA* Chapter 3, and Article 1102
(6) Relevant provisions in other FTAs

extent necessary to compensate for the elimination of the protective element of the tax.

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

5. No contracting party shall establish or maintain any internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions which requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources. Moreover, no contracting party shall otherwise apply internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1.*****

6. The provisions of paragraph 5 shall not apply to any internal quantitative regulation in force in the territory of any contracting party on July 1, 1939, April 10, 1947, or March 24, 1948, at the option of that contracting party; *Provided* that any such regulation which is contrary to the provisions of paragraph 5 shall not be modified to the detriment of imports and shall be treated as a customs duty for the purpose of negotiation.

7. No internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions shall be applied in such a manner as to allocate any such amount or proportion among external sources of supply.

8. (a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

(b) The provisions of this Article shall not prevent the payment of subsidies exclusively to domestic producers, including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products.

9. The contracting parties recognize that internal maximum price

control measures, even though conforming to the other provisions of this Article, can have effects prejudicial to the interests of contracting parties supplying imported products. Accordingly, contracting parties applying such measures shall take account of the interests of exporting contracting parties with a view to avoiding to the fullest practicable extent such prejudicial effects.

10. The provisions of this Article shall not prevent any contracting party from establishing or maintaining internal quantitative regulations relating to exposed cinematographic films and meeting the requirements of Article IV.

Ad Article III

Any internal tax or other internal charge, or any law, regulation or requirement of the kind referred to in paragraph 1 which applies to an imported product and to the like domestic product and is collected or enforced in the case of the imported product at the time or point of importation, is nevertheless to be regarded as an internal tax or other internal charge, or a law, regulation or requirement of the kind referred to in paragraph 1, and is accordingly subject to the provisions of Article III.

Paragraph 1

The application of paragraph 1 to internal taxes imposed by local governments and authorities within the territory of a contracting party is subject to the provisions of the final paragraph of Article XXIV. The term "reasonable measures" in the last-mentioned paragraph would not require, for example, the repeal of existing national legislation authorizing local governments to impose internal taxes which, although technically inconsistent with the letter of Article III, are not in fact inconsistent with its spirit, if such repeal would result in a serious financial hardship for the local governments or authorities concerned. With regard to taxation by local governments or authorities which is inconsistent with both the letter and spirit of Article III, the term "reasonable measures" would permit a contracting party to eliminate the inconsistent taxation gradually over a transition period, if abrupt action would create serious administrative and financial difficulties.

Paragraph 2

A tax conforming to the requirements of the first sentence of paragraph 2 would be considered to be inconsistent with the provisions of the second sentence only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a directly competitive or substitutable product which was not similarly taxed.

Paragraph 5

> Regulations consistent with the provisions of the first sentence of paragraph 5 shall not be considered to be contrary to the provisions of the second sentence in any case in which all of the products subject to the regulations are produced domestically in substantial quantities. A regulation cannot be justified as being consistent with the provisions of the second sentence on the ground that the proportion or amount allocated to each of the products which are the subject of the regulation constitutes an equitable relationship between imported and domestic products.[544]

The gist of the rule and its logic is this: treating domestic and imported products alike, at least in substance if not identically, is a key means to promote freer trade. "The foreigner shall be treated like the local" – that, is in crude terms, what this idea of non-discrimination is all about. Similarly, treating all foreigners equally is critical to promoting free trade.

The MFN rule amounts to a commandment to "love all your neighbors equally." It also is akin to an Equal Protection Clause, like that in the 14th Amendment to the U.S. Constitution, but set in a global context and applied to "like products. The theological analog to national treatment is the Golden Rule. Found in many if not all faiths, its expression in Christianity in the New Testament is: "… you shall love your neighbor as yourself…."[545] This statement, while simple, is difficult to practice.

In international trade relations, the statement – in GATT Article III (and reincarnated, like the MFN rule, in several other provisions in the GATT-WTO legal regime) – is not simple. It, too, is tempting to violate. Indeed, through the decades of GATT and into the WTO era, national treatment is one of the most heavily litigated areas of International Trade Law. If a WTO Member succumbs to the temptation to discrimination, it typically does so in favor of one of its domestic producers. Politics facilitate: the costs of protection are diffuse (*e.g.*, spread across poorly or loosely organized consumers), but the benefits are concentrated on a vocal minority of economic agents with access to the corridors of power.

Note, then, how seriously the WTO Appellate Body takes GATT Article III. It defines "like product" and "directly competitive or substitutable product" broadly under Article III:1-2 and the accompanying *Ad Article*. It tolerates no *de minimis* exception to Article III:1, first sentence. As to Article III:4, its test for "treatment no less favorable" is not a difficult one to satisfy. In short, the Appellate Body consistently rejects efforts to undermine the potency of the national treatment rule – and thereby burnishes its free trade credentials. Note also the distinction between Paragraphs 1-2 and 4, for fiscal and non-fiscal measures, respectively.

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544 https://kansas.sharepoint.com/:w:/t/WheatLawLibrary-Documents/EaCECtiEA7hDvm7vo1ab4MoBOXNmkCMVOtnjIrFHUVzFAQ?e=eoeBe6.

545 The Gospel According to Matthew, Chapter 19, Verse 19.

II. Internal Taxes, "Like Products," and Japan's Liquor Market

Japan is the second largest market in the world for American distilled spirits. Under Japan's *Liquor Tax Law*, certain imported alcoholic beverages – such as brandy, cognac, genever, gin, liqueurs, rum, vodka, whiskey, and other spirits – were subject to an internal tax. However, domestically produced *shochu* (a distilled white spirit) was subject to a much-reduced tax. For example, the tax on *shochu* was between one-fourth and one-seventh of the tax on imported brandy and whiskey, and two-thirds of the tax on imported rum and vodka. Not surprisingly, between 1989-1996, the share of *shochu* in the Japanese market for distilled spirits grew from 61% to 74%. Further, whereas other industrialized countries import an average of 30% of such beverages consumed, Japan imports only 8%.

The complainants in the 1996 *Japan Alcoholic Beverages* case – the U.S., EU, and Canada – alleged the Japanese tax scheme violated GATT Article III:2. They claimed a violation of both the first and second sentences of Article III:2. Contrary to the first sentence, Japan applied different tax rates to like products. Contrary to the second sentence, it distorted the relative prices of imports and *shochu*, and consequently distorted consumer choice between these categories of alcoholic beverages.

The first sentence of Article III:2 calls for non-discriminatory treatment with respect to internal taxes or other internal charges as between imports and "like" domestic products. Related to Article III:2 is a critical Interpretative Note, *Ad Article III, Paragraph 2*, which says: "[a] tax conforming to the requirements of the first sentence of paragraph 2 [of Article III] would be considered to be inconsistent with the provisions of the second sentence [of Article III:2] only in cases where competition was involved between, on the one hand, the taxed product and, on the other hand, a *directly competitive or substitutable product* which was not similarly taxed."[546]

So, on each claim, the complainants faced a threshold problem. As to the first sentence of Article III:2, are imported spirits and *shochu* "like products"? If not, then there could be no violation of this sentence, because it expressly refers to "like domestic products." As to the second sentence, are imported spirits and *shochu* "directly competitive and substitutable products"? If not, this sentence is inapplicable, because the Interpretative Note expressly refers to "directly competitive and substitutable products." Only if *shochu* were a "like" or a "directly competitive and substitutable product" would the complainants get protection under the Article III:2 national treatment principle.

Japan countered imported spirits are neither like products, nor are they directly competitive or substitutable. Hence, neither the first nor the second sentence of Article III:2 matters. Japan advocated a highly restrictive definition of "like" product, namely, one that was more-or-less the same product. Japan's fallback position was that even if *shochu* were a competitive or substitutable product, no violation of Article III:2 occurred, at least not of the second sentence, simply because the *Liquor Tax Law* was not designed to protect domestic production. Japan argued its pure-hearted motivation was relevant because the

546 Emphasis added.

second sentence of Article III:2 references Article III:1 which, in turn, frowns upon internal taxes applied so as to afford domestic production.

The WTO Panel rejected Japan's restrictive approach to defining a "like" product. It took a flexible, eclectic approach to defining a "like" product and a "directly competitive or substitutable product." There could be no one precise, uniform, or absolute definition of either term. Rather, the terms are to be interpreted on a case-by-case basis. The meaning of "likeness" and "directly competitive or substitutable" depends dearly on the context in which these terms were used in a particular GATT-WTO text. The Panel did not mean to imply its approach lacked substance. It affirmed the nature of the term "like" means that "like products" need not be identical in all respects, though they ought to have essentially the same physical characteristics and end uses. "Directly competitive or substitutable products" need not even physically resemble one another, though they ought to have common end uses as illustrated by elasticities of substitution. The Panel also felt confident pointing out "like products" are a narrower class of products than "directly competitive or substitutable products," because the first and second sentences, coupled with the Interpretative Note, differentiate between these two classes.

The Panel held *shochu* is a "like" domestic product *vis-à-vis* vodka, and Japan's tax scheme violated the first sentence of Article III:2 by taxing the latter in excess of the former. The Panel also concluded that *shochu*, brandy, genever, gin, liqueurs, rum, and whisky are "directly competitive or substitutable products." On this basis, the Panel concluded Japan violated the second sentence of Article III:2, as the dissimilar treatment of *shochu* and these imports affords domestic protection to *shochu* producers. Accordingly, the Panel recommended Japan equalize the taxes, either by raising the tax on *shochu* or lowering it on imported spirits.

Relevant excerpts from the Appellate Body Report are below. In cases following *Japan Alcoholic Beverages*, challenges have been made to the liquor tax regimes in various WTO Members, including Chile, Korea, and India. In such cases, the application of the holdings in *Japan Alcoholic Beverages* has become nearly axiomatic.[547] Many challenges also have been made to discriminatory internal taxes on non-alcoholic beverages, such as soft drinks sweetened with high fructose corn syrup, or with beet sugar, instead of domestically-produced cane sugar. Given the precedents, the results have been predictable.

III. Key Findings in 1996 *Japan Alcoholic Beverages* Case

WTO APPELLATE BODY REPORT, *JAPAN – TAXES ON ALCOHOLIC BEVERAGES*, WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (ADOPTED 1 NOVEMBER 1996)

A. INTRODUCTION

[547] *See, e.g.*, Appellate Body Reports in *Korea – Taxes on Alcoholic Beverages*, WT/DS75/AB/R, WT/DS84/AB/R (adopted 18 January 1999), *Chile – Taxes on Alcoholic Beverages*, WT/DS87/AB/R, WT/DS110/AB/R (adopted 12 January 2000).

Japan and the United States appeal from certain issues of law and legal interpretations in the Panel Report…. That Panel (the "Panel") was established to consider complaints … against Japan relating to the Japanese *Liquor Tax Law* (*Shuzeiho*), Law No. 6 of 1953 as amended....

…

C. ISSUES RAISED IN THE APPEAL

The appellants … have raised the following issues in this appeal:

…

1. Japan
   - (a) whether the Panel erred in failing to interpret Article III:2, first and second sentences, in the light of Article III:1;
   - (b) whether the Panel erred in rejecting an "aim-and-effect" test in establishing whether the *Liquor Tax Law* is applied "so as to afford protection to domestic production;"
   - (c) whether the Panel erred in failing to examine the effect of affording protection to domestic production from the perspective of the linkage between the origin of products and their treatment under the *Liquor Tax Law*;

     …
   - (e) whether the Panel erred in interpreting and applying Article III:2, second sentence, by equating the language "not similarly taxed" in *Ad Article III:2*, second sentence, with "so as to afford protection" in Article III:1; and
   - (f) whether the Panel erred in placing excessive emphasis on tariff classification as a criterion for determining "like products."
2. United States

   …
   - (b) whether the Panel erred in failing to find that all distilled spirits are "like products;"
   - (c) whether the Panel erred in drawing a connection between national treatment obligations and tariff bindings;

     …
   - (g) whether the Panel erred in finding that the coverage of Article III:2 and Article III:4 are not equivalent; and

…

D. TREATY INTERPRETATION

Article 3:2 of the *DSU* directs the Appellate Body to clarify the provisions of GATT 1994 and the other "covered agreements" of the *WTO Agreement* "in accordance with customary rules of interpretation of public international law." Following this mandate, in *United States – Standards for Reformulated and Conventional Gasoline* [WT/DS2/9, adopted 20 May 1996] we stressed the need to achieve such clarification by reference to the fundamental rule of treaty interpretation set out in Article 31(1) of the *Vienna Convention [on the Law of Treaties]*. We stressed there that this general rule of interpretation "has attained the status of a rule of customary or general international law."

There can be no doubt that Article 32 of the *Vienna Convention*, dealing with the role of supplementary means of interpretation, has also attained the same status.

…

Article 31 of the *Vienna Convention* provides that the words of the treaty form the foundation for the interpretive process: "interpretation must be based above all upon the text of the treaty." The provisions of the treaty are to be given their ordinary meaning in their context. The object and purpose of the treaty are also to be taken into account in determining the meaning of its provisions. A fundamental tenet of treaty interpretation flowing from the general rule of interpretation set out in Article 31 is the principle of effectiveness (*ut res magis valeat quam pereat*) [As the Appellate Body indicated in a footnote, this Latin expression means: "When a treaty is open to two interpretations, one of which does and the other does not enable the treaty to have appropriate effects, good faith and the objects and purposes of the treaty demand that the former interpretation should be adopted."] In *United States – Standards for Reformulated and Conventional Gasoline*, we noted that "[o]ne of the corollaries of the 'general rule of interpretation' in the *Vienna Convention* is that interpretation must give meaning and effect to all the terms of the treaty. An interpreter is not free to adopt a reading that would result in reducing whole clauses or paragraphs of a treaty to redundancy or inutility."

…

F. INTERPRETATION OF ARTICLE III

The *WTO Agreement* is a treaty – the international equivalent of a contract. It is self-evident that in an exercise of their sovereignty, and in pursuit of their own respective national interests, the Members of the WTO have made a bargain. In exchange for the benefits they expect to derive as Members of the WTO, they have agreed to exercise their sovereignty according to the commitments they have made in the *WTO Agreement*.

One of those commitments is Article III of the GATT 1994….

…

The broad and fundamental purpose of Article III is to avoid protectionism in the application of internal tax and regulatory measures. More specifically, the purpose of Article III "is to ensure that internal measures 'not be applied to imported or domestic products so as to afford protection to domestic production.'" [The quotation is from *United States – Section 337 of the Tariff Act of 1930*, B.I.S.D. (36th Supp.) 345 at ¶ 5.10 (1990) (adopted 7 November 1989).] Toward this end, Article III obliges Members of the WTO to provide equality of competitive conditions for imported products in relation to domestic products. [The Appellate Body cited two cases in support of this proposition: *United States – Taxes on Petroleum and Certain Imported Substances*, B.I.S.D. (34th Supp.) 136 at ¶ 5.1.9 (1988) (adopted 17 June 1987); *Japan – Customs Duties, Taxes and Labeling Practices on Imported Wines and Alcoholic Beverages*, B.I.S.D. (34th Supp.) 83 at ¶ 5.5(b) (1988) (adopted 10 November 1987) ("*1987 Japan – Alcohol*").] "[T]he intention of the drafters of the Agreement was clearly to treat the imported products in the same way as the like domestic products once they had been cleared through customs. Otherwise, indirect protection could be given." [Here, the Appellate Body quotes from *Italian Discrimination Against Imported Agricultural Machinery*, B.I.S.D. (7th Supp.) 60 at ¶ 11 (1959) (adopted 23 October 1958).] Moreover, it is irrelevant that "the trade effects" of the tax differential

between imported and domestic products, as reflected in the volumes of imports, are insignificant or even non-existent; Article III protects expectations not of any particular trade volume but rather of the equal competitive relationship between imported and domestic products. [For this point, the Appellate Body cited *United States – Taxes on Petroleum and Certain Imported Substances*, at 136 ¶ 5.1.9.] Members of the WTO are free to pursue their own domestic goals through internal taxation or regulation so long as they do not do so in a way that violates Article III or any of the other commitments they have made in the *WTO Agreement*.

The broad purpose of Article III of avoiding protectionism must be remembered when considering the relationship between Article III and other provisions of the *WTO Agreement*. Although the protection of negotiated tariff concessions is certainly one purpose of Article III, the statement in … the Panel Report that "one of the main purposes of Article III is to guarantee that WTO Members will not undermine through internal measures their commitments under Article II" should not be overemphasized. [In support of the first clause of this proposition, the Appellate Body cited two cases: *1987 Japan – Alcohol*, at 83 ¶ 5.5(b); *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies*, B.I.S.D. (39th Supp.) 27 at ¶ 5.30 (1993) (adopted 18 February 1992).] The sheltering scope of Article III is not limited to products that are the subject of tariff concessions under Article II. The Article III national treatment obligation is a general prohibition on the use of internal taxes and other internal regulatory measures so as to afford protection to domestic production. This obligation clearly extends also to products not bound under Article II. [As support, the Appellate Body cited three cases: *Brazilian Internal Taxes*, B.I.S.D. II 181 at ¶ 4 (1952) (adopted 30 June 1949); *United States – Taxes on Petroleum*, 136 at ¶ 5.1.9; *EEC-Regulation on Imports of Parts and Components*, B.I.S.D. (37th Supp.) 132 at ¶ 5.4 (1991) (adopted 16 May 1990).] This is confirmed by the negotiating history of Article III.

G. ARTICLE III:1

The terms of Article III must be given their ordinary meaning – in their context and in the light of the overall object and purpose of the *WTO Agreement*. Thus, the words actually used in the Article provide the basis for an interpretation that must give meaning and effect to all its terms. The proper interpretation of the Article is, first of all, a textual interpretation. Consequently, the Panel is correct in seeing a distinction between Article III:1, which "contains general principles," and Article III:2, which "provides for specific obligations regarding internal taxes and internal charges." Article III:1 articulates a general principle that internal measures should not be applied so as to afford protection to domestic production. This general principle informs the rest of Article III. The purpose of Article III:1 is to establish this general principle as a guide to understanding and interpreting the specific obligations contained in Article III:2 and in the other paragraphs of Article III, while respecting, and not diminishing in any way, the meaning of the words actually used in the texts of those other paragraphs. In short, Article III:1 constitutes part of the context of Article III:2, in the same way that it constitutes part of the context of each of the other paragraphs in Article III. Any other reading of Article III would have the effect of rendering the words of Article III:1 meaningless, thereby violating the fundamental principle of

effectiveness in treaty interpretation. Consistent with this principle of effectiveness, and with the textual differences in the two sentences, we believe that Article III:1 informs the first sentence and the second sentence of Article III:2 in different ways.

H. ARTICLE III:2

1. First Sentence

Article III:1 informs Article III:2, first sentence, by establishing that if imported products are taxed in excess of like domestic products, then that tax measure is inconsistent with Article III. Article III:2, first sentence does not refer specifically to Article III:1. There is no specific invocation in this first sentence of the general principle in Article III:1 that admonishes Members of the WTO not to apply measures "so as to afford protection." This omission must have some meaning. We believe the meaning is simply that the presence of a protective application need not be established separately from the specific requirements that are included in the first sentence in order to show that a tax measure is inconsistent with the general principle set out in the first sentence. However, this does not mean that the general principle of Article III:1 does not apply to this sentence. To the contrary, we believe the first sentence of Article III:2 is, in effect, an application of this general principle. The ordinary meaning of the words of Article III:2, first sentence leads inevitably to this conclusion. Read in their context and in the light of the overall object and purpose of the *WTO Agreement*, the words of the first sentence require an examination of the conformity of an internal tax measure with Article III by determining, first, whether the taxed imported and domestic products are "like" and, second, whether the taxes applied to the imported products are "in excess of" those applied to the like domestic products. If the imported and domestic products are "like products," and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence.

This approach to an examination of Article III:2, first sentence, is consistent with past practice under the GATT 1947. [Here, the Appellate Body cited four cases: *Brazilian Internal Taxes*, 181 at ¶ 14; *1987 Japan – Alcohol*, 83 at ¶ 5.5(d); *United States – Taxes on Petroleum*, 136 at ¶ 5.1.1; and *United States – Measures Affecting the Importation, Internal Sale and Use of Tobacco*, B.I.S.D. (41st Supp. vol. 1) 131 (1997) (adopted on 4 October 1994).] Moreover, it is consistent with the object and purpose of Article III:2, which the Panel in the predecessor to this case dealing with an earlier version of the *Liquor Tax Law* [*1987 Japan – Alcohol*] … rightly stated as "promoting non-discriminatory competition among imported and like domestic products [which] could not be achieved if Article III:2 were construed in a manner allowing discriminatory and protective internal taxation of imported products in excess of like domestic products." [*See Japan – Alcohol*, 83 at ¶ 5.5(c).]

(a) *"Like Products"*

Because the second sentence of Article III:2 provides for a separate and distinctive consideration of the protective aspect of a measure in examining its application to a broader

category of products that are not "like products" as contemplated by the first sentence, we agree with the Panel that the first sentence of Article III:2 must be construed narrowly so as not to condemn measures that its strict terms are not meant to condemn. Consequently, we agree with the Panel also that the definition of "like products" in Article III:2, first sentence, should be construed narrowly.

How narrowly is a matter that should be determined separately for each tax measure in each case. We agree with the practice under the GATT 1947 of determining whether imported and domestic products are "like" on a case-by-case basis. The Report of the Working Party on *Border Tax Adjustments*, adopted by the CONTRACTING PARTIES in 1970, set out the basic approach for interpreting "like or similar products" generally in the various provisions of the GATT 1947:

> … the interpretation of the term should be examined on a case-by-case basis. This would allow a fair assessment in each case of the different elements that constitute a "similar" product. Some criteria were suggested for determining, on a case-by-case basis, whether a product is "similar": the product's end-uses in a given market; consumers' tastes and habits, which change from country to country; the product's properties, nature and quality. [Report of the Working Party on *Border Tax Adjustments*, B.I.S.D. (18th Supp.) 97 at ¶ 18 (1972) (adopted 2 December 1970).]

This approach was followed in almost all adopted Panel Reports after *Border Tax Adjustments*. [The Appellate Body cited six cases to prove its point: *The Australian Subsidy on Ammonium Sulphate*, B.I.S.D. II 188 (1952) (adopted 3 April 1950); *EEC-Measures on Animal Feed Proteins*, B.I.S.D. (25th Supp.) 49 (1979) (adopted 14 March 1978); *Spain-Tariff Treatment of Unroasted Coffee*, B.I.S.D. (28th Supp.) 102 (1982) (adopted 11 June 1981); *1987 Japan – Alcohol*, at 83; *United States-Taxes on Petroleum*, 136; and *United States-Standards for Reformulated and Conventional Gasoline*, WT/DS2/9 (adopted on 20 May 1996).] This approach should be helpful in identifying on a case-by-case basis the range of "like products" that fall within the narrow limits of Article III:2, first sentence in the GATT 1994. Yet this approach will be most helpful if decision makers keep ever in mind how narrow the range of "like products" in Article III:2, first sentence is meant to be as opposed to the range of "like" products contemplated in some other provisions of the GATT 1994 and other Multilateral Trade Agreements of the *WTO Agreement*. In applying the criteria cited in *Border Tax Adjustments* to the facts of any particular case, and in considering other criteria that may also be relevant in certain cases, Panels can only apply their best judgment in determining whether in fact products are "like." This will always involve an unavoidable element of individual, discretionary judgment. We do not agree with the Panel's observation … that distinguishing between "like products" and "directly competitive or substitutable products" under Article III:2 is "an arbitrary decision." Rather, we think it is a discretionary decision that must be made in considering the various characteristics of products in individual cases.

No one approach to exercising judgment will be appropriate for all cases. The criteria in *Border Tax Adjustments* should be examined, but there can be no one precise

and absolute definition of what is "like." The concept of "likeness" is a relative one that evokes the image of an accordion. The accordion of "likeness" stretches and squeezes in different places as different provisions of the *WTO Agreement* are applied. The width of the accordion in any one of those places must be determined by the particular provision in which the term "like" is encountered as well as by the context and the circumstances that prevail in any given case to which that provision may apply. We believe that, in Article III:2, first sentence of the GATT 1994, the accordion of "likeness" is meant to be narrowly squeezed.

The Panel determined in this case that *shochu* and vodka are "like products" for the purposes of Article III:2, first sentence. We note that the determination of whether vodka is a "like product" to *shochu* under Article III:2, first sentence, or a "directly competitive or substitutable product" to *shochu* under Article III:2, second sentence, does not materially affect the outcome of this case.

A uniform tariff classification of products can be relevant in determining what are "like products." If sufficiently detailed, tariff classification can be a helpful sign of product similarity. Tariff classification has been used as a criterion for determining "like products" in several previous adopted Panel reports. [The Appellate Body cited three cases here: *EEC – Measures on Animal Feed Proteins*, at 49; *1987 Japan – Alcohol*, at 83; and *United States – Reformulated Gasoline*.] For example, in the *1987 Japan – Alcohol* Panel Report, the Panel examined certain wines and alcoholic beverages on a "product-by-product basis" by applying the criteria listed in the Working Party Report on *Border Tax Adjustments*,

> … as well as others recognized in previous GATT practice (*see* B.I.S.D. 25S/49, 63), such as the Customs Cooperation Council Nomenclature (CCCN) for the classification of goods in customs tariffs which has been accepted by Japan.

Uniform classification in tariff nomenclatures based on the Harmonized System (the "HS") was recognized in GATT 1947 practice as providing a useful basis for confirming "likeness" in products. However, there is a major difference between tariff classification nomenclature and tariff bindings or concessions made by Members of the WTO under Article II of the GATT 1994. There are risks in using tariff bindings that are too broad as a measure of product "likeness." Many of the least-developed country Members of the WTO submitted schedules of concessions and commitments as annexes to the GATT 1994 for the first time as required by Article XI of the *WTO Agreement*. Many of these least-developed countries, as well as other developing countries, have bindings in their schedules which include broad ranges of products that cut across several different HS tariff headings. For example, many of these countries have very broad uniform bindings on non-agricultural products. This does not necessarily indicate similarity of the products covered by a binding. Rather, it represents the results of trade concessions negotiated among Members of the WTO.

It is true that there are numerous tariff bindings which are in fact extremely precise with regard to product description and which, therefore, can provide significant guidance

as to the identification of "like products." Clearly enough, these determinations need to be made on a case-by-case basis. However, tariff bindings that include a wide range of products are not a reliable criterion for determining or confirming product "likeness" under Article III:2.

With these modifications to the legal reasoning in the Panel Report, we affirm the legal conclusions and the findings of the Panel with respect to "like products" in all other respects.

(b) *"In Excess Of"*

The only remaining issue under Article III:2, first sentence, is whether the taxes on imported products are "in excess of" those on like domestic products. If so, then the Member that has imposed the tax is not in compliance with Article III. Even the smallest amount of "excess" is too much. "The prohibition of discriminatory taxes in Article III:2, first sentence, is not conditional on a 'trade effects test' nor is it qualified by a *de minimis* standard." [For support, the Appellate Body cited *United States – Measures Affecting Alcoholic and Malt Beverages*, B.I.S.D. (39th Supp.) 206 at ¶ 5.6 (1993) (adopted 19 June 1992); *Brazilian Internal Taxes*, 181 at ¶ 16; *United States – Taxes on Petroleum*, 136 at ¶ 5.1.9; *1987 Japan – Alcohol*, 83 at ¶ 5.8.] We agree with the Panel's legal reasoning and with its conclusions on this aspect of the interpretation and application of Article III:2, first sentence.

2. Second Sentence

Article III:1 informs Article III:2, second sentence, through specific reference. Article III:2, second sentence, contains a general prohibition against "internal taxes or other internal charges" applied to "imported or domestic products in a manner contrary to the principles set forth in paragraph 1." … Article III:1 states that internal taxes and other internal charges "should not be applied to imported or domestic products so as to afford protection to domestic production." … *Ad Article III:2* [explains Article III:2, second sentence, applies to competition between a taxed imported product and a domestic "directly competitive or substitutable product" that is not similarly taxed]

…

Article III:2, second sentence, and the accompanying *Ad Article* have equivalent legal status in that both are treaty language which was negotiated and agreed at the same time. The *Ad Article* does not replace or modify the language contained in Article III:2, second sentence, but, in fact, clarifies its meaning. Accordingly, the language of the second sentence and the *Ad Article* must be read together in order to give them their proper meaning.

Unlike that of Article III:2, first sentence, the language of Article III:2, second sentence, specifically invokes Article III:1. The significance of this distinction lies in the fact that whereas Article III:1 acts implicitly in addressing the two issues that must be considered in applying the first sentence, it acts explicitly as an entirely separate issue that must be addressed along with two other issues that are raised in applying the second

sentence. Giving full meaning to the text and to its context, three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:

(1) the imported products and the domestic products are "directly competitive or substitutable products" which are in competition with each other;
(2) the directly competitive or substitutable imported and domestic products *are "not similarly taxed;"* and
(3) the dissimilar taxation of the directly competitive or substitutable imported domestic products *is "applied ... so as to afford protection to domestic production."*

Again, these are three separate issues. Each must be established separately by the complainant for a Panel to find that a tax measure imposed by a Member of the WTO is inconsistent with Article III:2, second sentence.

(a) *"Directly Competitive or Substitutable Products"*

If imported and domestic products are not "like products" for the narrow purposes of Article III:2, first sentence, then they are not subject to the strictures of that sentence and there is no inconsistency with the requirements of that sentence. However, depending on their nature, and depending on the competitive conditions in the relevant market, those same products may well be among the broader category of "directly competitive or substitutable products" that fall within the domain of Article III:2, second sentence. How much broader that category of "directly competitive or substitutable products" may be in any given case is a matter for the Panel to determine based on all the relevant facts in that case. As with "like products" under the first sentence, the determination of the appropriate range of "directly competitive or substitutable products" under the second sentence must be made on a case-by-case basis.

In this case, the Panel emphasized the need to look not only at such matters as physical characteristics, common end-uses, and tariff classifications, but also at the "market place." This seems appropriate. The GATT 1994 is a commercial agreement, and the WTO is concerned, after all, with markets. It does not seem inappropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as "directly competitive or substitutable."

Nor does it seem inappropriate to examine elasticity of substitution as one means of examining those relevant markets. The Panel did not say that cross-price elasticity of demand is "*the* decisive criterion" for determining whether products are "directly competitive or substitutable." The Panel stated the following:

> In the Panel's view, the decisive criterion in order to determine whether two products are directly competitive or substitutable is whether they have common end-uses, *inter alia*, as shown by elasticity of substitution.

We agree. And, we find the Panel's legal analysis of whether the products are "directly competitive or substitutable products" … to be correct.

…

[The Appellate Body also concluded, in favor of the U.S., that the Panel erred in law in limiting its conclusions on "directly competitive or substitutable products" to *shochu*, whisky, brandy, rum, gin, genever, and liqueurs. The self-imposed limitation was inconsistent with the Panel's Terms of Reference, which covered "all other distilled spirits and liqueurs falling within HS Heading 2208" too.]

(b) *"Not Similarly Taxed"*

To give due meaning to the distinctions in the wording of Article III:2, first sentence, and Article III:2, second sentence, the phrase "not similarly taxed" in the *Ad Article* to the second sentence must not be construed so as to mean the same thing as the phrase "in excess of" in the first sentence. On its face, the phrase "in excess of" in the first sentence means *any* amount of tax on imported products "in excess of" the tax on domestic "like products." The phrase "not similarly taxed" in the *Ad Article* to the second sentence must therefore mean something else. It requires a different standard, just as "directly competitive or substitutable products" requires a different standard as compared to "like products" for these same interpretive purposes.

Reinforcing this conclusion is the need to give due meaning to the distinction between "like products" in the first sentence and "directly competitive or substitutable products" in the *Ad Article* to the second sentence. If "in excess of" in the first sentence and "not similarly taxed" in the *Ad Article* to the second sentence were construed to mean one and the same thing, then "like products" in the first sentence and "directly competitive or substitutable products" in the *Ad Article* to the second sentence would also mean one and the same thing. This would eviscerate the distinctive meaning that must be respected in the words of the text.

To interpret "in excess of" and "not similarly taxed" identically would deny any distinction between the first and second sentences of Article III:2. Thus, in any given case, there may be some amount of taxation on imported products that may well be "in excess of" the tax on domestic "like products" but may not be so much as to compel a conclusion that "directly competitive or substitutable" imported and domestic products are "not similarly taxed" for the purposes of the *Ad Article* to Article III:2, second sentence. In other words, there may be an amount of excess taxation that may well be more of a burden on imported products than on domestic "directly competitive or substitutable products" but may nevertheless not be enough to justify a conclusion that such products are "not similarly taxed" for the purposes of Article III:2, second sentence. We agree with the Panel that this amount of differential taxation must be more than *de minimis* to be deemed "not similarly taxed" in any given case. And, like the Panel, we believe that whether any particular differential amount of taxation is *de minimis* or is not *de minimis* must, here too, be determined on a case-by-case basis. Thus, to be "not similarly taxed," the tax burden on imported products must be heavier than on "directly competitive or substitutable" domestic products, and that burden must be more than *de minimis* in any given case.

In this case, the Panel applied the correct legal reasoning in determining whether "directly competitive or substitutable" imported and domestic products were "not similarly taxed." However, the Panel erred in blurring the distinction between that issue and the entirely separate issue of whether the tax measure in question was applied "so as to afford protection." Again, these are separate issues that must be addressed individually. If "directly competitive or substitutable products" are *not* "not similarly taxed," then there is neither need nor justification under Article III:2, second sentence, for inquiring further as to whether the tax has been applied "so as to afford protection." But if such products are "not similarly taxed," a further inquiry must necessarily be made.

(c) *"So As To Afford Protection"*

This third inquiry under Article III:2, second sentence, must determine whether "directly competitive or substitutable products" are "not similarly taxed" in a way that affords protection. This is not an issue of intent. It is not necessary for a Panel to sort through the many reasons legislators and regulators often have for what they do and weigh the relative significance of those reasons to establish legislative or regulatory intent. If the measure is applied to imported or domestic products so as to afford protection to domestic production, then it does not matter that there may not have been any desire to engage in protectionism in the minds of the legislators or the regulators who imposed the measure. It is irrelevant that protectionism was not an intended objective if the particular tax measure in question is nevertheless, to echo Article III:1, "*applied* to imported or domestic products so as to afford protection to domestic production." [(Emphasis added.)] This is an issue of how the measure in question is *applied*.

In the *1987 Japan – Alcohol* case, the Panel subsumed its discussion of the issue of "not similarly taxed" within its examination of the separate issue of "so as to afford protection:"

> … whereas under the first sentence of Article III:2 the tax on the imported product and the tax on the like domestic product had to be equal in effect, Article III:1 and 2, second sentence, prohibited only the application of internal taxes to imported or domestic products in a manner "so as to afford protection to domestic production." The Panel was of the view that also small tax differences could influence the competitive relationship between directly competing distilled liquors, but the existence of protective taxation could be established only in the light of the particular circumstances of each case and there could be a *de minimis* level below which a tax difference ceased to have the protective effect prohibited by Article III:2, second sentence.

To detect whether the taxation was protective, the Panel in the 1987 case examined a number of factors that it concluded were "sufficient evidence of fiscal distortions of the competitive relationship between imported distilled liquors and domestic *shochu* affording protection to the domestic production of *shochu*." These factors included the considerably

lower specific tax rates on *shochu* than on imported directly competitive or substitutable products; the imposition of high *ad valorem* taxes on imported alcoholic beverages and the absence of *ad valorem* taxes on *shochu*; the fact that *shochu* was almost exclusively produced in Japan and that the lower taxation of *shochu* did "afford protection to domestic production;" and the mutual substitutability of these distilled liquors. The Panel in the 1987 case concluded that "the application of considerably lower internal taxes by Japan on *shochu* than on other directly competitive or substitutable distilled liquors had trade-distorting effects affording protection to domestic production of *shochu* contrary to Article III:1 and 2, second sentence."

As in that case, we believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.

Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, as the Panel rightly concluded in this case. Most often, there will be other factors to be considered as well. In conducting this inquiry, Panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.

In this respect, we note and agree with the Panel's acknowledgment in the *1987 Japan – Alcohol* Report:

> … that Article III:2 does not prescribe the use of any specific method or system of taxation. … [T]here could be objective reasons proper to the tax in question which could justify or necessitate differences in the system of taxation for imported and for domestic products. The Panel found that it could also be compatible with Article III:2 to allow two different methods of calculation of price for tax purposes. Since Article III:2 prohibited only discriminatory or protective tax burdens on imported products, what mattered was, in the view of the Panel, whether the application of the different taxation methods actually had a discriminatory or protective effect against imported products.

We have reviewed the Panel's reasoning in this case as well as its conclusions on the issue of "so as to afford protection"…. We find cause for thorough examination. The Panel began … by describing its approach as follows:

> … if directly competitive or substitutable products are not "similarly taxed", and if it were found that the tax favors domestic products, then protection

> would be afforded to such products, and Article III:2, second sentence, is violated.

This statement of the reasoning required under Article III:2, second sentence is correct. However, the Panel went on to note:

> … for it to conclude that dissimilar taxation afforded protection, it would be sufficient for it to find that the dissimilarity in taxation is not *de minimis*. … [T]he Panel took the view that "similarly taxed" is the appropriate benchmark in order to determine whether a violation of Article III:2, second sentence, has occurred as opposed to "in excess of" that constitutes the appropriate benchmark to determine whether a violation of Article III:2, first sentence, has occurred.

… [T]he Panel added:

> (i) The benchmark in Article III:2, second sentence, is whether internal taxes operate "so as to afford protection to domestic production," a term which has been further interpreted in the Interpretative Note *Ad Article III:2, Paragraph 2*, to mean dissimilar taxation of domestic and foreign directly competitive or substitutable products.

And, furthermore … the Panel concluded that:

> (ii) *Shochu*, whisky, brandy, rum, gin, genever, and liqueurs are "directly competitive or substitutable products" and Japan, by not taxing them similarly, is in violation of its obligation under Article III:2, second sentence, of the General Agreement on Tariffs and Trade 1994.

Thus, having stated the correct legal approach to apply with respect to Article III:2, second sentence, the Panel then equated dissimilar taxation above a *de minimis* level with the separate and distinct requirement of demonstrating that the tax measure "affords protection to domestic production." … [A] finding that "directly competitive or substitutable products" are "not similarly taxed" is necessary to find a violation of Article III:2, second sentence. Yet this is not enough. The dissimilar taxation must be more than *de minimis*. It may be so much more that it will be clear from that very differential that the dissimilar taxation was applied "so as to afford protection." In some cases, that may be enough to show a violation. In this case, the Panel concluded that it was enough. Yet in other cases, there may be other factors that will be just as relevant or more relevant to demonstrating that the dissimilar taxation at issue was applied "so as to afford protection." In any case, the three issues that must be addressed in determining whether there is such a violation must be addressed clearly and separately in each case and on a case-by-case basis. And, in every case, a careful, objective analysis, must be done of each and all relevant facts and all the relevant circumstances in order to determine "the existence of protective taxation." [The Appellate Body again cited the 1987 *Japan – Alcohol* case.] Although the Panel

blurred its legal reasoning in this respect, nevertheless we conclude that it reasoned correctly that in this case, the *Liquor Tax Law* is not in compliance with Article III:2. As the Panel did, we note that:

> … the combination of customs duties and internal taxation in Japan has the following impact: on the one hand, it makes it difficult for foreign-produced *shochu* to penetrate the Japanese market and, on the other, it does not guarantee equality of competitive conditions between *shochu* and the rest of "white" and "brown" spirits. Thus, through a combination of high import duties and differentiated internal taxes, Japan manages to "isolate" domestically produced *shochu* from foreign competition, be it foreign produced *shochu* or any other of the mentioned white and brown spirits.

Our interpretation of Article III is faithful to [in the words of *DSU* Article 3:2] the "customary rules of interpretation of Public International Law." WTO rules are reliable, comprehensible and enforceable. WTO rules are not so rigid or so inflexible as not to leave room for reasoned judgments in confronting the endless and ever-changing ebb and flow of real facts in real cases in the real world. They will serve the multilateral trading system best if they are interpreted with that in mind. In that way, we will achieve the "security and predictability" sought for the multilateral trading system by the Members of the WTO through the establishment of the dispute settlement system.

I. CONCLUSIONS AND RECOMMENDATIONS

For the reasons set out in the preceding sections of this report, the Appellate Body has reached the following conclusions:

…

(b) the Panel erred in law in failing to take into account Article III:1 in interpreting Article III:2, first and second sentences;

… and

(d) the Panel erred in law in failing to examine "so as to afford protection" in Article III:1 as a separate inquiry from "not similarly taxed" in the *Ad Article* to Article III:2, second sentence.

With the modifications to the Panel's legal findings and conclusions set out in this report, the Appellate Body affirms the Panel's conclusions that *shochu* and vodka are like products and that Japan, by taxing imported products in excess of like domestic products, is in violation of its obligations under Article III:2, first sentence…. Moreover, the Appellate Body concludes that *shochu* and other distilled spirits and liqueurs listed in HS 2208, except for vodka, are "directly competitive or substitutable products," and that Japan, in the application of the *Liquor Tax Law*, does not similarly tax imported and directly competitive or substitutable domestic products and affords protection to domestic production in violation of Article III:2, second sentence….

The Appellate Body *recommends* that the Dispute Settlement Body request Japan to bring the *Liquor Tax Law* into conformity with its obligations under the General Agreement on Tariffs and Trade 1994.

IV. Cultural Industries and 1997 *Canadian Magazines* Case

● Cultural Protection versus Free Trade?

In the GATT-WTO regime, there is no exception for cultural industries or goods to free trade obligations. Ought there to be one? The 1997 *Canada Magazines* case implicitly raises this issue, one which is increasingly important as many countries increasingly perceive "globalization" to mean "Americanization."

Of English language magazines circulating in Canada, half are foreign. Of all magazines sold at Canadian news stands, 80% are foreign, mostly American. Of the 1,400 magazines Canadian publishers produce, over half have no operating profit. Do these data bespeak a threat to Canadian culture, or a triumph of a free market for ideas?

To be sure, many of American magazines are split-run editions, *i.e.*, an edition is produced for the Canadian market containing advertisements directed at this market and extra pages for local editorial content. But, most of the editorial content remains American. Moreover, the parent publisher is an American company with the advantage of vast economies of scale.

Worst of all from the Canadian perspective is that split-run editions siphon off scarce advertising revenues. Every dollar of an advertising budget spent on placing an ad in an American or other foreign magazine directed at the Canadian market is one less dollar available for expenditure on an ad in a Canadian magazine. The result is that Canadian magazines are starved for advertising revenues. Indeed, the foreign parents find split-run editions to be effective ways to raise advertising revenues in local markets. In brief, to many in the Canadian magazine industry, a split-run edition is an essentially American product paid for by Canadian advertisers.

● Canada's Protective Measures

To preserve its domestic magazine market, on 15 December 1995 Canada enacted legislation – "Part V.I of the *Excise Tax Act*," the "Tax on Split-run Periodicals" – slapping an 80% excise tax on advertising revenues of split-run editions of foreign magazines. That is, Part V.I required imposition, levy, and collection of a tax equal to 80% of the value of all the advertisements in a split-run edition of a periodical. Tax liability lay with the publisher, or person connected with the publisher (*e.g.*, through an equity interest of 50% or more), or the distributor, printer, or wholesaler. To ensure collection, Canada imposed the tax on whichever of these persons resided in Canada, with joint and several liability for the tax operating between publisher and person connected with it, and also operating among distributor, printer, and wholesaler.

Clearly, a key term in Part V.I was "split run." Under Part V.I, a "split run" edition was defined as one (1) distributed in Canada, (2) in which more than 20% of the editorial material is the same or substantially the same as the editorial material that appears in one or more excluded editions of the periodical, and (3) contains an advertisement that does not appear in identical form in the excluded editions. There was an exemption for grandfathered periodicals, essentially those distributed in Canada before 26 March 1993. Part V.I also contained an exemption from the meaning of "split run" for any edition that is primarily circulated outside of Canada. Finally, it exempted from the definition any edition with identical advertisements in the Canadian and non-Canadian issues, so long as the circulation outside Canada exceeded the circulation within Canada. (Canada also excluded from the definition of "periodical" any catalog made up substantially of advertisements.)

Part V.I defined the value of all advertisements in a split-edition to be the total of all the gross fees for all the advertisements contained in the edition, and it applied the tax on a per-issue basis. Canada added an anti-avoidance provision to its tax code to make sure advertising expenses in a split-run edition of a foreign-owned magazine were not deductible from taxable income. These measures did not affect regular editions of foreign magazines distributed in Canada.

The U.S., which initiated both a Section 301 investigation and WTO case, argued the periodicals tax amounted to a virtual ban on the entry of split-run magazines into the Canadian market: 80% is so high, it makes operation economically unfeasible. It also argued the tax was discriminatory.

Canada pointed out the tax would apply equally to a domestic publisher with a split run edition containing foreign content and Canadian advertising. Moreover, the tax closed a loophole created by electronic publishing. Time-Warner, Inc. had declared its intention to produce a Canadian edition, with mostly American editorial content, of *Sports Illustrated* that would be transmitted electronically into Canada for printing. This transmission would circumvent Tariff Code 9958, a special restriction blocking importation into Canada of split-run periodicals.

Canada enacted Tariff Code 9958 in 1965. It applied to any special edition periodical (including a split-run edition or regional edition) containing an advertisement "primarily directed" to a market in Canada that did not also appear in identical form in all editions of that issue of the periodical distributed in the country of origin of the periodical. Tariff Code 9958 prohibited imports of these editions. To determine whether an advertisement was "primarily directed" at the Canadian market, the Canadian government took a number of factors into consideration. These included (1) specific invitations to Canadian consumers only, (2) listing of Canadian addresses as opposed to foreign addresses, (3) whether there were enticements to the Canadian market, and (4) references to Canada's goods and services tax. In addition, Tariff Code 9958 applied to any edition of a periodical in which more than 5% of the advertising content consisted of advertisements "directed" at the Canadian market. Advertisements were considered "directed" to the Canadian market if they indicated specific sources of product or service availability in

Canada, or if they had specific terms or conditions relating to the sale of goods or services in Canada. Naturally, the U.S. argued Tariff Code 9958 violated the GATT XI:1 rule against prophylactic restrictions on imports.

The U.S. also was irked by Canadian postal subsidies to its domestic publishing sector. These subsidies took the form of low rates charged by Canada Post Corporation, a crown corporation, to magazines produced in Canada by Canadian-owned companies. (In 1989, the value of the subsidy peaked at $ 172 million; by 1998 it had fallen to about $ 35 million.) Specifically, Canada had three categories of postal rates for publications:

(1) "funded" rates, which were subsidized by the Canadian government, and which were available only to periodicals edited, printed, and published in Canada that were Canadian-owned and controlled, and which met certain editorial and advertising requirements (*e.g.*, the subject of the periodical had to be news, commentary, religion, science, agriculture, literature or the arts, criticism, health, or academic/scholarly matters, and no more than 70% of the space in the periodical could be devoted to advertising);
(2) "Canadian" rates, which were available to Canadian-owned and controlled periodicals that were edited, printed, and published in Canada, and which to such periodicals that did not qualify for a funded rate; and
(3) "international" rates, which applied to all foreign publications mailed in Canada.

The funded rates program aimed to promote Canadian culture by reducing distribution costs for Canadian periodicals. Canada said this "subsidy" was the most efficient way to provide assistance. The U.S. retorted that because it was not provided directly by the Canadian government, it violated WTO rules.

- **WTO Panel and Appellate Body Reports**

Unlike the GATT-WTO regime, some FTAs – including *NAFTA* – have a cultural industry exception. Curiously, Canada did not invoke the cultural industry exemption provisions of *NAFTA* (Article 2106 and Annex 2106), in spite of American provocation to do so. Indeed, neither side availed itself of the *NAFTA* Chapter 20 forum. The U.S. urged that as a cultural product, a magazine should be considered in the same way as any merchandise. It accused Canada of using "culture" as an excuse to favor domestic firms. Canada said the matter was purely domestic, hence *NAFTA* was irrelevant. At bottom, Canada knew that invoking the *NAFTA* exemption would create the possibility of U.S. retaliation, which the exemption specifically authorizes.

In March 1997, a WTO Panel ruled against Canada, upholding most of the American arguments. In *Canada – Measures Prohibiting or Restricting Importation of Certain Periodicals*, the Panel said the periodicals tax violated the GATT Article III:2 national treatment obligation, and the 1965 tariff prohibiting imports of split-run editions violated the Article XI rule against import bans. The preferential postal rates did accord less favorable treatment to imported magazines than to like Canadian magazines, thus

violating the national treatment provision of GATT Article III:4. But, said the Panel, the preference was a subsidy under GATT Article III:8(b), hence the violation was excused.

Canada appealed the ruling, arguing the controversial measures were directed at a service – advertising in foreign magazines – not the magazines *per se*. In July 1997, the WTO Appellate Body rejected this argument. Its Report is excerpted below. Essentially, the Appellate Body upheld the findings of the Panel, though it reversed the Panel's conclusion on the postal subsidy issue, concluding postal rates did not constitute a subsidy under GATT Article III:8(b). Presumably, therefore, they violated Article III:4.

V. Key Findings in 1997 *Canada Magazines* Case

WTO APPELLATE BODY REPORT, *CANADA – CERTAIN MEASURES CONCERNING PERIODICALS*, WT/DS31/AB/R (ADOPTED 30 JULY 1997)

V. Article III:2, First Sentence, of the GATT 1994

With respect to the application of Article III:2, first sentence, we agree with the Panel that:

> … the following two questions need to be answered to determine whether there is a violation of Article III:2 of GATT 1994: *(a)* Are imported "split-run" periodicals and domestic non "split-run" periodicals like products?; and *(b)* Are imported "split-run" periodicals subject to an internal tax in excess of that applied to domestic non "split-run" periodicals? If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence. If the answer to the first question is negative, we need to examine further whether there is a violation of Article III:2, second sentence.

[Citing its Report in *Japan Alcoholic Beverages*, the Appellate Body observed in a footnote that it

> need not examine the applicability of Article III:1 separately, because, as the Appellate Body noted in its recent report, the first sentence of Article III:2 ***is***, in effect, an application of the general principle embodied in Article III:1. Therefore, if the imported and domestic products are "like products," and if the taxes applied to the imported products are "in excess of" those applied to the like domestic products, then the measure is inconsistent with Article III:2, first sentence. (Emphasis original.)]

A. LIKE PRODUCTS

We agree with the legal findings and conclusions in … the Panel Report [concerning the "like produce" analysis]. In particular, the Panel correctly enunciated, in theory, the legal test for determining "like products" in the context of Article III:2, first

sentence, as established in the Appellate Body Report in *Japan – Alcoholic Beverages*. We also agree with the second point made by the Panel. As Article III:2, first sentence, normally requires a comparison between imported products and like domestic products, and as there were no imports of split-run editions of periodicals because of the import prohibition in Tariff Code 9958, which the Panel found (and Canada did not contest on appeal) to be inconsistent with the provisions of Article XI of the GATT 1994, hypothetical imports of split-run periodicals have to be considered. As the Panel recognized, the proper test is that a determination of "like products" for the purposes of Article III:2, first sentence, must be construed narrowly, on a case-by-case basis, by examining relevant factors including:

> (i) the product's end-uses in a given market;
> (ii) consumers' tastes and habits; and
> (iii) the product's properties, nature and quality.

However, the Panel failed to analyze these criteria in relation to imported split-run periodicals and domestic non-split-run periodicals. Firstly, we note that the Panel did not base its findings on the exhibits and evidence before it, in particular, the copies of *TIME*, *TIME Canada* and *Maclean's* magazines, presented by Canada, and the magazines, *Pulp & Paper* and *Pulp & Paper Canada*, presented by the United States, or the *Report of the Task Force on the Canadian Magazine Industry* (the "*Task Force Report*").

Secondly, we observe that the Panel based its findings that imported split-run periodicals and domestic non-split-run periodicals "can" be like products, on a single hypothetical example constructed using a Canadian-owned magazine, *Harrowsmith Country Life*. However, this example involves a comparison between two editions of the same magazine, both imported products, which could not have been in the Canadian market at the same time. Thus, the discussion ... [in] the Panel Report is inapposite, because the example is incorrect.

> The Panel leapt from its discussion of an incorrect hypothetical example to ... conclude that imported "split-run" periodicals and domestic non "split-run" periodicals *can* be like products within the meaning of Article III:2 of GATT 1994. In our view, this provides sufficient grounds to answer in the affirmative the question as to whether the two products at issue *are* like because, ... the purpose of Article III is to protect expectations of the Members as to the competitive relationship between their products and those of other Members, not to protect actual trade volumes. (Emphasis added.)

It is not obvious to us how the Panel came to the conclusion that it had "sufficient grounds" to find the two products at issue *are* like products from an examination of an incorrect example which led to a conclusion that imported split-run periodicals and domestic non-split-run periodicals *can be* "like."

We therefore conclude that, as a result of the lack of proper legal reasoning based

on inadequate factual analysis, … the Panel could not logically arrive at the conclusion that imported split-run periodicals and domestic non-split-run periodicals are like products.

We are mindful of the limitation of our mandate in Articles 17:6 and 17:13 of the *DSU*. According to Article 17:6, an appeal shall be limited to issues of law covered in the Panel Report and legal interpretations developed by the Panel. The determination of whether imported and domestic products are "like products" is a process by which legal rules have to be applied to facts. In any analysis of Article III:2, first sentence, this process is particularly delicate, since "likeness" must be construed narrowly and on a case-by-case basis. We note that, due to the absence of adequate analysis in the Panel Report in this respect, it is not possible to proceed to a determination of like products.

We feel constrained, therefore, to reverse the legal findings and conclusions of the Panel on "like products." As the Panel itself stated, there are two questions which need to be answered to determine whether there is a violation of Article III:2 of the GATT 1994: (a) whether imported and domestic products are like products; and (b) whether the imported products are taxed in excess of the domestic products. If the answers to both questions are affirmative, there is a violation of Article III:2, first sentence. If the answer to one question is negative, there is a need to examine further whether the measure is consistent with Article III:2, second sentence.

Having reversed the Panel's findings on "like products," we cannot answer both questions in the first sentence of Article III:2 in the affirmative as is required to demonstrate a violation of that sentence. Therefore, we need to examine the consistency of the measure with the second sentence of Article III:2 of the GATT 1994.

B. NON-DISCRIMINATION

In light of our conclusions on the question of "like products" in Article III:2, first sentence, we do not find it necessary to address Canada's claim of "non-discrimination" in relation to that sentence.

VI. Article III:2, Second Sentence, of the GATT 1994

We will proceed to examine the consistency of Part V.1 of the *Excise Tax Act* with the second sentence of Article III:2 of the GATT 1994.

A. JURISDICTION

Canada asserts that the Appellate Body does not have the jurisdiction to examine a claim under Article III:2, second sentence, as no party has appealed the findings of the Panel on this provision. [The Appellate Body rejected this argument, essentially because (1) the legal obligations in the first and second sentences of Article II:2 are closely linked, (2) the Panel made findings legal findings concerning the first sentence, one of which the Appellate Body reversed, and (3) it would be remiss of the Appellate Body not to complete the analysis of Article III:2.]

…

B. THE ISSUES UNDER ARTICLE III:2, SECOND SENTENCE

In our Report in *Japan – Alcoholic Beverages*, we held that:

> ... three separate issues must be addressed to determine whether an internal tax measure is inconsistent with Article III:2, second sentence. These three issues are whether:
>
> (1) the imported products and the domestic products *are "directly competitive or substitutable products" which are in competition with each other*;
> (2) the directly competitive or substitutable imported and domestic products are *"not similarly taxed;"* and
> (3) the dissimilar taxation of the directly competitive or substitutable imported domestic products *is "applied ... so as to afford protection to domestic production."*

1. Directly Competitive or Substitutable Products

In *Japan – Alcoholic Beverages*, the Appellate Body stated that as with "like products" under the first sentence of Article III:2, the determination of the appropriate range of "directly competitive or substitutable products" under the second sentence must be made on a case-by-case basis. The Appellate Body also found it appropriate to look at competition in the relevant markets as one among a number of means of identifying the broader category of products that might be described as "directly competitive or substitutable," as the GATT is a commercial agreement, and the WTO is concerned, after all, with markets.

According to the Panel Report, Canada considers that split-run periodicals are not "directly competitive or substitutable" for periodicals with editorial content developed for the Canadian market. Although they may be substitutable advertising vehicles, they are not competitive or substitutable information vehicles. Substitution implies interchangeability. Once the content is accepted as relevant, it seems obvious that magazines created for different markets are not interchangeable. They serve different end-uses. Canada draws attention to a study by the economist, Leigh Anderson, on which the *Task Force Report* was at least partially-based, which notes:

> U.S. magazines can probably provide a reasonable substitute for Canadian magazines in their capacity as an advertising medium, although some advertisers may be better served by a Canadian vehicle. In many instances however, they would provide a very poor substitute as an entertainment and communication medium.

Canada submits that the *Task Force Report* characterizes the relationship as one of "imperfect substitutability" – far from the direct substitutability required by this provision.

The market share of imported and domestic magazines in Canada has remained remarkably constant over the last 30-plus years. If competitive forces had been in play to the degree necessary to meet the standard of "directly competitive" goods, one would have expected some variations. All this casts serious doubt on whether the competition or substitutability between imported split-run periodicals and domestic non-split-run periodicals is sufficiently "direct" to meet the standard of *Ad Article III*.

According to the United States, the very existence of the tax is itself proof of competition between split-run periodicals and non-split-run periodicals in the Canadian market. As Canada itself has acknowledged, split-run periodicals compete with wholly domestically-produced periodicals for advertising revenue, which demonstrates that they compete for the same readers. The only reason firms place advertisements in magazines is to reach readers. A firm would consider split-run periodicals to be an acceptable advertising alternative to non-split-run periodicals only if that firm had reason to believe that the split-run periodicals themselves would be an acceptable alternative to non-split-run periodicals in the eyes of consumers. According to the United States, Canada acknowledges that "[r]eaders attract advertisers" and that, "… Canadian publishers are ready to compete with magazines published all over the world in order to keep their readers, but the competition is fierce."

According to the United States, the *Task Force Report* together with statements made by the Minister of Canadian Heritage and Canadian officials, provide further acknowledgment of the substitutability of imported split-run periodicals and domestic non-split-run periodicals in the Canadian market.

We find the United States' position convincing, while Canada's assertions do not seem to us to be compatible with its own description of the Canadian market for periodicals.

…

The statement by the economist, Leigh Anderson, quoted by Canada and the *Task Force Report*'s description of the relationship as one of "imperfect substitutability" does not modify our appreciation. A case of perfect substitutability would fall within Article III:2, first sentence, while we are examining the broader prohibition of the second sentence. We are not impressed either by Canada's argument that the market share of imported and domestic magazines has remained remarkably constant over the last 30-plus years, and that one would have expected some variation if competitive forces had been in play to the degree necessary to meet the standard of "directly competitive" goods. This argument would have weight only if Canada had not protected the domestic market of Canadian periodicals through, among other measures, the import prohibition of Tariff Code 9958 and the excise tax of Part V.1 of the *Excise Tax Act*.

Our conclusion that imported split-run periodicals and domestic non-split-run periodicals are "directly competitive or substitutable" does not mean that all periodicals belong to the same relevant market, whatever their editorial content. A periodical containing mainly current news is not directly competitive or substitutable with a periodical dedicated to gardening, chess, sports, music or cuisine. But news magazines, like *TIME*, *TIME Canada* and *Maclean's*, are directly competitive or substitutable in spite of the

"Canadian" content of *Maclean's*. The competitive relationship is even closer in the case of more specialized magazines, like *Pulp & Paper* as compared with *Pulp & Paper Canada*, two trade magazines presented to the Panel by the United States.

The fact that, among these examples, only *TIME Canada* is a split-run periodical, and that it is not imported but is produced in Canada, does not affect at all our appreciation of the competitive relationship. The competitive relationship of imported split-run periodicals destined for the Canadian market is even closer to domestic non-split-run periodicals than the competitive relationship between imported non-split-run periodicals and domestic non-split-run periodicals. Imported split-run periodicals contain advertisements targeted specifically at the Canadian market, while imported non-split-run periodicals do not carry such advertisements.

We, therefore, conclude that imported split-run periodicals and domestic non-split-run periodicals are directly competitive or substitutable products in so far as they are part of the same segment of the Canadian market for periodicals.

2. Not Similarly Taxed

Having found that imported split-run and domestic non-split-run periodicals of the same type are directly competitive or substitutable, we must examine whether the imported products and the directly competitive or substitutable domestic products are not similarly taxed. Part V.1 of the *Excise Tax Act* taxes split-run editions of periodicals in an amount equivalent to 80 per cent of the value of all advertisements in a split-run edition. In contrast, domestic non-split-run periodicals are not subject to Part V.1 of the *Excise Tax Act*. Following the reasoning of the Appellate Body in *Japan – Alcoholic Beverages*, dissimilar taxation of even some imported products as compared to directly competitive or substitutable domestic products is inconsistent with the provisions of the second sentence of Article III:2. In *United States – Section 337*, the Panel found:

> ... that the "no less favorable" treatment requirement of Article III:4 has to be understood as applicable to each individual case of imported products. The Panel rejected any notion of balancing more favorable treatment of some imported products against less favorable treatment of other imported products. [GATT B.I.S.D. (36th Supp.) 345 at ¶ 5.14 (adopted 7 November 1989).]

With respect to Part V.1 of the *Excise Tax Act*, we find that the amount of the taxation is far above the *de minimis* threshold required by the Appellate Body Report in *Japan – Alcoholic Beverages*. The magnitude of this tax is sufficient to prevent the production and sale of split-run periodicals in Canada.

3. So as to Afford Protection

The Appellate Body established the following approach in *Japan – Alcoholic Beverages* for determining whether dissimilar taxation of directly competitive or

substitutable products has been applied so as to afford protection:

> … we believe that an examination in any case of whether dissimilar taxation has been applied so as to afford protection requires a comprehensive and objective analysis of the structure and application of the measure in question on domestic as compared to imported products. We believe it is possible to examine objectively the underlying criteria used in a particular tax measure, its structure, and its overall application to ascertain whether it is applied in a way that affords protection to domestic products.
>
> Although it is true that the aim of a measure may not be easily ascertained, nevertheless its protective application can most often be discerned from the design, the architecture, and the revealing structure of a measure. The very magnitude of the dissimilar taxation in a particular case may be evidence of such a protective application, … Most often, there will be other factors to be considered as well. In conducting this inquiry, Panels should give full consideration to all the relevant facts and all the relevant circumstances in any given case.

With respect to Part V.1 of the *Excise Tax Act*, we note that the magnitude of the dissimilar taxation between imported split-run periodicals and domestic non-split-run periodicals is beyond excessive, indeed, it is prohibitive. There is also ample evidence that the very design and structure of the measure is such as to afford protection to domestic periodicals.

The Canadian policy which led to the enactment of Part V.1 of the *Excise Tax Act* had its origins in the *Task Force Report*. It is clear from reading the *Task Force Report* that the design and structure of Part V.1 of the *Excise Tax Act* are to prevent the establishment of split-run periodicals in Canada, thereby ensuring that Canadian advertising revenues flow to Canadian magazines. Madame Monique Landry, Minister Designate of Canadian Heritage at the time the *Task Force Report* was released, issued the following statement summarizing the Government of Canada's policy objectives for the Canadian periodical industry:

> The Government reaffirms its commitment to protect the economic foundations of the Canadian periodical industry, which is a vital element of Canadian cultural expression. To achieve this objective, the Government will continue to use policy instruments that encourage the flow of advertising revenues to Canadian magazines and discourage the establishment of split-run or "Canadian" regional editions with advertising aimed at the Canadian market. We are committed to ensuring that Canadians have access to Canadian ideas and information through genuinely Canadian magazines, while not restricting the sale of foreign magazines in Canada.

Furthermore, the Government of Canada issued the following response to the *Task*

Force Report:

> The Government reaffirms its commitment to the long-standing policy of protecting the economic foundations of the Canadian periodical industry. To achieve this objective, the Government uses policy instruments that encourage the flow of advertising revenues to Canadian periodicals, since a viable Canadian periodical industry must have a secure financial base.

During the debate of Bill C-103, *An Act to Amend the Excise Tax Act and the Income Tax Act*, the Minister of Canadian Heritage, the Honorable Michel Dupuy, stated the following:

> ... the reality of the situation is that we must protect ourselves against split-runs coming from foreign countries and, in particular, from the United States.

Canada also admitted that the objective and structure of the tax is to insulate Canadian magazines from competition in the advertising sector, thus leaving significant Canadian advertising revenues for the production of editorial material created for the Canadian market. With respect to the actual application of the tax to date, it has resulted in one split-run magazine, *Sports Illustrated*, to move its production for the Canadian market out of Canada and back to the United States. Also, *Harrowsmith Country Life*, a Canadian-owned split-run periodical, has ceased production of its United States' edition as a consequence of the imposition of the tax.

We therefore conclude on the basis of the above reasons, including the magnitude of the differential taxation, the several statements of the Government of Canada's explicit policy objectives in introducing the measure and the demonstrated actual protective effect of the measure, that the design and structure of Part V.1 of the *Excise Tax Act* is clearly to afford protection to the production of Canadian periodicals.

VI. NFL, "Sim Sub," and Copyright Licensing

Super Bowl LI, in February 2017, was a thrilling overtime game in which the New England Patriots defeated the Atlanta Falcons by a 34-28. Canadians watched the game on Canadian broadcasting, via Bell Media (and its media division, CTV), the exclusive copyright licensee to which the NFL transferred broadcasting rights. Since the 1970s, Canada has had a policy of "Simultaneous Substitution," or "Sim Sub," whereby Canadian advertising is substituted for American advertising, thus blocking American ads from being shown in Canada.[548] Sim Sub "lets Canadian television service providers temporarily replace a U.S. TV channel's signal with a Canadian signal, thereby also allowing them to

[548] *See* B.J. Siekierski, *New Setback for Bell, NFL in Canada Super Bowl Ad Case*, 35 International Trade Reporter (BNA) 179 (1 February 2018) [hereinafter, *New Setback*]; Victoria Graham, *NFL Tries "Hail Mary" Effort to Influence NAFTA Negotiations*, 34 International Trade Reporter (BNA) 1277 (28 September 2017) [hereinafter, *NFL Tries "Hail Mary"*].

sell advertising spots during the program."[549] That is:

> allows signals that contain Canadian ads to be played over American ones when programming on a U.S. network airs at the same time on a Canadian network. The rule … was put in place "to protect the rights of broadcasters and promote local broadcasting as well as the creation of programs made by Canadians," according to federal Canadian broadcasting policy.[550]

Sim Sub applies only when an American broadcaster airs the same program as a Canadian broadcaster. But, in August 2016, the Canadian Radio-Television and Telecommunications Commission (CRTC), decided that Sim Sub does not apply to the Super Bowl. Ending Sim Sub meant Canadians could watch American advertisements during the Super Bowl.

That is, for the Super Bowl (and only that game), the CRTC removed Sim Sub requirements, thereby allowing any broadcaster (Canadian or American) of the Super Bowl to show American commercials rather than substituting them for Canadian ads. For Super Bowl LI, Fox Sports was the American broadcaster, along with the NFL licensee, a Canadian broadcaster, Bell Media (which is owned by a Canadian telecommunications company, BCE Inc.), which owned the rights to Super Bowl broadcasts in Canada through 2019). Both showed American ads, and Bell Media argued "CRTC's decision to eliminate the rule during the game hurts Canadian broadcasters who are now competing with American feeds for the advertising base…."[551] In other words:

> The administrative action, in Bell and the NFL's case, is the 2015 decision by the Canadian Radio-television and Telecommunications Commission to stop applying the policy of simultaneous substitution to the Super Bowl starting with the 2017 game.
>
> ...
>
> In purchasing the NFL's exclusive Canadian license to broadcast the Super Bowl through 2020, Bell assumed simultaneous substitution would be in place – increasing the value of what they could charge for coveted ad spots and what they were willing to pay the NFL for the license.[552]

So, the NFL and Bell went on the offense, using both legal and lobbying plays, to reinstate Sim Sub. They were coached by the USTR, which in its 2017 *NTE*, decried the Canadian NTB to services trade: "U.S. suppliers of programming believe that the price Canadian networks pay for Super Bowl rights is determined by the value of advertising they can sell

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549 B.J. Siekierski, *Canadian Supreme Court to Hear Super Bowl Ad Appeal*, 35 International Trade Reporter (BNA) 675 (17 May 2018). [Hereinafter, *Canadian Supreme Court*.]

550 Madison Alder, *NFL Continues Drive in Court, NAFTA Talks for Super Bowl Ads*, 34 International Trade Reporter (BNA) 1463 (2 November 2017). [Hereinafter, "*NFL Continues Drive*."] The Canadian policy is Canadian Radio-Television and Telecommunications Commission, Broadcasting Regulatory Policy CRTC 2015-25, Measures to Address Issues Related to Simultaneous Substitution (29 January 2015), www.crtc.gc.ca/eng/archive/2015/2015-25.htm.

551 *NFL Continues Drive*. *See also* Bell Media, Elimination of Sim Sub for the Super Bowl (undated), www.bellmedia.ca/superbowl-simsub/.

552 *Canadian Supreme Court*.

in Canada, and ... the CRTC's decision reduces the value of their programming."[553]

Canadian viewers agreed with the CRTC's populist decision. They said American commercials are "integral" to any Super Bowl, and without them, the game would "lose its cultural significance."[554] The NFL disagreed, protested the CRTC decision. The NFL argued in favor of Sim Sub. The League said its Canadian licensee should be allowed to substitute Canadian for American ads during the Super Bowl. Bell Media had enjoyed a monopoly and corresponding revenue stream, until the decision, because they did not have to compete with American ads. Of the 7.9 million Canadians who watched the Patriots-Falcons game, 4.4 million viewed it via a Canadian broadcaster, but 3.4 million flipped the switch to Fox, so they could see the American ads. Bell Media said the loss of 3.4 million viewers – a drop of 39% for the 2017 versus 2016 Super Bowl – cost it U.S. $8,105,370 (CAD$ $11 million) in advertising revenue.[555] That hurt Bell, which needed to pay the NFL for its exclusive copyright license.

The NFL said it was injured, too: the Canadian audience was split between viewers watching (1) its Canadian copyright licensee, and (2) Fox Sports, both airing American ads. The split audience reduced the value of the copyright to NFL broadcasts in Canada, both for Super Bowl LI and future games. The NFL cited *NAFTA* 1.0 Chapter 17 national treatment rules for IP in its favor: the CRTC decision deprived its exclusive copyright licensee, Bell Media, of significant revenue by eliminating the Sim Sub requirement for the Super Bowl.[556] Had Sim Sub been in place, any broadcaster would have had to air Canadian-only ads, and there would have been no incentive for a Canadian viewer to watch the Super Bowl on Fox Sports. That is, *NAFTA* 1.0 (as well as *NAFTA* 2.0) required that foreign copyrights be treated no less favorably than domestic ones. Cancelling the Sim Sub for the Super Bowl significantly impaired the ability of the NFL to generate revenue from its Canadian copyright license.[557]

Critics called the NFL-Bell argument a "Hail Mary" pass.[558] It certainly was a costly toss. The NFL paid $400,000 in lobbying fees to Covington & Burling LLP between 2015 (4th quarter)-2017 (3rd quarter) relating to the "consistency of Canadian television programming with *NAFTA*."[559] The pass fell incomplete. The Canadian Supreme Court rejected the argument, and no change was made to Sim Sub rules during the fall 2017-spring 2018 *NAFTA* renegotiations. NFL and Bell thus tried a different strategy to "maximize their audience – simulcasting on a number of channels, giving away more than

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553 OFFICE OF THE UNITED STATES TRADE REPRESENTATIVE, 2017 NATIONAL TRADE ESTIMATE REPORT ON FOREIGN TRADE BARRIERS, 71 (March 2017), https://ustr.gov/sites/default/files/files/reports/2017/NTE/2017%20NTE.pdf.

554 *NFL Tries "Hail Mary."*

555 *New Setback*. Likewise, "Bell claims viewers of the game on Canadian channels decreased 40 percent from 2016 for the 2017 and 2018 games, costing them C$11 million (US$ 8.6 million) in revenue for the 2017 game alone." *Canadian Supreme Court*.

556 *See NFL Continues Drive*, (reporting "the NFL argued that the decision by CRTC deprives the League's Canadian Super Bowl licensee of its right to the telecommunications rule that once protected its advertising base from the lure of American ads").

557 *NFL Tries "Hail Mary."*

558 *NFL Tries "Hail Mary"* (*quoting* Professor Michael Geist, University of Ottawa).

559 *NFL Tries "Hail Mary." See also NFL Continues Drive* (reporting these figures).

$243,000 ($300,000 Canada) in prizes, ... directing viewers to BigGameAds.ca, a website that allows Canadians to watch all the American ads released in advance of the game, and [hiring] the popular Canadian comedian Russell Peters ... [to] appear in ... humorous video bits ... only ... available to Canadian viewers."[560]

The controversy was resolved in *NAFTA 2.0* in a manner that allowed the NFL and Bell Media to broadcast American ads during the Super Bowl. That is, in Annex 15-D to Chapter 15 (which concerns Cross-Border Trade in Services) of the *USMCA*, Canada agreed to overturn the CRTC decision. Paragraph 1 states:

> Canada shall rescind Broadcasting Regulatory Policy CRTC 2016-334 and Broadcasting Order CRTC 2016-335. With respect to simultaneous substitution of commercials during the retransmission in Canada of the program referenced in those measures, Canada may not accord the program treatment less favorable than the treatment accorded to other programs originating in the United States retransmitted in Canada.

Thus, Canada reinstated Sim Sub, as it was obliged to accord treatment no less favorable to Super Bowl broadcasts than it accorded to all other U.S.-origin programs. Canadians no longer could watch those glitzy ads during broadcasts of the big game, and instead needed to search for them on the internet.

VII. Two Cracks in Third Pillar: Direct and FX Taxation

● Direct Taxation

Like the MFN and tariff concession principles, the obligation to provide national treatment principle is not unqualified. For instance, under both GATT Article III:2 and *NAFTA* Article 301:1, national treatment applies to indirect but not direct taxes. Suppose an Indian food company sells its *mithai* (traditional sweets) in Pakistan. Assume the Pakistani tax authority has jurisdiction over the company (perhaps because the company has an office in Lahore). The Pakistani tax authority imposes a higher income tax (a direct tax) on the Indian company than on Pakistani *mithai* producers. There is no violation of the MFN, tariff concession, or national treatment obligations.

This hypothetical example begs the question of what delineates a "direct" from an "indirect" tax. The fact that an "indirect" tax also is called an "internal" tax is misleading, because it suggests only a post-border (*i.e.*, post-customs clearance) levy would be an "indirect" or "internal" tax. Where a tax is imposed – at or after the border – is irrelevant to distinguishing "direct" from "indirect" taxes. Another irrelevancy is the rubric applied to a tax by the taxing authority. A government might call a levy an "internal" tax, when in fact it is a tariff. Its motive for the label might be to avoid application of GATT Article II tariff binding rule to the levy, because its overt tariff plus the levy exceed the bound rate. Calling the levy an "internal" tax would take it out from Article II scrutiny. Yet, if the levy

560 *New Setback*.

is collected at the time, and on condition of entry, into an importing country, and not applied to domestic products, then it is squarely a tariff subject to the discipline of Article II, not an "indirect" or "internal" tax subject to the discipline of Article III.

The simplest and most practicable distinction between a "direct" and "indirect" tax is that the former is a tax on income and the latter is not. A "direct" tax applies to the earnings of a taxpayer and is levied on the producer or vendor. An "indirect" tax is levied on a product or a transaction, namely, the value thereof. That is, the difference is the taxable entity. A "direct" tax is borne by a producer or seller, which generates income from economic activity. An "indirect" tax is borne by a consumer of the goods or services associated with that activity. Thus, a tax on gross income, adjusted for various items (i.e., credits and deductions) is "direct." A tax on sales or value added is "indirect."

Consider whether this distinction, based on incidence of the tax makes sense in reality? Do producers and vendors pass on at least a portion of their income taxes to consumers through higher prices? Do they also sometimes absorb sales and value added taxes through lower prices? Consider, too, why GATT Article III carves out direct taxes from the discipline of national treatment? Would even the original 23 GATT contracting parties have agreed to multilateral regulation of income taxes?

- **Exchange and Sub-Central Taxation**

Some categories of taxation do not fit easily into the "direct" – "indirect" distinction. For example, are exchange taxes, which apply to foreign exchange transactions, covered by Article III:1-2? The hedged answer is "not necessarily." The argument that they are would be made under GATT Article XV:4, the Interpretative Note to it, *Ad Article XV, Paragraph 4*, and Article XV:9. What would be the arguments for and against requiring exchange taxes to comport with national treatment?

Are taxes imposed by state or local governments subject to national treatment? Here the answer is more firm. If discriminatory, then they are problematical under GATT, particularly because of the Interpretative Note, *Ad Article III, Paragraph 1* (last sentence) and Article XXIV:12. Consider the terms in these provisions that would be used to attack such taxes. Without doubt, state and local taxation is covered by the national treatment principle of *NAFTA* 1.0. Article 301:1 plainly applies to them by virtue of Article 301:2. Note also, Article 301.3 explains that Annex 301.3 details exceptions taken by the *NAFTA* Parties to the national treatment principle. These exceptions pertain to tariffs and measures applicable to specific types of imports. *NAFTA* 2.0 contains essentially the same provisions.

Chapter 17

THIRD PILLAR (CONTINUED): GATT ARTICLE III:4 AND NATIONAL TREATMENT FOR NON-FISCAL MEASURES[561]

I. Voluntary Purchase Undertakings and 1984 *Canada Foreign Investment Review Act* Case

GATT PANEL REPORT, *CANADA – ADMINISTRATION OF THE FOREIGN INVESTMENT REVIEW ACT*, B.I.S.D. (30TH SUPP.) AT 140, 142-147 (ADOPTED 7 FEBRUARY 1984)

2. Factual Aspects

…

2.2. *The Foreign Investment Review Act*. In December 1973 the Parliament of Canada enacted the *Foreign Investment Review Act*. According to Section 2(1) of this *Act*, the Parliament adopted the law "in recognition that the extent to which control of Canadian industry, trade and commerce has become acquired by persons other than Canadians and the effect thereof on the ability of Canadians to maintain effective control over their economic environment is a matter of national concern" and that it was the[re]fore expedient to ensure that acquisitions of control of a Canadian business or establishments of a new business by persons other than Canadians be reviewed and assessed and only be allowed to proceed if the government had determined that they were, or were likely to be, of "significant benefit to Canada."

2.3. Section 2(2) lists five factors to be taken into account in assessing whether a proposed investment is or is likely to be of significant benefit to Canada. These are:

> (a) the effect of the acquisition or establishment on the level and nature of economic activity in Canada, including, without limiting the generality of the foregoing, the effect on employment, on resource processing, on the utilization of parts, components and services produced in Canada, and on exports from Canada;

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[561] Documents References:
(1) *Havana (ITO) Charter* Articles 18-19, 29, 46-54
(2) GATT Articles III, XV:4, XV:9, XVII, and XXIV:12, and Interpretative Notes, *Ad Article III* and *Ad Article XV*
(3) WTO *TRIMs Agreement* Articles 2-3, and Annex
(4) WTO *GPA*, Article III
(5) *NAFTA* Chapter 3, and Article 1102
(6) Relevant provisions in other FTAs

(b) the degree and significance of participation by Canadians in the business enterprise of new business and in any industry or industries in Canada of which the business enterprise or new business forms or would form a part;
(c) the effect of the acquisition or establishment on productivity, industrial efficiency, technological development, product innovation and product variety in Canada;
(d) the effect of the acquisition or establishment on competition within any industry or industries in Canada; and
(e) the compatibility of the acquisition or establishment with national industrial and economic policies, taking into consideration industrial and economic policy objectives enunciated by the government or legislature of any province likely to be significantly affected by the acquisition or establishment.

2.4. *Written undertakings given by investors*. The *Act* provides that investors may submit written undertakings on the conduct of the business they are proposing to acquire or establish, conditional on approval by the Canadian government of the proposed acquisition or establishment. The submission of undertaking is not required under the *Act* but, as the administration of the *Act* evolved, they are now routinely submitted in support of nearly all larger investment proposals. Many undertakings are the result of negotiations between the investor and the Canadian government. Undertakings given by investors may deal with any aspect of the conduct of a business, including employment, investment, research and development, participation of Canadian shareholders and managers, productivity improvements as well as practices with respect to purchasing, manufacturing and exports. There are no pre-set formulas or prescriptions for the undertakings.

2.5. *Purchase undertakings*. Undertakings with respect to the purchase of goods have been given in a variety of forms:

– some involve best efforts to seek Canadian sources of supply;
– some specify a percentage or amount of purchases of Canadian products;
– some envisage replacement of imports with Canadian-made goods in a specific dollar amount;
– some refer to the purchase of Canadian products, others only to the purchase from Canadian suppliers (whether of domestic or imported goods);
– some involve a commitment to set up a purchasing division in the Canadian subsidiary; and
– some involve a commitment to consult with [a] federal or provincial industry specialist in drawing up tender lists.

Undertakings on purchases are often but not always conditional on goods being "available," "reasonably available" or "competitively available" in Canada with respect to price, quality, and delivery or other factors specified by the investor.

2.6. *Manufacturing undertakings*. Some firms have given undertakings to manufacture in Canada products or components of a product used or sold by the firm.

…

2.8. *Statistics on the undertakings*. The *Act* came into force on 9 April 1974 with respect to acquisitions and on 15 October 1975 with respect to new businesses. From April 1974 to September 1982, the Government of Canada has rendered decisions on 4,103 investment proposals, of which 2,448 were from the United States. Approximately 90 per cent of the reviewable investment proposals on which the government has taken a decision have been judged to be of significant benefit to Canada and have, therefore, been allowed. The Panel asked questions about the frequency with which the various types of undertakings have been given. In order to answer these questions the Canadian government reviewed a sample of 181 investments allowed in the month of November in the years 1980, 1981 and 1982. … In this sample, 55 of the investors or 30 per cent of the total gave no undertakings relating to sourcing. The remaining 126 investors gave a total of 178 sourcing undertakings. (Some investors gave more than one sourcing undertaking). Of those 178 sourcing undertakings, 65 per cent referred to the purchase of goods and services from Canadian suppliers or words to that effect, 15 per cent referred to purchase of Canadian produced goods. The remaining 20 per cent were sourcing commitments of other kinds, *e.g.*, to set up a Canadian purchasing division, or to consult with a government body to identify potential Canadian suppliers. This latter 20 per cent also includes undertakings relating solely to the purchase of services. 71 per cent of the undertakings to purchase in Canada or to purchase Canadian produced goods carried a qualification with respect to the availability of goods on competitive terms.

…

2.10. *Enforcement of the undertakings*. Written undertakings given by firms are legally binding on the investor if the investment is allowed. According to Section 21 of the *Act* the Minister responsible for the administration of the *Act* may apply to the courts for a remedial order in the event an investor fails to implement undertakings he/she has given….

II. Key Findings in 1984 *Canada Foreign Investment Review* Case

GATT PANEL REPORT, *CANADA – ADMINISTRATION OF THE FOREIGN INVESTMENT REVIEW ACT*, B.I.S.D. (30TH SUPP.) AT 140, 157-162, 165-168 (ADOPTED 7 FEBRUARY 1984)

3. Main Arguments

3.1. The *United States* requested the Panel to find that the written undertakings obtained by the Government of Canada under the *Foreign Investment Review Act* which oblige foreign investor[s] subject to the *Act*

(a) to purchase goods of Canadian origin in preference to imported goods or in specified amounts or proportions, or to purchase goods from Canadian sources [and]

(b) to manufacture in Canada goods which would be imported otherwise are inconsistent with Article[] III:4 ... of the General Agreement....

3.2. *Canada* requested the Panel to find that the purchase undertakings (paragraph 3.1(a)), given by foreign investors are not inconsistent with the provisions of Article[] III:4 … of the General Agreement. … As to the manufacturing undertakings (paragraph 3.1(b)), Canada asked the Panel to find that these do not fall under the Panel's terms of reference.

…

5. Findings

(a) *General*

…

5.3. The Panel considered that the examination of undertakings to *manufacture* goods which would be imported otherwise, as requested by the United States … was not covered by its terms of reference which only refer to "the *purchase* of goods in Canada and/or the *export* of goods from Canada." Accordingly the Panel did not examine this question.

(b) *Undertakings to purchase goods of Canadian origin in preference to imported goods or in specified amounts or proportions, or to purchase goods from Canadian sources*

5.4. *Article III:4*. The Panel first examined whether the purchase undertakings are to be considered "laws, regulations or requirements" within the meaning of Article III:4. As both parties had agreed that the *Foreign Investment Review Act* and the *Foreign Investment Review Regulations* – whilst providing for the possibility of written undertakings – did not make their submission obligatory, the question remained whether the undertakings given in individual cases are to be considered "requirements" within the meaning of Article III:4. In this respect the Panel noted that Section 9(c) of the *Act* refers to any "any written undertakings ... relating to the proposed or actual investment given by any party thereto conditional upon the allowance of the investment" and that Section 21 of the *Act* states that "where a person who has given a written undertaking … fails or refuses to comply with such undertaking" a court order may be made "directing that person to comply with the undertaking." The Panel further noted that written purchase undertakings … leaving aside the manner in which they may have been arrived at (voluntary submission, encouragement, negotiations, etc.) – once they were accepted, became part of the conditions under which the investment proposals were approved, in which case compliance could be legally enforced. The Panel therefore found that the word "requirements" as used in Article III:4 could be considered a proper description of existing undertakings.

5.5. The Panel could not subscribe to the Canadian view that the word "requirements" in Article III:4 should be interpreted as "mandatory rules applying across-the-board" because this latter concept was already more aptly covered by the term "regulations" and the authors of this provision must have had something different in mind when adding the word "requirements." The mere fact that the few disputes have so far been brought before the CONTRACTING PARTIES regarding the application of Article III:4 have only concerned laws and regulations does not in the view of the Panel justify an assimilation of "requirements" with "regulations." The Panel also considered that, in judging whether a measure is contrary to obligations under Article III:4, it is not relevant whether it applies

across-the-board or only in isolated cases. Any interpretation which would exclude case-by-case action would, in the view of the Panel, defeat the purposes of Article III:4.

5.6. The Panel carefully examined the Canadian view that the purchase undertakings should be considered as private contractual obligations of particular foreign investors vis-à-vis the Canadian government. The Panel recognized that investors might have an economic advantage in assuming purchase undertakings, taking into account the other conditions under which the investment was permitted. The Panel felt, however, that even if this was so, private contractual obligations entered into by investors should not adversely affect the rights which contracting parties, including contracting parties not involved in the dispute, possess under Article III:4 of the General Agreement and which they can exercise on behalf of their exporters. This applies in particular to the rights deriving from the national treatment principle, which – as stated in Article III:1 – is aimed at preventing the use of internal measures "so as to afford protection to domestic production."

5.7. The Panel then examined the question whether less favorable treatment was accorded to imported products than that accorded to like products of Canadian origin in respect of requirements affecting their purchase. For this purpose the Panel distinguished between undertakings to purchase goods of Canadian origin and undertakings to use Canadian sources or suppliers (irrespective of the origin of the goods), and for both types of undertakings took into account the qualifications "available," "reasonably available," or "competitively available."

5.8. The Panel found that undertakings to purchase *goods of Canadian origin* without any qualification exclude the possibility of purchasing available imported products so that the latter are clearly treated less favorably than domestic products and that such requirements are therefore not consistent with Article III:4. This finding is not modified in cases where undertakings to purchase goods of Canadian origin are subject to the qualification that such goods be "available." It is obvious that if Canadian goods are not available, the question of less favorable treatment of imported goods does not arise.

5.9. When these undertakings are conditional on goods being "competitively available" (as in the majority of cases) the choice between Canadian or imported products may frequently coincide with normal commercial considerations and the latter will not be adversely affected whenever one or the other offer is more competitive. However, it is the Panel's understanding that the qualification "competitively available" is intended to deal with situations where there are Canadian goods available on competitive terms. The Panel considered that in those cases where the imported and domestic product are offered on equivalent terms, adherence to the undertaking would entail giving preference to the domestic product. Whether or not the foreign investor chooses to buy Canadian goods in given practical situations is not at issue. The purpose of Article III:4 is not to protect the interests of the foreign investor but to ensure that goods originating in any other contracting party benefit from treatment no less favorable than domestic (Canadian) goods, in respect of the requirements that affect their purchase (in Canada). On the basis of these considerations, the Panel found that a requirement to purchase goods of Canadian origin, also when subject to "competitive availability," is contrary to Article III:4. The Panel

considered that the alternative qualification "reasonably available" which is used in some cases, is *a fortiori* inconsistent with Article III:4, since the undertaking in these cases implies that preference has to be given to Canadian goods also when these are not available on entirely competitive terms.

5.10. The Panel then turned to the undertakings to buy from *Canadian suppliers*. The Panel did not consider the situation where domestic products are not available, since such a situation is not covered by Article III:4. The Panel understood the choice under this type of requirement to apply on the one hand to imported goods if bought through a Canadian agent or importer and on the other hand to Canadian goods which can be purchased either from a Canadian "middleman" or directly from the Canadian producer. The Panel recognized that these requirements might in a number of cases have little or no effect on the choice between imported or domestic products. However, the possibility of purchasing imported products *directly* from the foreign producer would be excluded and as the conditions of purchasing imported products through a Canadian agent or importer would normally be less advantageous, the imported product would therefore have more difficulty in competing with Canadian products (which are not subject to similar requirements affecting their sale) and be treated less favorably. For this reason, the Panel found that the requirements to buy from Canadian suppliers are inconsistent with Article III:4.

5.11. In case undertakings to purchase from Canadian suppliers are subject to a "competitive availability" qualification, as is frequent, the handicap for the imported product is alleviated as it can be obtained directly from the foreign producer if offered under more competitive conditions than via Canadian sources. In those cases in which Canadian sources and a foreign manufacturer offer a product on equivalent terms, adherence to the undertaking would entail giving preference to Canadian sources, which in practice would tend to result in the purchase being made directly from the Canadian producer, thereby excluding the foreign product. The Panel therefore found that requirements to purchase from Canadian suppliers, also when subject to competitive availability, are contrary to Article III:4. As before (paragraph 5.9), the Panel considered that the qualification "reasonably available" is *a fortiori* inconsistent with Article III:4.

…

6. Conclusions

6.1. … [T]he Panel concluded that the practice of Canada to allow certain investments subject to the *Foreign Investment Review Act* conditional upon written undertakings by the investors to *purchase* goods of Canadian origin, or goods from Canadian sources, is inconsistent with Article III:4 of the General Agreement according to which contracting parties shall accord to imported products treatment no less favorable than that accorded to like products of national origin in respect of all internal requirements affecting their purchase. …

…

6.3. The Panel is aware that inconsistency with Article III:4 was not intended by the *Foreign Investment Review Act*, which does not require the submission of undertakings, but that this practice developed as the administration of the *Act* evolved, to the point that "they are now routinely submitted in support of nearly all larger investment proposals." …

This evolution may partly reflect the need for foreign investors to demonstrate, by this and other means, to the Canadian administration that their proposed investment would be of significant benefit to Canada. The Panel sympathizes with the desire of the Canadian authorities to ensure that Canadian goods and suppliers would be given a fair chance to compete with imported products. However, the Panel holds the view that the purchase requirements under examination do not stop short of this objective but tend to tip the balance in favor of Canadian products, thus coming into conflict with Article III:4.

6.4. The Panel recognizes that purchase requirements may reflect plans which the investors would have carried out also in the absence of the undertakings; that undertakings with such provisos as "competitive availability" have an adverse impact on imported products only in those cases in which imported and Canadian goods are offered on equivalent terms; and that the undertakings are enforced flexibly. Many of the undertakings, though technically in violation with the General Agreement, therefore possibly do not nullify or impair benefits accruing to the United States under the General Agreement. However, under standing GATT practice, a breach of a rule is presumed to have an adverse impact on other contracting parties, and the Panel also proceeded on this assumption.

6.5. As to the extent to which purchase requirements reflect plans of the investors, the Panel does not consider it relevant nor does it feel competent to judge how the foreign investors are affected by the purchase requirements, as the national treatment obligations of Article III of the General Agreement do not apply to foreign persons or firms but to imported products and serve to protect the interests of producers and exporters established on the territory of any contracting party. Purchase requirements applied to foreign investors in Canada which are inconsistent with Artic[l]e III:4 can affect the trade interests of all contracting parties, and impinge upon their rights.

…

6.7. Taking into account all the above considerations, the Panel considered what scope might exist for modifications of administrative practices under the *Foreign Investment Review Act* so as to bring them into conformity with Canada's obligations under the General Agreement….

… [T]he Panel considers that the Canadian authorities might resolve the problem by ensuring that any *future* purchase undertakings will not provide more favorable treatment to Canadian products in relation to imported products. The Panel's findings also apply to *existing* purchase undertakings. However, the Panel recognizes that an immediate application of its findings to these undertakings might cause difficulties in the administration of the *Foreign Investment Review Act*. Consequently, the Panel suggests that the CONTRACTING PARTIES recommend that Canada bring the existing purchase undertakings as soon as possible into conformity with its obligations under the General Agreement….

III. FDI and WTO *TRIMs Agreement*

- **FDI Theories**

Why does a business choose to become an MNC? That is, why "go global" by setting up operations in a country other than the home jurisdiction of the entity? This matter is the subject of considerable economic research.[562] Broadly, there are (at least) three pertinent theories.

First, Internalization Theory emphasizes supply chain linkages.[563] This Theory argues that benefits are had by physically locating units in a supply chain in a foreign – especially developing – country. Those benefits may be as simple as the costs of obtaining inputs in the foreign country are cheaper than sourcing them domestically, or put differently, the benefits exceed the costs of staying local. "Ownership, Location, and Internalization" Theory is an offshoot of Internalization Theory. OLI Theory focuses on how an entity can maximize (or leverage) benefits of foreign ownership and location, and internalizing foreign processes or outcomes.

Second (as discussed in a separate Chapter), the Product Life Cycle Hypothesis proposes that a firm initially seeks capital intensive and/or technologically sophisticated innovations for its domestic market.[564] The result is a product for that market, but as that product cycles through the phases of innovation, growth, maturity, and decline, the firm shifts production to one or more developing countries (in which many of the sales of that product may occur). Back home, this MNC seeks a newly innovative product. Note each product may allow for some degree of differentiation and, therefore, monopolization. Note, too, the MNC accepts legal, political, currency, credit, and other risk associated with investing in the "Third World," because the target (host) country in which it invests may have laxer labor and/or environmental regulations than its home country.

Third, Institutional Theory examines the structures and behaviors of organizations.[565] This Theory posits that the environment surrounding an environment causally affects the ways in which, and reasons for, a local entity opts to become an MNC.

To be sure, these Theories are not necessarily mutually exclusive. An organization may be accurately characterized by one Theory at one point in the evolution of the business, say for its first foreign. But subsequently, another Theory may better encapsulate its decision-making as to how, why, and when it opted to enter the same, or a different, foreign market. In other words, these Theories sum to a non-exclusion list of motivations to search

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562 *See* Asta Žilinskė, *Negative and Positive Effects of Foreign Direct Investment*, ECONOMICS AND MANAGEMENT 332-336 (2010), www.researchgate.net/publication/228433965_Negative_and_positive_effects_of_foreign_direct_investment; Paul Justin & María M. Feliciano-Centero, *Five Decades of Research on Foreign Direct Investment by MNEs: An Overview and Research Agenda*, 124 JOURNAL OF BUSINESS RESEARCH 800-812 (January 2021).

563 *See* A.M. Rugman, *Reconciling Internalization Theory and the Eclectic Paradigm*, 18 MULTINATIONAL BUSINESS REVIEW issue 2, 1-12 (2010).

564 *See* Raymond Vernon, *International Investments and International Trade in the Product Life Cycle*, 80 QUARTERLY JOURNAL OF ECONOMICS issue 2, 190-207 (1966).

565 *See* J. Child, *Strategic Choice in the Analysis of Action, Structure, Organizations and Environment: Retrospect and Prospect*, 18 ORGANIZATION STUDIES issue 1, 43-47 (1997).

for, and source from, new markets.

- **FDI Patterns**

Viewed from the vantage points of both the home and a target (host) country, there FDI may be categorized as either "horizontal" or "vertical." In a "horizontal" FDI, an MCN opens a business in the host country that is the same as, or similar to, its operations in its home country.[566] The MNC is not establishing a new step in its supply chain; rather, the position in the supply chain it holds at home is what it opens abroad. For example, concerning services, a restaurant in Kansas City may open a like retail establishment in Mumbai, or a non-golf country club in Kansas City may construct a like facility in Singapore. Succinctly put, the MNC is replicating in the host country its activities in which it engages in its home country.

In contrast, "vertical" FDI, a business organization examines its stages of production towards the final good or service it provides. The entity searches for comparative advantages that would make it cost-effective to divide these stages into particularized steps in one or more target (host) countries. Rather than engage in all activities at home, is it cost-effective to spread them across two or more countries? Why, for example, would a smartphone manufacturer like Samsung source lithium-ion batteries from South Korea if it can get them relatively more cheaply in, say, China? Why would a U.S. nuclear power plant damage the health and welfare of Native Americans by mining Uranium on their property (*e.g.*, Federally recognized tribal lands) if it can obtain this element safely overseas?

Observe that vertical FDI could be "backward" or "forward."[567] These adjectives modify the supply chain of the MNC. So, "backward" FDI means the MNC is investing overseas upstream, in the early or middle stages of the production or service-delivery process. "Forward" FDI indicates the MCN is investing "downstream," that is, in later or final stages towards the provision of a finished product or service. If an MNC brewery source hops from overseas, that would be backward, whereas if it opens tasting houses overseas, that would be forward.

- **FDI Effects**

Judging whether FDI inflows from developed home countries to target developing and least developed host countries is a net positive or negative for those targets is an unending, and probably ultimately unresolvable, matter.[568] In the final analysis, the answer

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566 *See* Robert R. Lipsey, *Foreign Direct Investment and the Operations of Multinational Firms: Concepts, History, and Data*, NATIONAL BUREAU OF ECONOMIC RESEARCH WORKING PAPERS 8665 (December 2001), www.researchgate.net/publication/5196637_Foreign_Direct_Investment_and_the_Operations_of_Multinational_Firms_Concepts_History_and_Data.

567 *See* ALEXANDER PROTSENKO, VERTICAL AND HORIZONTAL FOREIGN DIRECT INVESTMENTS IN TRANSITION COUNTRIES (2003), https://ideas.repec.org/p/lmu/dissen/2105.html.

568 Among the litany of studies, see, e.g., E.M. Ekanayaka & Dasha Chatrna, *The Effect of Foreign Aid on Economic Growth in Developing Countries*, JOURNAL OF INTERNATIONAL BUSINESS AND CULTURAL

may be "it depends," that is, on the time period boundaries, MNC case studies, and countries involved.

This said, at a minimum, FDI is supposed to have two positive benefits for host countries. First, it should lead to capital accumulation in that country. New inputs, and new production, along with all the physical and human capital needed, should occur. Second, FDI should result in technology transfer. New ideas and techniques should spread into the host country. Both capital accumulation and technology transfer ought, in theory, to bolster *per capita* economic growth in the target country. However, whether that outcome occurs depends on an array of intervening variables – including infrastructure, taxation, welfare safety nets, educational opportunities, women's empowerment, anti-discrimination and anti-corruption rules, and competition policy.

- **National Treatment and FDI**

National treatment matters for FDI as well as cross-border trade. So, national treatment is the hallmark of the *TRIMs Agreement*, which emerged from the Uruguay Round. Article 2 of the *TRIMs Agreement* incorporates by reference GATT Article III. Any investment measure that violates Article III, particularly the Article III:4 mandate that a WTO Member provide treatment no less favorable to imported merchandise as to like domestic products, runs afoul of Article 2.

Consider the WTO Panel Report in *Indonesia – Certain Measures Affecting the Automobile Industry*.[569] What did the Panel say about the relationship between GATT Article III and the *TRIMs Agreement* Article 2, and how did these rules to the local content obligations of Indonesia's National Car Program?

Sub-central governments sometimes create local content requirements, yet the *TRIMs Agreement* applies to them as well as a central government. That is a key point of which to be aware, whether in respect of a developed or developing country. For example, in April and October 2013, India claimed subsidies provided by the State of Michigan and City of Austin, Texas, violated *TRIMs* Article 2.[570]

Via its 2008 *Clean, Renewable, and Efficient Energy Act* (Public Act 295), Michigan said any energy system with a minimum threshold of 50% Michigan-made equipment would earn incentive credits. Those credits could be used to satisfy the state requirement that by 2015 at least 10% of the retail supply portfolio of a state electric provider consist of renewable energy. Of all renewable energy credits Michigan granted in

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STUDIES (2010); Shiva S. Makki & Agapi Somwaru, *Impact of Foreign Direct Investment and Trade on Economic Growth: Evidence from Developing Countries*, 86 AMERICAN JOURNAL OF AGRICULTURAL ECONOMICS number 3, 795-801 (August 2004), www.jstor.org/stable/3697825; Luiz de Mello Jr., *Foreign Direct Investment-Led Growth: Evidence from Times Series and Panel Data*, 51 OXFORD ECONOMIC PAPERS 133-151 (1999).

569 *See* WT/DS54/R (adopted 23 July 1998, not appealed).

570 *See* Daniel Pruzin, *U.S. Declines to Counter India Claims Of Illegal Subsidies for Energy Programs*, 30 International Trade Reporter (BNA) 1550 (10 October 2013).

2012, only 0.0021 were incentive credits. But, that fact surely was immaterial: either the potential for favoritism, or actual discrimination no matter how small, is actionable.

As for Austin, its city-owned public power company, Austin Energy, sponsored a Residential Solar PV Rebate Program. Austin Energy gave higher rebates, and paid higher sums, for solar power generated by equipment that was at lest 60% made or assembled in the Austin Energy service area. India said this incentive to use local content, as with the Michigan law, violated GATT Article III:4, and thus *TRIMs* Article 2.

Not all FDI problems involve local content requirements or national treatment. Frequent issues include expropriation (or the risk thereof), compensation for nationalized assets, repatriation of earnings, and corruption. (On the latter topic, as a matter of legal compliance and ethical behavior, the U.S. *FCPA* and OECD *Anti-Bribery Convention* are vital.) Such topics are properly covered in an FDI course. Still, as the *Canada Foreign Investment Review* case suggests, many issues arising from FDI involve discrimination *vis-à-vis* domestic competitors.

National treatment also is a cornerstone of U.S. FTAs, such as *NAFTA* 1.0 and *NAFTA* 2.0 (*USMCA*). The general obligation is in Article 301 of *NAFTA* 1.0, which incorporates GATT Article III by reference. In respect of FDI, what is the *NAFTA* 1.0 Chapter 11 national treatment rule? Compare it to the *USMCA* analog.

IV. Domestic Sourcing, GATT Article III:5, and 1994 *American Tobacco* Case

- **Facts**

GATT PANEL REPORT, *UNITED STATES – MEASURES AFFECTING THE IMPORTATION, INTERNAL SALE AND USE OF TOBACCO*, B.I.S.D. (41ST SUPP. VOL l.) AT 131-134, 136-139, 159 (1997) (ADOPTED 4 OCTOBER 1994)

General

6. On 10 August 1993, the United States enacted the 1993 *Budget Act* [the *Omnibus Budget Reconciliation Act of 1993*, Pub. L. No. 103-66, 107 Stat. 318, August 10, 1993] which included the Agricultural Reconciliation Act of 1993 containing, in Section 1106, … a Domestic Marketing Assessment ("DMA") [concerning tobacco]…. The U.S. tobacco program had for many years comprised production controls and price supports for tobacco produced in the United States. Control of the domestic supply of tobacco was provided for to the extent that producers of an individual kind or type of tobacco had approved such controls. Production controls had been approved for 98 per cent of all tobacco grown in the United States, including the two principal kinds, burley and flue-cured tobacco. However, according to law, a group of growers could, by majority vote, decide not to form a producer co-operative and could thereby "opt out" of both the price-support and the production-control provisions of the law. For instance, Maryland tobacco was not subject to production controls or price supports, because its producers voted to eliminate controls in 1966. Production controls were currently enforced through the use of poundage quotas, which

limited the number of pounds that could be marketed both nationally and from a particular domestic farm. Only those farms with a poundage quota could market without penalty tobacco of the kind or type to which the quota applied. The U.S. Secretary of Agriculture set a national poundage quota under formulas established by law and differing by tobacco kind. Poundage quotas acted as licenses to market tobacco. These "licenses" were strictly limited, and generally held only by farms with a production history.

7. The current tobacco program also provided for price support, the level of which was set by the Secretary of Agriculture on an annual basis and which was available only to producers who had approved production controls. Price support was provided through non-recourse government loans. [The loans were non-recourse, because tobacco served as collateral to satisfy the loan amount, and there was no further recourse to the producer.] Instead of selling their tobacco to a private buyer, farmers subject to production controls could pledge their tobacco as collateral for a price support loan under the price support program. Because the farmer would not normally sell the tobacco for less than the loan amount, the loan value of the tobacco acted as a floor price for domestic tobacco. The price support program operated through special "area marketing associations", first created in 1938, which maintained the inventory of the pledged tobacco. The producer owned area marketing associations existed solely to perform functions connected with the price support interests of producers. The loans were made available through funds supplied by the Commodity Credit Corporation (CCC) of the United States Department of Agriculture (USDA). CCC tobacco outlays were repaid by the proceeds of the sale of inventory tobacco by the area marketing associations. With the inauguration of the "no-net-cost program" … producers and purchasers had to pay "assessments" to cover any losses incurred by the CCC.

Domestic Marketing Assessment (Section 1106(a))

8. Beginning after the end of 1994, the *1993 Budget Act* required that designated "Domestic Manufacturers of Cigarettes," *i.e.* those manufacturers that individually contributed at least 1 per cent of all cigarettes produced and sold in the United States, certify the percentage of domestic tobacco used in the cigarettes they had produced in the United States for the year. Six companies in the United States were considered as Domestic Manufacturers of Cigarettes under the *Act*, and these manufacturers accounted for more than 99 per cent of all cigarettes produced in the United States in the period 1986-1990. If a Domestic Manufacturer of Cigarettes failed to certify the quantity used, it was presumed to have used only imported tobacco. If a Domestic Manufacturer of Cigarettes's use of domestic tobacco was less than 75 per cent of its total tobacco use per year, it had to pay to the CCC a non-refundable marketing assessment and make supplementary purchases from the burley and flue-cured tobacco area marketing associations up to the amount of the shortfall, which could be used in the following year. The requirement applied equally to cigarettes that were exported. The assessment per pound was equivalent to the difference between: (1) the average of domestic burley and flue-cured tobacco market prices during the preceding calendar year; and (2) the average market prices for imported unmanufactured tobacco during the preceding calendar year. Penalties were due from Domestic Manufacturers of Cigarettes which failed to pay an outstanding assessment, or

which did not make the purchases from the area marketing associations.

- **Key Holdings**

GATT PANEL REPORT, *UNITED STATES – MEASURES AFFECTING THE IMPORTATION, INTERNAL SALE AND USE OF TOBACCO*, B.I.S.D. (41ST SUPP. VOL l.) AT 131, 160-162, 176-177 (1997) (ADOPTED 4 OCTOBER 1994)

Domestic Marketing Assessment (DMA)

63. The Panel noted that the issues in dispute with respect to the DMA arose essentially from the following facts. The DMA legislation, Section 1106(a) of the 1993 *Budget Act*, required each "domestic manufacturer of cigarettes" … to certify to the Secretary of the U.S. Department of Agriculture (USDA), for each calendar year, the percentage of domestically produced tobacco used by such manufacturer to produce cigarettes during the year. A domestic manufacturer that failed to make such a certification or to use at least 75 per cent domestic tobacco was subject to penalties in the form of a non-refundable marketing assessment (*i.e.* the DMA) and was required to purchase additional quantities of domestic burley and flue-cured tobacco.

…

Article III:5

…

66. The Panel … recalled the complainants' claim that the DMA was inconsistent with both the first and second sentences of this provision.

67. As to the applicability of Article III:5, first sentence, to the DMA, the Panel considered that it first had to determine whether the United States had established an "internal quantitative regulation relating to the mixture, processing or use of products in specified amounts or proportions…." The Panel noted the following in this respect:

(a) First, the DMA was established by an Act of the U.S. Congress, Section 1106(a) of the *1993 Budget Act*, and was implemented through regulations of USDA. The effective date for the DMA was 1 January 1994. It thus constituted a *regulation* within the meaning of Article III:5.

(b) Second, the Panel noted that the opening sentence of the DMA legislative provision, Section 1106(a) of the *1993 Budget Act*, stated:

> "CERTIFICATION. A *domestic manufacturer* of cigarettes *shall certify* to the Secretary, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that is produced in the United States." (Emphasis added.)

The DMA was thus an *internal* regulation imposed on domestic manufacturers of cigarettes.

(c) Third, the Panel noted that the second sub-paragraph of the DMA legislative provision stated:

> "PENALTIES. In General. Subject to subsection (f) [exception for crop losses due to natural disasters], a *domestic manufacturer of cigarettes that has failed*, as determined by the Secretary after notice and opportunity for a hearing, to *use in the manufacture of cigarettes* during a calendar year a *quantity of tobacco grown in the United States that is at least 75 percent of the total quantity of tobacco used* by the manufacturer or to comply with subsection (a) [certification requirement], *shall be subject to* the requirements of subsections (c), (d) and (e) [*penalties* in the form of a nonrefundable marketing assessment and a required purchase of additional quantities of domestic burley and flue-cured tobacco]." (Emphasis added.)

The DMA was thus a *quantitative* regulation in that it set a minimum *specified proportion* of 75 per cent for the use of U.S. tobacco in manufacturing cigarettes.

(d) Fourth, the DMA was an internal quantitative regulation relating to the *use* of a product, in that it *required the use* of U.S. domestically grown tobacco.

The Panel thus found that the DMA was an "internal quantitative regulation relating to the … use of products in specified amounts or proportions…," within the meaning of the first part of the first sentence of Article III:5.

68. The Panel then turned to a consideration of whether the DMA "requires, directly or indirectly, that any specified amount or proportion of any product which is the subject of the regulation must be supplied from domestic sources", as provided in the second part of the first sentence of Article III:5. The Panel noted the following in this respect:

(a) The DMA required each domestic manufacturer of cigarettes to certify to the Secretary of USDA, for each calendar year, the percentage of the quantity of tobacco used by the manufacturer to produce cigarettes during the year that was produced in the United States.

(b) Subject to an exception dealing with crop losses due to disasters, a domestic manufacturer that failed to make the required certification or to use at least 75 per cent domestic tobacco was subject to penalties including the required purchase of additional domestic tobacco.

The Panel thus *concluded* that the DMA was an internal quantitative regulation relating to the use of tobacco in specified amounts or proportions which required, directly or indirectly, that a minimum specified proportion of tobacco be supplied from domestic sources, inconsistently with Article III:5, first sentence.

69. The Panel next turned to a consideration of whether the DMA was inconsistent with Article III:5, second sentence, as claimed by the complainants. On this point, the Panel

noted that the second sentence of Article III:5 is subsidiary to the first sentence thereof, as the second sentence only becomes relevant where a contracting party is *"otherwise* apply[ing] internal quantitative regulations in a manner contrary to the principles set forth in paragraph 1", *i.e.*, "so as to afford protection to domestic production." The Panel was therefore of the view that, in light of the finding of inconsistency of the DMA with Article III:5, first sentence, it would not be necessary to examine the consistency of the DMA with Article III:5, second sentence.

…

VI. Conclusions and Recommendations

125. On the basis of the findings set out above, the Panel *concludes* that:

(a) the Domestic Marketing Assessment (Section 1106(a) of the *1993 Budget Act*) was an internal quantitative regulation inconsistent with Article III:5….

…

126. The Panel recommends that the CONTRACTING PARTIES request the United States to bring its inconsistent measures into conformity with its obligations under the General Agreement.

V. Two More Cracks in Third Pillar: GATT Article III:8(a)-(b)

● Government Procurement and Article III:8(a)

Until the plurilateral Uruguay Round *GPA*, the national treatment principle did not apply to government procurement by virtue of GATT Article III:8(a). Article III of the *GPA* obligates the parties to accord national treatment to products, services, and suppliers of other parties. However, once again this obligation is heavily qualified. The WTO Members that are parties to the *GPA* are entitled to take, and indeed have taken, derogations as set forth in Appendix I to the *GPA*. The Member-parties specifically list their public sector entities that abide by the *GPA*. For example, the U.S. elected to eschew application to certain purchases of the DOC, DOD, and USDA, and to purchases by certain sub-central governments like the State of Kansas.

● Subsidies and Article III:8(b)

How is it legally permissible for a WTO Member to provide a subsidy to one of its nationals, but not to foreigners? For example, suppose the Indian government offers its farmers subsidized water and kerosene, the Argentine government offers its people subsidized bread, and the U.S. and EU governments offer support payments for certain crops grown by their producers. Assume these schemes discriminate against foreigners. Indeed, for budgetary reasons, they must – governments are unwilling, unable, or both to subsidize the entire world. The discrimination is excused by GATT Article III:8(b). Here, then, is a clear limitation on national treatment.

VI. GATT Article III:8(a) Government Procurement Exception:

TRIMs, Domestic Content Requirements, Competitive Relationship Test, and 2013 *Canada Renewable Energy* Case

- **Facts**

The *Canada Renewable Energy* dispute concerned an energy policy implemented by the Government of Ontario, Canada in 2009.[571] The scheme sought to increase the supply of electricity generated from certain renewable sources of energy. The basic aspects of the system are relatively common, and referred to as feed-in tariff programs, or FIT programs. The Ontario FIT Program was the third in a series of schemes designed to diversify the energy supply-mix in Ontario and aide in the replacement of coal-fired facilities. The Ontario FIT Program was launched by the Ontario Power Authority (OPA) in 2009, pursuant to the Direction of the Ontario Minister of Energy and Infrastructure acting under the authority of the *Electricity Act of 1998*, as amended by the *Green Energy and Green Economy Act of 2009*.

Generators taking part in the program were paid by the OPA a guaranteed price per kilowatt hour (kWh) of electricity delivered into the Ontario electricity grid under 20- and 40-year contracts between the generating firms and the OPA. The program was open to generators of electricity located in Ontario that produced renewable energy in the form of (*inter alia*) wind- and solar photovoltaic (PV) electricity. The FIT Program was divided into the FIT stream, for larger, mass produced, energy projects and the microFIT stream, for smaller projects such as small households, farms, or business generation.

The FIT Program included certain contractual obligations, which if followed, ensured the participating generators would get a standard contract price for their renewable energy. The price was attractive: it covered development costs and yielded a reasonable rate of return over the duration of the contracts. The WTO Panel found the after tax rate of return on equity from the prices provided by the contracts was 11%.

The most notorious obligations among the disputed measures in Ontario were the "Minimum Required Domestic Content Levels." These Levels had to be satisfied during the development and construction of solar PV electricity generation facilities in the FIT and microFIT streams of the program, and in the wind power electricity generation facilities in the FIT steam of the program. For wind power generators between 2009 and

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571 *See* Appellate Body Report, *Canada – Certain Measures Relating to the Renewable Energy Sector*, WT/DS412/AB/R (24 May 2013); and Appellate Body Report, *Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS426/AB/R (24 May 2013) [hereinafter jointly referred to as *Canada Renewable Energy* Appellate Body Report]. The Appellate Body issued, and DSB adopted, the two Reports on the same days. For most purposes, the Appellate Body treated the two disputes as one, and – unless otherwise noted – such is the treatment herein.

The Panel Reports in the case were *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, and *Canada – Measures Relating to the Feed-In Tariff Program*, WT/DS412/R, WT/DS426/R (adopted as modified by the Appellate Body, 24 May 2013).

For an analysis of *DSU* cases concerning renewable energy and the different GATT-WTO agreement provisions raised in them, see Rojina Thapa, *Trade or the Environment in the Context of Renewable Energy?*, 26 INTERNATIONAL TRADE LAW & REGULATION issue 1, 15-38 (2020).

2011, the required level of domestic content in the development and construction of relevant facilities was 25%, and increased to 50% in 2012. For solar-PV FIT Program generators, the DCR was 50% from 2009 to 2010, and increased to 60% in 2011. For solar-PV microFIT Program generators, the DCR was 40% from 2009 to 2010, and the requirement increased to 60% in 2011.

- **Relationship between GATT Article III:8(a) and *TRIMs Agreement* Article 2:2?**

The FIT Program in Ontario was first challenged by Japan in September 2011. Almost 1 year later, the EU initiated a dispute against the program. Panels were established with the same members, and a single Panel then harmonized the timetables and the disputes. The Panel prepared joint reports, with its separate recommendations and conclusions. The same process also was implemented with regard to the appellate portion of the dispute.

The scope of the complaints encompassed 3 WTO agreements, namely, GATT, *TRIMs Agreement* and *SCM Agreement*. On appeal, a key substantive issue before the Appellate Body dealt with Article III of GATT and Article 2 of the *TRIMs Agreement*.

Article 2 of the *TRIMs Agreement* provides, in relevant part:

National Treatment and Quantitative Restrictions

> 1. Without prejudice to other rights and obligations under GATT 1994, no Member shall apply any TRIM that is inconsistent with the provisions of Article III or Article XI of GATT 1994.
>
> 2. An Illustrative List of TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 and the obligation of general elimination of quantitative restrictions provided for in paragraph 1 of Article XI of GATT 1994 is contained in the Annex to this Agreement.

Additionally, the *Illustrative List of TRIMs* referenced in Article 2:2 of the *TRIMs Agreement* states, in relevant part:

> 1. TRIMs that are inconsistent with the obligation of national treatment provided for in paragraph 4 of Article III of GATT 1994 include those which are mandatory or enforceable under domestic law or under administrative rulings, or compliance with which is necessary to obtain an advantage, and which require:
>
> (a) the purchase or use by an enterprise of products of domestic origin or from any domestic source, whether specified in terms of

> particular products, in terms of volume or value of products, or in terms of a proportion of volume or value of its local production; ...

The core issue was whether a TRIM that is within the scope of Article 2:2 of the *Illustrative List of the TRIMs Agreement* is inconsistent with Article III:4 of the GATT, even if that TRIM also falls within the scope of Article III:8(a) of the GATT.

Article III:4 of the GATT contains the famous national treatment obligation for non-fiscal measures:

> 4. The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favorable than that accorded to like products of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges, which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.

Article III:8(a) of the GATT derogates from the general duties Article III requires of WTO Members, providing an exception to the national treatment obligation:

> 8(a) The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

The Panel found Articles 2:1 and 2:2 of the *TRIMs Agreement* do not preclude application of GATT Article III:8(a). In other words, the Panel said a TRIM that is illegal under Articles 2:1 or 2:2 as a violation of national treatment thereunder still may qualify for the Article III:8(a) exception to national treatment.

On appeal, the EU challenged the Panel finding. The EU cited the express reference to Article III:4 of GATT in Article 2:2 of the *TRIMs Agreement*. The EU claimed the derogation from GATT Article III allowed for by Article III:8(a) should not apply when a measure falls within the *Illustrative List in the Annex of the TRIMs Agreement*. The EU said that is because application of Article III:8(a) is not contemplated by the *TRIMs Agreement*. Ultimately, the Appellate Body rejected the European argument, and instead found that application of Article III:8(a) is not precluded where the challenged measures fall within the scope of Article 2:2 and Paragraph 1(a) of the *Illustrative List of the TRIMs Agreement*.[572]

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572 *See Canada Renewable Energy* Appellate Body Report, ¶ 5.29.

- **Legal Arguments**

So, a key substantive issue the Appellate Body addressed was whether Article III:8(a) of the GATT applied to measures falling under Article 2:2 of the *TRIMs Agreement* and the *Illustrative List* referenced in Article 2:2.

On appeal, the EU asserted the Panel was wrong to hold that Articles 2:1 and 2:2 of the *TRIMs Agreement* do not preclude the application of Article III:8(a) of the GATT. The EU said those *TRIMS Agreement* Articles actually do prevent, or block, invocation of the exception contained in GATT Article III:8(a). To the Europeans, Article 2:1 of the *TRIMs Agreement* refers to Article III of the GATT, whereas the *Illustrative List* mentioned in Article 2:2 of the *Agreement* precludes the applicability of Article III:8(a), where it states the measures found in the *Illustrative List* are necessarily inconsistent with Article III:4 of the GATT. In effect, from the EU standpoint, if a measure is illegal under Article 2:2 of the *TRIMs Agreement* and the *Illustrative List*, then GATT Article III:8(a) cannot save, or rescue, that measure. Article III:8(a) does – or should – not take precedence over the *TRIMs Agreement*, voiced the EU.

Conversely, Canada agreed with the Panel. To the Canadians, Article III:8(a) applied to the FIT Program domestic content measures, and thus exempted those measures from the national treatment obligation. That is because Article 2:2 of the *TRIMs Agreement* expressly refers to the national treatment obligation contained in Paragraph 4 of GATT Article III, rather than to Article III generally. Thus, "Article 2:2 does not address the consistency of the measures listed in the *Annex* with Article III, as a whole, including Article III:8(a)."[573]

Canada also chose to attack the logical basis underlying the EU interpretation of Article 2:2 of the *Agreement* and Paragraph 1 of the *Annex*. Pursuant to the EU interpretation, the TRIMs listed as inconsistent with Article XI:1 of the GATT, which are found in the *Illustrative List* of Article 2:2 of the *Agreement*, must fall outside the scope of Article XI:2 of the GATT. However, Canada asserted a comparison between Article XI:2 of the GATT and the measures listed in the *TRIMs Annex* showed the EU view was "untenable."[574] Thus, the interpretation of Article 2:2 of the *TRIMs Agreement* and Paragraph 1 of the *Annex* is inconsistent with the text and context of the measures.

When distilled, the issue warranting Appellate Body attention was whether TRIMs that fall within the scope of Article 2:2 and the *Illustrative List* of the *TRIMs Agreement* are illegal under GATT Article III:4, irrespective of whether they also fall within the scope of Article III:8(a) of GATT. Put differently, does a *TRIM* that is within the Article 2:2 and the *List*, and thus unlawful thereunder, get the benefit of protection from GATT Article III:8(a)?

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573 *Canada Renewable Energy* Appellate Body Report, ¶ 5.17 (*quoting* Canada's appellee's submission, ¶ 29).

574 *Canada Renewable Energy Appellate Body Report*, ¶ 5.18 (*quoting* Canada's appellee's submission, ¶ 33).

- **Holding and Rationale**

The Appellate Body first recalled that Article 2:2 of the *TRIMs Agreement* refers to the national treatment obligation contained in Article III of GATT and the obligation to eliminate quantitative restrictions as envisioned in Paragraph 1 of Article XI of GATT. The Appellate Body also clarified that the *Illustrative List* found in the *Annex* to the *TRIMs Agreement* (and referred to in Article 2:2 of the *Agreement*) is a non-exhaustive tally. With regard to the *List*, the Panel found the disputed measures fell within the scope of Paragraph 1(a). Additionally, as maintained by the EU, Article 2:2 of the *Agreement* and Paragraph 1 of the *Illustrative List* are similar in that both refer expressly to obligations in Article III:4 of the GATT.

The Appellate Body disagreed with the narrow interpretation the EU advocated. The Appellate Body said Article 2:2 of the *TRIMs Agreement* provides further specification on the types of measures that are inconsistent with Article 2:1. Yes, the *Illustrative List* referenced in Article 2:2 of the *Agreement* provides examples of measures inconsistent with the national treatment obligation in GATT Article III:4. No, Article 2:2 and the *List* do not apply to the inconsistency of Article III as a whole.

The Appellate Body opted for a "harmonious" interpretation, which understood the absence of a reference to Article III:8 of GATT in Article 2:2 of the *TBT Agreement* and in the *Illustrative List* as indicating the neutral applicability of GATT Article III:8(a).[575] Therefore, a measure within the scope of GATT Article III:8(a) is not inconsistent with Article III. To it, accepting the EU argument would result in different obligations for TRIMs that fell within the *Illustrative List* and those that did not.

The Appellate Body provided additional support for its finding by citing Articles 2:1 and 3 of the *TRIMs Agreement*. Those provisions qualify the obligations in Article 2:1 of the GATT by suggesting that Article 2:1 is not intended to inhibit the other rights that WTO Members have under the GATT. The practical effect of this interpretation, as viewed by the Appellate Body, was that – as the EU rightly warned – in some situations a measure would fall within the scope of both the *Illustrative List* of examples in the *TRIMs Agreement* and GATT Article III:8(a), but not be found inconsistent with GATT Article III:4, because of the applicability of Article III:8(a). The Appellate Body considered this outcome acceptable.

Though the envisioned situation may occur occasionally, the Appellate Body considered that most TRIMs falling under the examples in the *Illustrative List*, and thus illegal as violations of national treatment, would not also fall within the scope of the Article III:8(a) exemption. Possibly, that is because Article III:8(a) is a narrow exception for government procurement of goods, while the scope of measures dealt with by the *TRIMs Agreement* and *List* is far wider. Thus, though Article III:8(a) trumps the examples in the *Illustrative List* and the applicability of Article III:4, that outcome should be allowed. Or, to put it as the Appellate Body did, "the application of Article III:8(a) of the [GATT] is not

575 *Canada Renewable Energy Appellate Body Report*, ¶ 5.22.

precluded where the challenged measures fall within the scope of Article 2:2 and Paragraph 1(a) of the *Illustrative List of the TRIMs Agreement*."[576]

- **Interpretation and Application of GATT Article III:8(a) to Facts?**

A second key substantive appellate issue was dependent upon the first, insofar as once the Appellate Body found GATT Article III:8(a) was not precluded, it had to address whether Article III:8(a) applied to the facts of the case at bar. On appeal, Canada contended the Panel incorrectly found that Article III:8(a) did not cover the FIT Program and related FIT and microFIT Contracts. Obviously, Canada wanted the benefit for its schemes of the Article III:8(a) to the national treatment obligation. Conversely, the EU and Japan agreed with the Panel finding regarding the non-applicability of Article III:8(a) to the disputed measures, though both parties disagreed with some aspects of the Panel interpretation and applicability that led to that finding.

After an exhaustive textual and predictably lexicographic analysis of the language of Article III:8(a), the Appellate Body reversed the Panel finding that the DCRs in the disputed measures were laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of this Article. Thus, the disputed measures did not qualify for the exception in Article III:8(a); instead those measures needed to comply with the general national treatment obligations of Article III. However, because Canada chose not to appeal the underlying Panel finding regarding the inconsistency of the disputed measures with Article 2:1 of the *TRIMs Agreement* and Article III:4 of the GATT, the Panel finding remained valid. This finding ultimately was the most important, because it provided the EU and Japan a victory in the dispute, and led to the Appellate Body recommendation that Canada remove the measures in question.

- **Legal Arguments**

Turning to GATT Article III:8(a), Canada, the EU, and Japan each challenged different aspects of its interpretation and application by the Panel. Canada contended the Panel incorrectly found the FIT Program and related FIT and microFIT Contracts were not covered by Article III:8(a). Conversely, the EU and Japan agreed with the Panel finding regarding the non-applicability of Article III:8(a) to the disputed measures, but both parties disagreed with some aspects of the Panel interpretation and applicability that led to that finding.

In particular, Canada challenged the Panel finding that the Government of Ontario's purchases of electricity generated from renewable sources under the disputed measures were taken with a view to commercial resale, within the meaning of GATT Article III:8(a). The Canadians viewed the relevant language in Article III:8(a) to be "with a view to," rather than the term on which the Panel focused – "commercial resale."[577] Canada said the evidenced showed the Government of Ontario adopted the disputed measures with a view "to help ensure the sufficient and reliable supply of electricity for Ontarians and to protect

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576 *Canada Renewable Energy* Appellate Body Report, ¶ 5.29.

577 *Canada Renewable Energy* Appellate Body Report, ¶ 5.29.

the environment."[578] Additionally, the term "commercial resale" suggests intent to profit, and there was no evidence the Ontario Government meant to profit from its renewable energy initiatives.[579]

Japan appealed the Panel finding that the Government of Ontario "purchases" electricity. In its view, the structure of the energy system in Ontario suggested the Ontario Government did not physically supply or sell electricity. Instead, the relevant functions of generation, transmission, and distribution of electricity were unbundled and put under the responsibility of separate entities. As an alternative argument, Japan alleged the Panel erred in concluding the disputed measures involved "purchase[s] for governmental purposes."[580] Here, Japan maintained the Panel committed a logical error in finding that a government could not purchase electricity for a governmental purpose and with a view to commercial resale. Lastly, as a second alternative, Japan asked the Appellate Body to interpret the term "commercial resale" to mean, "with a view to being sold into the stream of commerce of trade."[581] That is, it did not matter whether the Ontario Government sought to profit from the resale; what mattered was whether the good (electricity) was to be resold into the stream of commerce or trade.

The EU appealed the Panel finding that the DCRs in the disputed measures governed the alleged procurement of electricity within the meaning of GATT Article III:8(a). The EU urged the measures analyzed under Article III:8(a) must be related to the subject matter of the products purchased for governmental purposes in order to govern such procurement. Surely Article III:8(a) does not cover requirements or conditions that are not connected with intrinsic characteristics, or the nature, of the product procured. In this case, that meant the DCRs regarding the equipment used to generate the electricity procured did not fall within the scope of Article III:8(a), because there was no rational link between those requirements and the attributes of the electricity procured. So, Article III:8(a) was unavailable to save those requirements from the discipline of the national treatment obligation.

The EU also took issue with the broad nature of the Panel interpretation of the term "governmental purposes" in Article III:8(a). The Panel interpreted the term to mean "for the stated aim of the government."[582] Instead, the EU requested the Appellate Body interpret the term to mean "government purchases of goods that are needed to sustain the work and functions of the government."[583] To it, government purposes should include only goods actually used for the consumption of the purchasing government. In effect, the EU felt the Panel interpretation provided too much deference to government decisions. The Appellate Body should recognize the difference between legitimate policy objectives (present here) and the provision of an actual public service (which it argued was the intention of the scope of Article III:8(a)).

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578 *Canada Renewable Energy* Appellate Body Report, ¶ 5.46 (*quoting* Canada's appellant's submission, ¶ 34).

579 *Canada Renewable Energy* Appellate Body Report, ¶ 5.46.

580 *Canada Renewable Energy* Appellate Body Report, ¶ 5.46.

581 *Canada Renewable Energy* Appellate Body Report, ¶ 5.51.

582 *Canada Renewable Energy* Appellate Body Report, ¶ 5.53.

583 *Canada Renewable Energy* Appellate Body Report, ¶ 5.53.

- **Holding and Rationale**

At the end of its unnecessarily dilated analysis, much of which was unenlightening, if not mind-numbing, and nearly all of which predictably relied on the *Oxford English Dictionary*, the Appellate Body summarized its interpretation as follows:

> In sum, we consider that Article III:8(a) sets out a derogation from the national treatment obligation contained in Article III of the GATT 1994. The provision exempts from the national treatment obligation certain measures containing rules for the process by which government purchases products. Under Article III:8(a), the entity procuring products for the government is a "governmental agency." We have found above that a "governmental agency" is an entity performing functions of government and acting for or on behalf of government. Furthermore, we have found that the derogation of Article III:8(a) must be understood in relation to the obligations stipulated in Article III. *This means that the product of foreign origin must be in a competitive relationship with the product purchased. Furthermore, Article III:8(a) is limited to products purchased for the use of government, consumed by government, or provided by government to recipients in the discharge of its public functions. … Article III:8(a) does not cover purchases made by governmental agencies with a view to reselling the purchased products in an arm's-length sale and it does not cover purchases made with a view to using the product previously purchased in the production of goods for sale at arm's length*.[584]

Having interpreted the relevant language in Article III:8(a), the Appellate Body turned to applying its own interpretation to the facts of the dispute.

Here, the product subject to the DCRs in the disputed measures was certain renewable energy equipment. The product the Government of Ontario purchased under the disputed measures was electricity, not the generation equipment used to create the electricity. Accordingly, "the product being purchased by a governmental agency for purposes of Article III:8(a) – namely, electricity – [was] not the same as the product that [was] treated less favorably [*i.e.*, generation equipment] as a result of the [DCRs contained in the disputed measures]."[585]

The Panel also saw the difference between the product subject to (1) the DCRs and (2) procurement. However, it found the generation equipment was needed and used to produce the electricity and, therefore, exhibited a sufficiently close relationship to the products affected by the DCRs of the disputed measures. Canada supported the Panel finding in this regard, reasoning that the DCRs for electricity generation equipment were mandatory, and thus tied to the disputed measures. Canada had to agree with the Panel on

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584 Emphasis added.

585 *Canada Renewable Energy* Appellate Body Report, ¶ 5.53.

this point, of course, to ensure the Article III:8(a) exception to the national treatment obligation covered both generation equipment and electricity generated by that equipment.

The Appellate Body acknowledged the connection between the (1) procurement of electricity and (2) DCRs regarding generation equipment, but pointed to other conditions in GATT Article III:8(a) that had to be met for this exception to be applicable. In particular, the Appellate Body relied on its understanding that the conditions for derogation under Article III:8(a) must be considered in relation to obligations found generally in Article III. Thus, the product allegedly being discriminated against (*i.e.*, electricity generation equipment) must be in a competitive relationship with the product purchased (*i.e.*, electricity).

Yet, in the case at bar, the two products were not in a competitive relationship. Therefore, the discrimination relating to generation equipment contained in the disputed measures was not covered by Article III:8(a) derogation. Accordingly, the Appellate Body reversed the Panel finding that the Minimum Required Domestic Content Levels of the FIT Program and related FIT and microFIT Contracts were laws, regulations, or requirements governing the procurement by governmental agencies of electricity within the meaning of Article III:8(a).

Given this conclusion, the Appellate Body declined to address alternative claims made by the parties. Additionally, Canada chose not to appeal the Panel finding that the disputed measures were inconsistent with Article III:4 of the GATT and Article 2:1 of the *TRIMs Agreement*. In effect, Canada conceded the measures ran afoul of the national treatment obligation, so when it lost in its argument for an Article III:8(a) exception, it lost the case. Stated differently, though the Appellate Body reversed the Panel finding relating to the relationship between electricity generation equipment and electricity itself, the underlying finding by the Panel regarding the inconsistency of the disputed measures with *TRIMs Agreement* Article 2:1 and GATT Article III:4 remained valid and stood. Therefore, as a whole, the EU and Japan emerged victorious, and the Appellate Body recommended Canada remove the measures in question.

VII. GATT Article III:8(a) Government Procurement Exception: Competitive Relationship Test and 2016 *India Solar Cells* Case

● India's Solar Power Program

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

In April 2014, the U.S. requested the establishment of a Panel to address what it claimed were WTO-inconsistent DCRs under Phase I (Batch 1), Phase I (Batch 2), and

Phase II (Batch 1-A) of the NSM. Thus began the *India Solar Cells* case – WTO Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R (adopted 14 October 2016).

The relevant measures of these Phases and Batches can be found in "Guidelines" and "Request for Selection" documents published by India, the model power purchase agreement (PPA), and individually executed PPAs between solar power developers (SPDs) and Indian Government agencies. The PPAs specify the rates for 25-year terms for guaranteed electricity transactions between the SPDs and the Central GOI. After the Central GOI electricity from the SPDs, it resells it to distribution companies, which again resell it to consumers throughout India.

The measures imposed mandatory DCRs on SPDs participating in the relevant Phases and Batches, but the specifics of the DCRs varied depending on the relevant Batch of the NSM. Under Phase I (Batch 1), the NSM required all SPDs to use crystalline silicon (c-Si) modules manufactured in India for all relevant projects, however, foreign c-Si cells and foreign thin-film modules or concentrator photovoltaic (PV) cells were allowed. Under Phase I (Batch 2), the NSM required all SPDs to use c-Si modules and cells manufactured in India for all relevant projects, however, domestic or foreign modules made from thin-film modules or concentrator PV cells were allowed. Under Phase II (Batch 1-A), SPDs were required to use Indian-manufactured solar cells and modules, regardless of the type of technology used by the particular project. The U.S. claims related only to the specific DCRs imposed under each relevant Phase and Batch, and not to any other elements of the NSM.

- **Key Substantive GATT Issues**

In defense against America's key substantive claim, namely, that India's DCRs violated the national treatment obligation of GATT Article III:4, India invoked three GATT exceptions: Article III:8(a) (discussed below), Article XX(j) (the short supply exception, discussed in a separate Chapter), and Article XX(d) (the administrative necessity exception). India lost across the board, at both the Panel and Appellate Body stages.[586]

- **Losing Indian and Winning American Arguments**

[586] The Appellate Body Report includes a separate opinion of one Appellate Body Member. That Member took issue with hearing the decision not to address further India's claims regarding the remaining legal elements under pertinent GATT-WTO provisions. The Member expressed agreement with that decision, yet opted to explain why it was appropriate to end the analysis without addressing further issues on appeal. Summarized, the separate opinion justifies under DSU Article 17:12 (which requires the Appellate Body to review issues raised by the parties) the application of judicial economy. However, the decision of how to address issues must occur within the overarching principles of the WTO dispute settlement system, including "prompt settlement" and "positive solutions." Fully addressing all aspects of a claim is not necessary in all instances. This odd separate opinion seems not to have been an opinion, or even a concurring opinion in a legal sense, and would have been better placed in a legal journal than as part of the official record of WTO jurisprudence.

Article III:8(a) provides a derogation to the Article III:4 obligation that WTO Members must give "treatment no less favorable" to products imported from any Member relative to "like" products produced domestically, that is, that Members may not discriminate against imported goods in favor of domestic goods. Article III:8(a) says:

> The provisions of this Article shall not apply to laws, regulations or requirements governing the procurement by governmental agencies of products purchased for governmental purposes and not with a view to commercial resale or with a view to use in the production of goods for commercial sale.

Essentially, the national treatment obligation does not apply to some forms of government procurement as long as the products are not used for a commercial purpose.

As the Appellate Body recognizes, the keys terms on which to focus legal analyses under Article III:8(a) of the GATT are whether the measures in dispute qualify as "laws, regulations or requirements governing [. . .] procurement," whether the entity purchasing products is a "governmental agency," and whether the dispute involves "products purchased for governmental purposes," and "not with a view to commercial resale or with a view to use the production of goods for commercial sale."[587] In the *India Solar Cells* case, the dispositive issue related to the "products purchased" analysis.

On appeal, India said the Panel erred when it held GATT Article III:8(a) was not applicable to the DCR measures in dispute. That is, India said the Panel was wrong to find that the DCR measures do not fall within the scope of this exception to the national treatment obligation of Article III:4. India specifically claimed the Panel erred by not making an objective assessment of its arguments and related evidence that:

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

Throughout the proceedings, India and the U.S. relied on arguments that, in turn, relied on or distinguished the 2013 Appellate Body Report in *Canada – Renewable Energy*. India disagreed with the Panel's interpretation and application, or rather, lack thereof, of that case law, claiming the Panel "mechanically applied the Appellate Body's test of competitive relationship" developed in *Canada – Renewable Energy*.

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[587] *India Solar Cells* Appellate Body Report, ¶ 5:18 (*citing* Appellate Body Report, *Canada – Certain Measures Affecting the Renewable Energy Generation Sector*, WT/DS412/AB/R (adopted 24 May 2013), ¶ 5:74, and Appellate Body Report, *Canada – Measures Relating to the Feed-in Tariff Program*, WT/DS426/AB/R (adopted 24 May 2013, ¶ 5:74 [hereinafter, referred to jointly as *Canada – Renewable Energy*]).

In *Canada – Renewable Energy*, the Appellate Body stated that, "[w]hether the derogation in Article III:8(a) can extend also to discrimination [relating to inputs and processes of production used in respect of products purchased by way of procurement] is a matter we do not decide in this case."[588] India relied on this language, arguing it "left space for legal reasoning on the issue of inputs."[589]

The U.S., equally relying upon *Canada – Renewable Energy*, countered India's arguments by pointing out the Appellate Body also found that "Article III:8(a) [of the GATT] does not apply when a [WTO Member] purchases one product, but discriminates against another, different product" and requires that the product "subject to discrimination" be in a "competitive relationship."[590] In *Canada – Renewable Energy*, the term "competitive relationship" was used to describe: "(1) identical products; (2) 'like' products; or (3) products that are directly competitive or substitutable."[591] The U.S. viewed this language as directly relevant, because the facts in *Canada – Renewable Energy* and *India Solar Cells* involved transactions in which a government purchased electricity but discriminated against foreign generation equipment.

- **Holding and Rationale on Scope of Article III:8(a)**

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

> Because Article III:8(a) [of the GATT] is a derogation from the obligations contained in other paragraphs of Article III, [. . .] the same discriminatory treatment must be considered both with respect to the obligations of Article III and with respect to the derogation of Article III:8(a). Accordingly, the scope of the terms "products purchased" in Article III:8(a) is informed by the scope of "products" referred to in the obligations set out in other paragraphs of Article III. Article III:8(a) thus concerns, in the first instance, the product that is subject to the discrimination.[592]

In *India Solar Cells*, the Appellate Body confirmed that the scope of the derogation cannot extend beyond the scope of the obligation from which the derogation is sought.

The Appellate Body's logic ran counter to India's position. Essentially, India attempted to expand the scope of Article III:8(a) to "inputs" and "processes of production," regardless of whether the product subject to discrimination is in a "competitive relationship" with the product purchased. But, the Appellate Body considered the analysis of "competitive relationship" to be a threshold issue, concluding that "consideration of

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588 *India Solar Cells* Appellate Body Report, ¶ 5:19 (*citing Canada – Renewable Energy* Appellate Body Report, ¶ 5:63).

589 *India Solar Cells* Appellate Body Report, ¶ 5:19 (*citing* India's appellant's submission, ¶ 4 and *Canada – Renewable Energy* Appellate Body Report, ¶ 5:63).

590 *India Solar Cells* Appellate Body Report, ¶ 5:20 (*citing* U.S.' appellee's submission, ¶¶ 38 and 42).

591 *Canada – Renewable Energy* Appellate Body Report, ¶ 5:63.

592 *Canada – Renewable Energy* Appellate Body Report, ¶ 5:63.

inputs and processes of product may only inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against."[593]

The Appellate Body said its logic was sufficient to address India's appellate claims under Article III:8(a). Nonetheless, the Appellate Body chose to examine India's arguments relating to the approach taken by the Panel.[594] The Appellate Body summarized the Panel's approach as follows:

> The Panel focused its analysis on the issue of "how the Appellate Body's findings and reasoning under Article III:8(a) [of the GATT] should apply to the DCR measures at issue in this dispute," instead of "whether the Appellate Body left room for an alternative to the 'competitive relationship' standard."[595]

The Appellate Body recognized the Panel appeared to take such an approach due to the reliance of the parties on *Canada – Renewable Energy*, and the Panel's finding that the facts of the dispute were not "distinguishable in any relevant respect" from those in *Canada – Renewable Energy*.[596] The Panel believed it was "not presented with the question of whether we should deviate from the Appellate Body's findings and reasoning in [*Canada – Renewable Energy*]; rather, we are presented with the question of how the Appellate Body's findings and reasoning under Article III:8(a) [of the GATT] should apply to the DCR measures at issue in this dispute."[597] So, understandably, the Panel cited previous WTO jurisprudence concerning "the issue of whether a Panel should 'resolve the same legal question in the same way in a subsequent case' and whether it can depart for 'cogent reasons' from previous Appellate Body findings of the same issue of legal interpretation."[598]

The Appellate Body disagreed with India, concluding the Panel did not rely on previous jurisprudence as binding (recall there is no formal doctrine of *stare decisis* in

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593 *India Solar Cells* Appellate Body Report, ¶ 5:24.

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

595 *India Solar Cells* Appellate Body Report, ¶ 5:27 (citing *India Solar Cells* Panel Report, ¶¶ 7:115 and 7:120).

596 *India Solar Cells* Appellate Body Report, ¶ 5:27 (citing *India Solar Cells* Panel Report, ¶ 7:135).

597 *India Solar Cells* Appellate Body Report, ¶ 5:38 (citing *India Solar Cells* Panel Report, ¶ 7:115).

598 *India Solar Cells* Appellate Body Report, ¶ 5:39 (citing Appellate Body Report, *United States – Final Anti-Dumping Measures on Stainless Steel from Mexico*, WT/DS344/AB/R (adopted 20 May 2008), ¶ 160, analyzed in *WTO Case Review 2008*; the Panel also cited Appellate Body Report, *United States – Continued Existence and Application of Zeroing Methodology*, WT/DS350/AB/R (adopted 19 February 2009), ¶¶ 358-365, analyzed in *WTO Case Review 2009*; Panel Report, *China – Measures Relating to the Exportation of Rare Earths, Tungsten and Molybdenum*, WT/DS431/R (adopted 29 August 2014), ¶¶ 7.55-7.61, the Appellate Body Report of which was analyzed in *WTO Case Review 2014*; and Panel Report, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/R (adopted 25 March 2011), ¶ 7:311-7:317, the Appellate Body Report of which was analyzed in *WTO Case Review 2011*).

WTO law, though arguably it operates in a *de facto* sense). The Appellate Body thus rejected India's suggestion that the Panel disregarded India's arguments. Instead, the Appellate Body felt the Panel appropriately found that India's arguments were insufficient to distinguish, on the fact, the dispute at hand to those in *Canada – Renewable Energy*. In sum, the Appellate Body upheld the Panel's finding that India's DCR measures are not covered by the derogation under Article III:8(a).

VIII. GATT Article III:8(b) Domestic Subsidy Exception: Postal Rates and 1997 *Canada Magazines* Case[599]

WTO APPELLATE BODY REPORT, *CANADA – CERTAIN MEASURES CONCERNING PERIODICALS*, WT/DS31/AB/R (ADOPTED 30 JULY 1997)

Both participants agree that Canada's "funded" postal rates involve "a payment of subsidies." The appellant, the United States, argues, however, that the "funded" postal rates program involves a transfer of funds from one government entity to another, *i.e.*, from Canadian Heritage to Canada Post, and not from the Canadian government to domestic producers as required by Article III:8(b).

As we understand it, through the PAP, Canadian Heritage provides Canada Post, a wholly-owned Crown corporation, with financial assistance to support special rates of postage for eligible publications, including certain designated domestic periodicals mailed and distributed in Canada. This program has been implemented through a series of agreements, the MOA [*i.e.*, the Memorandum of Agreement Concerning the Publications Assistance Program Between the Department of Communications and Canada Post Corporation], between Canadian Heritage and Canada Post, which provide that in consideration of the payments made to it by Canadian Heritage, Canada Post will accept for distribution, at special "funded" rates, all publications designated by Canadian Heritage to be eligible under the PAP. The MOA provides that while Canadian Heritage will administer the eligibility requirements for the PAP based on criteria specified in the MOA, Canada Post will accept for distribution all publications that are eligible under the PAP at the "funded" rates.

The appellant, the United States, cited four GATT 1947 panel reports as authorities for its interpretation of Article III:8(b). However, these panel reports are not all directly on point. In *Italian Agricultural Machinery* [GATT B.I.S.D. (7th Supp.) 60 (adopted 23 October 1958)] and *EEC-Oilseeds* [GATT B.I.S.D. (37th Supp.) 86 (adopted 25 January 1990)], the panels found that subsidies paid to purchasers of agricultural machinery and processors of oilseeds were not made "exclusively to domestic producers" of agricultural machinery and oilseeds, respectively. In *United States-Malt Beverages* [GATT B.I.S.D. (39th Supp.) 206 (adopted 19 June 1992)] and *United States-Tobacco* [GATT B.I.S.D. (37th Supp.) 86 (adopted 25 January 1990)], the issue was whether a reduction in the federal excise tax on beer or a remission of a product tax on tobacco constituted a "payment of subsidies" within the meaning of Article III:8(b). In *United States-Malt Beverages*, the Panel found that a reduction of taxes on a good did not qualify as a "payment of subsidies"

599 This case is cited, and its facts summarized, in an earlier Chapter.

for the purposes of Article III:8(b) of the GATT 1994. In *United States – Tobacco*, having found that the measure at issue was not a tax remission, the Panel concluded that it was a payment which qualified under Article III:8(b) of the GATT 1994.

In *EEC - Oilseeds*, the Panel stated that "it can reasonably be assumed that a payment not made directly to producers is not made 'exclusively' to them." This statement of the Panel is *obiter dicta*, as the Panel found in that report that subsidies paid to oilseeds processors were not made "exclusively to domestic producers," and therefore, the EEC payments of subsidies to processors and producers of oilseeds and related animal feed proteins did not qualify under the provisions of Article III:8(b).

A proper interpretation of Article III:8(b) must be made on the basis of a careful examination of the text, context and object and purpose of that provision. In examining the text of Article III:8(b), we believe that the phrase, "including payments to domestic producers derived from the proceeds of internal taxes or charges applied consistently with the provisions of this Article and subsidies effected through governmental purchases of domestic products" helps to elucidate the types of subsidies covered by Article III:8(b) of the GATT 1994. It is not an exhaustive list of the kinds of programs that would qualify as "the payment of subsidies exclusively to domestic producers," but those words exemplify the kinds of programs which are exempted from the obligations of Articles III:2 and III:4 of the GATT 1994.

Our textual interpretation is supported by the context of Article III:8(b) examined in relation to Articles III:2 and III:4 of the GATT 1994. Furthermore, the object and purpose of Article III:8(b) is confirmed by the drafting history of Article III. In this context, we refer to the following discussion in the Reports of the Committees and Principal Sub-Committees of the Interim Commission for the International Trade Organization concerning the provision of the Havana Charter for an International Trade Organization that corresponds to Article III:8(b) of the GATT 1994:

> This sub-paragraph was redrafted in order to make it clear that nothing in Article 18 could be construed to sanction the exemption of domestic products from internal taxes imposed on like imported products or the remission of such taxes. At the same time the Sub-Committee recorded its view that nothing in this sub-paragraph or elsewhere in Article 18 would override the provisions of Section C of Chapter IV. [Interim Commission for the International Trade Organization, Reports of the Committees and Principal Sub-Committees: ICITO I/8, Geneva, September 1948, p. 66. As the Appellate Body stated in footnote 73 of its Report, Article 18 and Section C of Chapter IV of the Havana Charter for an International Trade Organization correspond, respectively, to Article III and Article XVI of the GATT 1947.]

We do not see a reason to distinguish a reduction of tax rates on a product from a reduction in transportation or postal rates. Indeed, an examination of the text, context, and object and purpose of Article III:8(b) suggests that it was intended to exempt from the

obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government.

We agree with the Panel in *United States – Malt Beverages* that:

> Article III:8(b) limits, therefore, the permissible producer subsidies to "payments" after taxes have been collected or payments otherwise consistent with Article III. This separation of tax rules, *e.g.*, on tax exemptions or reductions, and subsidy rules makes sense economically and politically. Even if the proceeds from non-discriminatory product taxes may be used for subsequent subsidies, the domestic producer, like his foreign competitors, must pay the product taxes due. The separation of tax and subsidy rules contributes to greater transparency. It also may render abuses of tax policies for protectionist purposes more difficult, as in the case where producer aids require additional legislative or governmental decisions in which the different interests involved can be balanced.

As a result of our analysis of the text, context, and object and purpose of Article III:8(b), we conclude that the Panel incorrectly interpreted this provision. For these reasons, we reverse the Panel's findings and conclusions that Canada's "funded" postal rates scheme for periodicals is justified under Article III:8(b) of the GATT 1994.

Chapter 18

FOURTH PILLAR: GATT ARTICLE XI AND QRs[600]

I. GATT Article XI:1 Prophylactic Ban on QRs

- **Text**

Paragraph 1 of Article XI contains a prophylactic ban on QRs:

> *No* prohibitions or restrictions other than duties, taxes or other charges, whether made effective through *quotas*, import or export *licenses* or *other measures*, shall be instituted or maintained by any contracting party on the importation of any product of the territory of any other contracting party or on the exportation or sale for export of any product destined for the territory of any other contracting party.[601]

Read literally, the only permissible trade barrier under GATT is a tariff, tax, or other kind of charge. Of course, as with other pillar obligations in GATT that constitute broad, trade liberalizing rules, there are exceptions (discussed later). Moreover, as with any obligation, there is the possibility of obtaining a waiver, which GATT contracting parties – especially from Europe in early GATT history – to derogate from Article XI:1.[602]

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[600] Documents References:
(1) *Havana (ITO) Charter* Articles 4, 6, 13, 20-21, 38-39
(2) GATT Article XI and XVIII:B
(3) *NAFTA* 1.0 Chapters 9, 18
(4) Relevant provisions in other FTAs

[601] https://kansas.sharepoint.com/:w:/t/WheatLawLibrary-Documents/EaCECtiEA7hDvm7vo1ab4MoBOXNmkCMVOtnjIrFHUVzFAQ?e=eoeBe6. (Emphasis added.)

[602] In 1955, America obtained a significant waiver for agricultural import restrictions. *See Waiver Granted to the United States in Connection with Import Restrictions Imposed Under Section 22 of the Agricultural Adjustment Act, as Amended*, B.I.S.D. (3rd Supp.) 32 (1955) (adopted 5 March 1955). For a brief discussion of the Section 22 of the *Agricultural Adjustment Act of 1933*, 7 U.S.C. § 624, *see* Raj Bhala, *International Trade Law: Theory and Practice* 688-690 (Newark, New Jersey: LexisNexis, 2nd ed. 2000). Among the waivers from Article XI for European countries are:

(1) For Germany in 1960. *See German Import Restrictions, Decision of 30 May 1959*, B.I.S.D. (8th Supp.) 31 (1960) (adopted 30 May 1959) (covering dairy products, grains, and live animals).
(2) For Switzerland in 1959. *See Provisional Accession of the Swiss Federation*, B.I.S.D. (7th Supp.) 19 (1959) (adopted 22 November 1958) (covering import restrictions and monopolies on alcohol and wheat).
(3) For Belgium in 1956. *See Belgium Import Restrictions, Decision of 3 December 1955*, B.I.S.D. (4th Supp.) 22 (1956) (adopted 3 December 1955) (covering certain vegetables, dairy products, and live animals).

Article XI also contains two Interpretative Notes, plus a generic one at the outset – in effect, a *chapeau*. The *chapeau* for *Ad Articles XI, XII, XIII, XIV, and XVIII* reinforces the aggressive anti-QR of Paragraph 1:

> Throughout Articles XI, XII, XIII, XIV and XVIII, the terms "import restrictions" or "export restrictions" *include* restrictions made effective through *state-trading operations*.[603]

In brief, STEs are subject to the discipline of Article XI:1. This coverage appears to contemplate direct or indirect state involvement in a restriction.

- **Issues of Origin, Scope, and STEs**

While Article XI:1 is a discipline about as clearly worded as is to be found in GATT, the language still raises issues in need of elaboration. First, an origin determination is needed in every case. The phrase "product of the territory of any other contracting party" means Paragraph 1 is inapplicable if the merchandise in question is a domestic product.

Second, just how broad is the scope, *i.e.*, does "no" literally mean "no"? The phrase "prohibitions or restrictions" is juxtaposed with the phrase "other than duties, taxes, or other charges." The implication is the scope of Article XI:1 complements the scope of Article II. If the measure in question is a duty, tax, or other charge, then it falls within the ambit of Article II, because Paragraph 1(b) of that Article refers to ordinary customs duties, and to ODCs. However, as Professor Jackson reports, there is no preparatory history to support this textual interpretation.[604]

From the text, it is reasonable to infer that the way in which a QR is enforced is irrelevant. Professors Matsushita, Schoenbaum, and Mavroidis state:

> [I]t does *not* matter if the restrictions in question are enforced in the traditional way, namely through customs regulation, or if they are enforced in other ways, such as through *state-trading companies* or import monopolies. Article XI:1 reaches measures that are not legally enforceable if they meet two criteria: (1) there are reasonable grounds to believe that sufficient incentives or disincentives existed for the non-mandatory measures to take effect; and (2) the operation of the measures is essentially

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(4) For Luxembourg also in 1956. *See Luxembourg Import Restrictions, Decision of 3 December 1956*, B.I.S.D. (4th Supp.) 27 (1956) (adopted 3 December 1956) (covering dairy products, live animals, and wheat).

(5) For the European Coal and Steel Community in 1953. *See European Coal and Steel Community, Decision of 10 November 1952*, B.I.S.D. (1st Supp.) 17 (1953) (adopted 10 November 1952) (covering combustibles and steel).

603 Emphasis added. This Interpretative Note had been part of the original Article XI, in a Paragraph 3, but following the 1955 GATT Review Session, was transferred and expanded to an *Ad Article*. *See* JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT §13.3 at 315 (1969). [Hereinafter, JACKSON 1969.]

604 *See* JACKSON 1969 §13.3 at 315.

> dependent on *government* action.[605]

In brief, the scope of Article XI:1 is not dependent on the way in which a QR is administered, as long as the restriction emanates, directly or indirectly, from a governmental body or a private body acting with governmental authority.

Third, with respect to STEs in particular, it is not clear – even with the Interpretative Note quoted above – how Article XI:1 applies. In this respect, the above-quoted summary needs modest elaboration. Certainly, an STE that is an import monopoly can constrict supply of merchandise from overseas, and thereby favor domestic producers of a like product. Professor Jackson writes:

> An argument could be made that the language [of the Interpretative Note, *Ad Articles XI, XII, XIII, XIV, and XVIII*] prevents the state enterprise from using its purchasing practice to limit imports in any way whatsoever. If this interpretation were correct, however, then Article XVII [concerning STEs] seems relatively unnecessary.[606]

This comment raises a more general problem (discussed later), namely, how does Article XI:1 relate to and interact with other GATT obligations?

- **More on Scope: Case Law Examples of Forbidden QRs**

A fuller answer to the question of the scope of Article XI:1 demands movement beyond the plain language. That is, it is necessary to refer to GATT jurisprudence through the decades. Overall, this case law counsels in favor of an expansive, if not outright literal, interpretation so as to give the discipline as much strength as possible. In particular, Article XI:1 clearly embraces, and, therefore, bans,

(1) "Quotas," in the conventional sense of the term, as Paragraph 1 expressly states, and as is reinforced by the 1989 GATT Panel Report in 1989 case of *Japan – Restrictions on Imports of Certain Agricultural Products*.[607]

(2) "Import or export licenses," as Paragraph 1 expressly states.

The term "other measures" imparts significant strength to the ban, because it is inherently broad, and GATT Panels have interpreted it as such.

Thus, among the QRs these Panels or the WTO Appellate Body have held to be "other measures," and hence illegal under Article XI:1, are:

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605 MITSUO MATSUSHITA, THOMAS J. SCHOENBAUM & PETROS C. MAVROIDIS, THE WORLD TRADE ORGANIZATION – LAW, PRACTICE, AND POLICY 124-125 (1st ed., 2003). (Emphasis added.) [Hereinafter, MATSUSHITA ET AL.]

606 JACKSON 1969 §13.3 at 316.

607 *See* B.I.S.D. (35th Supp.) 163 (1989) (adopted 22 March 1988).

(1) A requirement to post a security deposit, as the 1979 GATT Panel ruled in *EEC – Program of Minimum Import Prices, Licenses and Surety Deposits for Certain Processed Fruits and Vegetables*.[608]

(2) A prohibition on an imported product that is not manufactured in a certain way, as the 1979 GATT Panel also ruled in *EEC Fruits and Vegetables* case.[609]

(3) A prohibition on imports of works that are copyrighted but not made domestically, as the 1984 GATT Panel ruled in *United States Manufacturing Clause*.[610]

(4) A requirement to collect data or to monitor, as the GATT Panel ruled in the 1988 case of *Japan – Trade in Semi-Conductors*.[611]

(5) A minimum price system, as the GATT Panel also ruled in the 1988 *Japan Semi-Conductors* case.[612]

(6) A TRQ, as is evident from the 1997 Appellate Body Report in *European Communities – Regime for the Importation, Sale and Distribution of Bananas*.[613]

It should not be surprising the meaning of the term "other measures" has taken shape over time, through the evolution of jurisprudence. This term is inherently malleable. No doubt this evolution will continue for as long as governments seek to devise new kinds of quantitative restrictions.

Moreover, and more importantly, it should not be surprising that through progressive adjudication, the term "other measures" takes on an ever-broader meaning. It is impossible to appreciate the significance of Article XI:1 without considering its relationship to other pillar obligations of GATT (as discussed later). It might be of very little practical benefit to require WTO Members to bind their tariffs under Article II:1(b) if the Members could raise NTBs. The prophylactic ban on QRs, while entirely logical from an economic standpoint because of the vices associated with these restrictions, commends

608 *See* B.I.S.D. (25th Supp.) 68 (1979) (adopted 18 October 1979).

609 *See* B.I.S.D. (25th Supp.) 68 (1979) (adopted 18 October 1979).

610 *See* B.I.S.D. (31st Supp.) 74 (1985) (adopted 15-16 May 1984).

611 *See* B.I.S.D. (35th Supp.) 116, 162 at ¶ 132 (1989) (adopted 4 May 1988). For an analysis of this case, see Raj Bhala, *Modern GATT Law* Volume II, Chapter 38, § 2 (2nd ed. 2013).

612 *See* B.I.S.D. (35th Supp.) 116, 162 at ¶ 132 (1989) (adopted 4 May 1988).

613 *See* WT/DS27/AB/R ¶ 194 (adopted 25 September 1997); Panel Report, *European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/R ¶ 7:154 (adopted as modified by the Appellate Body 22 May 1997). The *Bananas* case is discussed in a separate Chapter. For additional treatments of this case, *see, e.g.*, Hunter R. Clark, *The WTO Bananas Dispute Settlement and its Implications for Trade Relations between the U.S. and the E.U.*, 35 CORNELL INTERNATIONAL LAW JOURNAL 291 (Fall 2002); Raj Bhala, *The Bananas War*, 31 MCGEORGE LAW REVIEW 839-971 (Summer 2000).

itself for this additional reason. Without it, binding tariffs would be like pouring water into a cracked glass.

A similar link can be made to GATT Articles I and III. Of what help would it be to bar discriminatory treatment, whether in favor of a like product from a particular foreign country or in favor of a like domestic product, if it were possible to slap a quantitative restriction on merchandise from one foreign country, or to protect a domestic producer? Article XI:1 complements the non-discrimination obligations in GATT, just as it does the tariff binding rules. In brief, the drafters of GATT had no choice – if they were serious about facilitating trade, which of course they were – but to write an aggressive rule against quantitative restrictions into Article XI:1. Following in their tradition, GATT Panelists and WTO adjudicators have no choice but to impart an expansive meaning to the term "other measures."

II. Overview of Article XI:2 Exceptions

For the realist – or cynic – about the translation of free trade theory into trade law and policy, Paragraph 2 of Article XI provides considerable comfort. More accurately, it provides discomfort. After the grand, trade liberalizing obligation in Paragraph 1, the drafters of GATT inserted a list of exceptions to this obligation in Paragraph 2. Given the heated debate to reach the London Compromise – Articles XI, XII, XIII, and XIV – at the 1946 London Preparatory Conference, this two-part structure is not surprising.

The drafters compromised on three exceptions to Paragraph 1 – for export restrictions to deal with shortages of food or other essential goods (Paragraph 2(a)), for import or export restrictions to administer grading and classification standards (Paragraph 2(b)), and for import restrictions in conjunction with agriculture and fisheries support programs (Paragraph 2(c)). Interestingly, like the text of Paragraph 1, 2 of the exceptions in Paragraph 2 (in (a) and (c)) reflect proposals made by the U.S.[614] Article XI:2 states:

> The provisions of paragraph 1 of this Article shall *not* extend to the following:
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> (a) *Export* prohibitions or restrictions *temporarily* applied to *prevent or relieve critical* shortages of *foodstuffs* or *other products essential* to the exporting contracting party;
>
> (b) *Import and export* prohibitions or restrictions *necessary* to the *application* of standards or regulations for the *classification, grading or marketing* of *commodities* in international trade;
>
> (c) *Import* restrictions on any *agricultural* or *fisheries* product, imported in any form, *necessary* to the *enforcement of governmental measures* which operate:

614 *See* JACKSON 1969 §13.3 at 314, §13.4 at 316-319.

> (i) to *restrict the quantities of the like domestic product* permitted to be marketed or produced, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be *directly substituted*; or
>
> (ii) to *remove a temporary surplus of the like domestic product*, or, if there is no substantial domestic production of the like product, of a domestic product for which the imported product can be *directly substituted*, by *making the surplus available* to *certain* groups of *domestic* consumers *free* of charge or at *prices below* the *current* market level; or
>
> (iii) to *restrict the quantities* permitted to be *produced* of any *animal product* the production of which is *directly* dependent, wholly or mainly, on the imported commodity, if the domestic production of that commodity is *relatively negligible*.
>
> Any contracting party applying restrictions on the importation of any product pursuant to sub-paragraph (c) of this paragraph shall give *public notice* of the *total quantity or value* of the product permitted to be imported during a specified future period and of any change in such quantity or value. Moreover, *any restrictions applied under (i)* above *shall not be such as will reduce the total of imports relative to the total of domestic production*, as compared with the *proportion* which might *reasonably be expected* to rule between the two *in the absence of restrictions*. In determining this proportion, the contracting party shall pay due regard to the proportion prevailing during a *previous representative period* and to *any special factors* which may have affected or may be affecting the trade in the product concerned.[615]

Surely, the existence of Article XI:2 does more than reinforce the following axiom about reading an international trade rule: expect a trade liberalizing obligation in an initial passage or paragraph to be followed by several subsequent provisions that either define key terms in the obligation so as to limit its force, create outright exceptions to the obligation, or both. Surely, Paragraph 2 calls into question the commitment of the drafters themselves to open trade. The fact the Interpretative Note, *Ad Articles XI, XII, XIII, XIV and XVIII*, applies the Paragraph 2 exceptions to restrictions made effective through state trading operations might be read (or misread) as further calling into question their commitment.

This conclusion is (or would be) hasty. To start, the Interpretative Note, *Ad Articles XI, XII, XIII, XIV and XVIII*, ensures the disciplines on invoking a Paragraph 2 exception

615 Emphasis added.

apply to an import restriction regardless of whether the restriction is effected (directly or indirectly) through a STE or the private sector. More importantly, a careful review of the three exceptions in Article XI:2 to the prophylactic ban on quantitative restrictions in Article XI:1 indicates the exceptions do not, as lawyers would put it, "swallow the rule." The drafters crafted the exceptions carefully. The result is three narrow, and not unreasonable, limitations (discussed in turn below).

III. GATT Article XI:2(a) "Critical Shortages" Exception, and 2019 and 2022-2023 India, and 2022 Malaysia, Cases

● Nature of Exception

Article XI:2(a) permits a WTO Member to impose a QR on exports of a foodstuff or other product under three conditions. It is not clear what constitutes an "other product." There is legislative history from the 1946 London Preparatory Conference to suggest it permits imposition of a quota on exports to allow for conservation of an exhaustible natural resource.[616] But, this suggestion is not apparent from the text. Whether a particular good qualifies as an "other product," so its exports can be restricted would seem to depend on the Member concerned, and probably – at least initially – is self-judging.

As for an export ban under Paragraph 2(a), it must be for "prevention" or "relief." Preparatory work indicates "prevent" means steps can be taken before the critical shortage is manifest.[617] That prevention or relief must be with respect to a "critical" shortage. The foodstuff or other product must be "essential" to the exporting country. Still, the key terms – particularly critical and essential – are self-judging, at least in the first instance. An exporting Member facing a crisis will impose a trade restrictive measure on exports, and it will be for an importing Member to bring suit alleging one or more of the conditions were unfulfilled. If the exporting Member had to await approval of the WTO Membership, or some committee drawn from a subset of Members, then the needed response to the crisis might come too late to help victims in the exporting Member suffering from a shortage. Significantly, based on a 1955 GATT Working Party Report, the shortage can arise because of conditions in another country.[618] For example, it is permissible for one WTO Member to invoke Paragraph 2(a) because of a dramatic price rise caused by conditions in another Member.

● Sudan Foodstuff Hypothetical

At a human level, the exception in Article XI:2(a) might seem odd. However, consider the following hypothetical example. Suppose Sudan is a WTO Member and faces a shortage of powdered milk. There is one powdered milk producer in Khartoum. The economic difficulties faced by most Sudanese, in the midst of many years of civil strife culminating in the July 2012 secession of South Sudan, have reduced significantly their

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616 *See* JACKSON 1969 §13.4 at 317 (*citing* U.N. Doc. EPCT/A/SR.40 at 1-2 (1947)).

617 *See* JACKSON 1969 §13.4 at 317 (*citing* U.N. Doc. EPCT/141 at 2 (1947)).

618 *See Reports Relating to the Review of the Agreement, Quantitative Restrictions*, B.I.S.D. (3rd Supp.) 170, 191 at ¶ 73 (1955) (adopted 2, 4-5 March 1955).

purchasing power. The Khartoum powdered milk company, while it could sell its product for the equivalent (measured in U.S. dollars) of $1 per unit within Sudan, could sell the product to Kenyan consumers at $2. Judged from a profit-maximizing standpoint, the company elects to export, or continue exporting, its powdered milk to Kenya. The Government of Sudan reacts by limiting exports of the product to one shipping container per month, or possibly bans exports completely. Kenya complains its consumers suffer, as powdered milk supplies fall, and prices rise. Article XI:2(a) provides Sudan with a defense against an Article XI:1 claim by Kenya.

It also provides a defense in an altered scenario. Suppose the powdered milk shortage commences in Kenya, which responds by importing large quantities of it, including from Sudan. The Sudanese Government can invoke Article XI:2(a) to stem the rising tide of exports of powdered milk, and thereby alleviate a critical shortage.

How might this defense be justified? It may be thought of as a policy tool to prevent profiteering in a crisis situation. The powdered milk company in Khartoum is not permitted to make a profit-maximizing decision that adversely affects the common good of the Sudanese people. History is replete with instances of companies engaging in profiteering behavior during times of war, natural disasters, or other turbulence. Article XI:2(a) simply allows a government to regulate exportation of a product during such times. In a sense, this exception to the ban on quantitative restrictions is the mirror image of the rules on safeguards in Article XIX. Both kinds of barriers arise when trade is conducted on a fair basis, *i.e.*, there is no allegation of dumping, subsidization, or IP infringement. In both instances, there is an acute problem in the domestic economy of the importing country. Thus, in both instances, a trade restrictive measure may be imposed, though only on a temporary basis.

This defense, reasonable as it may be, conflicts with the concept of non-discrimination resonating in GATT. The Sudanese export restraint favors local over foreign consumers. The defense raises a philosophical, if not theological, problem. If Sudanese and Kenyans are of equal human dignity – and that is precisely the teaching of the Catholic and other faiths – then why is it permissible to favor Sudanese over Kenyans by curtailing powdered milk shipments to Kenya? An answer may be to refer to another moral precept, which is to exercise a preferential option for the least well off in a community. The community in the hypothetical is SSA. In that community, the Sudanese suffer a worse lot, on balance, than the Kenyans. Therefore, so the argument goes, permit discrimination in favor of the Sudanese under Article XI:2(a).

- **Indian Onions, Broken Rice, Parbroiled Rice, and Basmati Rice Cases**

As another – and real – illustration of the logic of GATT Article XI:2(a) exception to the Article XI:1 ban on QRs, consider four export bans imposed by India, one on onions in October 2019, one on broken rice in September 2022, and two (discussed below) on pharmaceuticals in March 2020 in the context of the COVID-19 pandemic.[619] The first ban

[619] By no means were these bans the only ones. Governments around the world considered whether export bans on food to secure domestic supplies for their citizens might be appropriate, in addition to other

measures, and with a view to preserving social stability notwithstanding the disruption to global trade or the adverse effects on NFIDCs:

> Kazakhstan, one of the world's biggest shippers of wheat flour, banned exports of that product along with others, including carrots, sugar and potatoes. Vietnam temporarily suspended new rice export contracts. Serbia has stopped the flow of its sunflower oil and other goods, while Russia is leaving the door open to shipment bans and said it's assessing the situation weekly.
>
> …
>
> As it is, many governments have employed extreme measures, setting curfews and limits on crowds or even on people venturing out for anything but to acquire essentials. That could spill over to food policy, said Ann Berg, an independent consultant and veteran agricultural trader….
>
> "You could see wartime rationing, price controls and domestic stockpiling," she said.
>
> Some nations are adding to their strategic reserves. China, the biggest rice grower and consumer, pledged to buy more than ever before from its domestic harvest, even though the government already holds massive stockpiles of rice and wheat, enough for one year of consumption.
>
> Key wheat importers including Algeria and Turkey have also issued new tenders, and Morocco said a suspension on wheat-import duties would last through mid-June.
>
> …
>
> As governments take nationalistic approaches, they risk disrupting an international system that has become increasingly interconnected in recent decades.
>
> Kazakhstan had already stopped exports of other food staples, like buckwheat and onions, before the move this week to cut off wheat-flour shipments. That latest action was a much bigger step, with the potential to affect companies around the world that rely on the supplies to make bread.
>
> For some commodities, a handful of countries, or even fewer, make up the bulk of exportable supplies. Disruptions to those shipments would have major global ramifications. Take, for example, Russia, which has emerged as the world's top wheat exporter and a key supplier to North Africa. Vietnam is the third-largest rice exporter, sending many of its cargoes to the Philippines.
>
> …
>
> … [Tim Benton, Research Director, Emerging Risks, Chatham House] warned that frenzied shopping coupled with protectionist policies could eventually lead to higher food prices -- a cycle that could end up perpetuating itself.
>
> "If you're panic buying on the market for next year's harvest, then prices will go up, and as prices go up, policy makers will panic more," he said.
>
> And higher grocery bills can have major ramifications. Bread costs have a long history of kick-starting unrest and political instability. During the food price spikes of 2011 and 2008, there were food riots in more than 30 nations across Africa, Asia and the Middle East.
>
> "Without the food supply, societies just totally break," Benton said.

Isis Almeida & Agnieszka de Sousa, *Countries Starting to Hoard Food, Threatening Global Trade*, BLOOMBERG, 24 March 2020, www.bloomberg.com/news/articles/2020-03-24/countries-are-starting-to-hoard-food-threatening-global-trade?sref=7sxw9Sxl.

clearly covered a "food stuff, as per the language of Paragraph 2(a), while the second and third implicated "other products." But, are onions, along with pharmaceuticals and medical devices, "essential" to India? And, the bans had to be "temporary," which India projected would be until the domestic onion supply increased, and presumably until the threat from the deadly coronavirus outbreak receded.

India's declaration that "[n]ot a single onion can leave India" shocked its neighbors, which rely on India for "hundreds of millions of pounds of the crop."[620] A dreadful cycle of drought and excessive rainfall triggered a shortage in India, and prompted the QR. Concomitant with the ban were Indian government anti-hoarding restrictions on the onion stock wholesalers and retailers could retain. Across South Asia, India onions are "so important to the cuisine," and even "central to foreign policy and domestic harmony alike."[621] As Charu Sing, a New Delhi-based research put it, "[w]ithout onions, food is incomplete and colorless."[622] An onion shortage triggered India's ban. More than the Kashmir conflict, "issues like the price of onions matter most." India held firm: "[o]nions are one of those flavors that have no real substitute," and "[t]hey go into almost every curry."[623]

Though India applied the ban on MFN basis, it had a *de facto* discriminatory effect on Indian-like cuisine across the Subcontinent. In Bangladesh, the shortage led to a 700% increase in onion prices in Dhaka. Bengali food needs onions. Nepal, too, suffered from the swift termination of 370 million pounds (as of 2018) of Indian onions. Nepalese cuisine needs onions. None of India's neighbors found in Chinese onions a substitute. "[P]eople don't like Chinese onions," said K.C. Tara (Ms.), a Kathmandu vegetable seller, as they tend to be "big and flashy."[624]

India's export ban on broken rice was similarly controversial:

> India banned exports of broken rice and imposed a 20% duty on exports of various grades of rice … as the world's biggest exporter of the grain tries to

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620 Jeffrey Gettleman, Julfikar Ali Manik & Suhasini Raj, *India Locks Down Its Onions*, THE NEW YORK TIMES (International Edition, Berlin), 1, 3 October 2019. [Hereinafter, *India Locks*.]

621 *India Locks*.

622 *Quoted in India Locks*.

623 *India Locks*.

624 *Quoted in India Locks*.

For a chronicle of how the coronavirus crisis disrupted logistics in global food supply chains (including labor shortages in air freight and trucking and distribution channels, and planting and harvesting of crops), even though that crisis had not caused underlying shortages of fruit, vegetables, dairy products, and meat, thus disrupting (for example) "shipments of vegetables from Africa to Europe or fruit from South America to the United States," see *Explainer: How the Coronavirus Crisis is Affecting Food Supply*, REUTERS, 2 April 2020, www.reuters.com/article/us-health-coronavirus-food-explainer/explainer-how-the-coronavirus-crisis-is-affecting-food-supply-idUSKBN21L0D2. Note also the fact "the concentration of exportable supply of some food commodities in a small number of countries and export restrictions by big suppliers concerned they have enough supply at home can make world supply more fragile than headline figures suggest." *Id*. In other words, the interests of NFIDCs were at risk from QRs imposed by food-surplus countries.

augment supplies and calm local prices after below-average monsoon rainfall curtailed planting.

India exports rice to more than 150 countries, and any reduction in its shipments would increase upward pressure on food prices, which are already rising because of drought, heat-waves and Russia's invasion of Ukraine.

The new duty is likely to discourage buyers from making purchases from India and prompt them to shift towards rivals Thailand and Vietnam, which have been struggling to increase shipments and raise prices.

The government has excluded parboiled and basmati rice from the export duty….

New Delhi also banned exports of 100% broken rice, which a few poor African countries import for human consumption, though that variety is mainly used for feed purposes.

The duty will affect white and brown rice, which account for more than 60% of India's exports, said B.V. Krishna Rao, president of the All India Rice Exporters Association.

"With this duty, Indian rice shipments will become uncompetitive in the world market. Buyers will shift to Thailand and Vietnam," Rao said.

India accounts for more than 40% of global rice shipments and competes with Thailand, Vietnam, Pakistan, and Myanmar in the world market.

Below-average rainfall in key rice-producing states such as West Bengal, Bihar and Uttar Pradesh has raised concerns over India's rice production. …

…

Exporters want the government to provide some relief for export contracts that have already been signed, with vessels loading at the ports.

"Buyers can't pay 20% more over agreed price and even sellers can't afford to pay the levy. The government should exempt already signed contracts from the levy," Agarwal said.

India's rice exports touched a record 21.5 million tons in 2021, more than the combined shipments of the world's next four biggest exporters of the grain: Thailand, Vietnam, Pakistan, and the United States.

India has been cheapest supplier of rice by huge margin and that shielded African countries such as Nigeria, Benin, and Cameroon to an extent from

> a rally in wheat and corn prices, said a Mumbai-based dealer with a global trading firm.
>
> …
>
> The ban on broken rice shipments could badly affect China's purchases for feed purpose, he said.
>
> China was the biggest buyer of broken rice, with purchases of 1.1 million tonnes in 2021, while African countries such as Senegal and Djibouti bought brokens for human consumption.[625]

Note three points about India's action on rice.

First, it was a combination of an export ban and export duty, depending on the type of rice. Second, the reverberations were especially difficult for NFIDCs, such as the Philippines, and LDCs, especially some SSACs – notwithstanding India's adherence to the MFN rule. Would it not have been easier for those countries if India had exempted them from the ban and duty? Indeed, the Indian export ban on rice (and wheat) hit hard many LDCs, and India's own poor:

> As India is the world's largest rice exporter, the imposition of restrictions covering the majority of its exports was *both irresponsible and futile*: irresponsible in that higher global rice prices were *particularly painful for poorer developing nations*, which were already struggling to pay for imports; futile in that the *bigger culprit* in India's domestic price pressures has been higher costs for chemical fertilizers, labor, and other inputs.
>
> The weakening of the *rupee* this year [2022] has aggravated the problem by further raising the effective cost of imported crude oil and fertilizers for Indian buyers, given that the products are traded globally in dollars. By boosting transportation costs, excessive state and federal fuel taxes have also kept prices high.[626]

It was precisely because of India's outsized supplier stature in the world rice market that its export ban drove up prices, suggesting that it had – but neglected or ignored – a moral responsibility to temper its behavior so as not to harm the least privileged. Third, a sinister combination of climate change and war prompted India's actions. (India also banned sugar and wheat exports in 2022, for the same reasons.) To what extent can these causal factors be mitigated by multilateral agreements. In other words, were India's move reflective of a collective action problem in the face of global problems?

> In 2022-2023, India was the world's largest rice exporter, holding 40.5% of the

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625 Rajendra Jadhav, *India Restricts Rice Exports, Could Fuel Food Inflation*, REUTERS, 9 September 2022, www.reuters.com/world/india/india-imposes-20-duty-rice-exports-various-grades-2022-09-08/.

626 Prerna Sharma Singh, *India's Ban on Rice and Wheat Exports Has Been a Failure*, NIKKEI ASIA, 9 December 2022, https://asia.nikkei.com/Opinion/India-s-ban-on-rice-and-wheat-exports-has-been-a-failure.

world market share as against Thailand (15.3%) and Vietnam (13.5%).[627] But climate-change associated adverse weather (*i.e.*, the extremes of drought and flooding) caused the supply curve of India's rice output to shift inward. The demand curve shifted outward, with increased domestic consumption associated with India becoming the world's most populous country. Rice prices in India and across Asia soared to their highest levels in nearly 15 years.[628] Seeking a third successive term in office via 2025 general elections, the Modi Administration took three actions in August 2023 to secure the rice market in India, reduce rice price inflation – in addition to its 2022 ban on broken rice exports.[629]

First, the Indian government levied a 20% export tax on parboiled rice.[630] (Parboiled, rice accounts for on-third of India's overall rice exports. This type of rice is partially boiled before it is milled; the result is a higher nutritional content, changed texture, and product that is easier to clean and cook.[631]) Second, it banned the export of non-basmati white rice.[632] Third, the government effectively banned the export of basmati rice by mandating a minimum price of $1,200 per ton. (This floor price combatted smugglers who falsely labelled shipments of cheaper non-basmati white rice as more expensive – and fragrant – basmati rice, and sold the masked merchandise as low as $359 per ton.[633]) Any export contract for basmati rice priced at less than $1,200 would be reviewed by a government panel.

These protectionist measures meant India had prohibited or restricted all varieties of its rice exports. Election politics aside, domestic food security, and combatting food price inflation, were the obvious rationales to back India's measures, and GATT Article XI:2(a) was its legal justification. Rice was not the only crop market in which the Indian government intervened: it limited shipments of sugar and wheat, and contemplated removal of its 40% tariff on wheat.[634]

- **Malaysian Chicken Rice**

Still another example of a temporary export ban on a food item came in June 2022, amidst Russia's war against Ukraine, plus climate change and COVID pressures (all discussed in separate Chapters). Malaysia banned shipments of a highly popular rice dish:

> Singapore is bracing for a shortage of its *de facto* national dish, chicken rice, as major supplier Malaysia halts all chicken exports … [effective 1 June

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627 *See* Pratik Parija, Shruti Srivastava & Siddhartha Singh, *India Further Tightens Rice Shipments in Threat to Global Supply*, BLOOMBERG, 27 August 2023, www.bloomberg.com/news/articles/2023-08-27/india-further-tightens-rice-shipments-in-threat-to-global-supply?sref=7sxw9Sxl. [Hereinafter, *India Further Tightens Rice Shipments*.]

628 *See India Further Tightens Rice Shipments*.

629 *See India Further Tightens Rice Shipments*.

630 *See India Expands Rice Exports Curbs with 20% Duty on Parboiled Grade*, NIKKEI ASIA, 26 August 2023, https://asia.nikkei.com/Economy/Trade/India-expands-rice-exports-curbs-with-20-duty-on-parboiled-grade#. [Hereinafter, *India Expands Rice Exports Curbs*.]

631 *See India Further Tightens Rice Shipments*.

632 *India Expands Rice Exports Curbs*.

633 *See India Further Tightens Rice Shipments*.

634 *See India Further Tightens Rice Shipments*.

2022].

Restaurants and street stalls in the city-state are faced with hiking prices of the staple food or shutting down altogether as their supplies dwindle from neighbouring Malaysia, where production has been disrupted by a global feed shortage.

Malaysia's export ban is the latest sign of growing global food shortages as countries, reeling from the effects of Russia's invasion of Ukraine, extreme weather, and pandemic-related supply disruptions, scramble to shore up domestic supplies and tame food inflation. …

…

Daniel Tan, owner of a chain of seven stalls called OK Chicken Rice, said Malaysia's ban will be "catastrophic" for vendors like him.

"The ban would mean we are no longer able to sell. It's like McDonald's with no burgers," he said.

He added his stalls usually source live birds from Malaysia but will have to switch to using frozen chicken within the week and are expecting a "strong hit to sales" as customers react to the change in quality of the dish.

Singapore, although among the wealthiest countries in Asia, has a heavily urbanised land area of just 730 square km (280 square miles) and relies largely on imported food, energy, and other goods. Nearly all of its chicken is imported: 34% from Malaysia, 49% from Brazil and 12% from the United States, according to data from Singapore Food Agency (SFA).

A plate of simple poached chicken and white rice cooked in broth served with a side of greens is a dish beloved by the country's 5.5 million people, and is usually widely available for about S$ 4 ($ 2.92) at eateries known as hawker centers.

The SFA has said the shortfall can be offset by frozen chicken from Brazil, and has urged consumers to opt for other protein sources like fish.

Malaysia, itself facing soaring prices, has decided to halt chicken exports until local production and costs stabilise.

Prices have been capped since February at 8.90 *ringgit* ($2.03) per bird and a subsidy of 729.43 million *ringgit* ($166 million) has been set aside for poultry farmers.

Chicken feed typically consists of grain and soybean, which Malaysia imports. But the government is having to consider alternatives amid a global feed shortage.

> Lower quality feed means the birds are not growing as fast as usual, slowing down the entire supply chain, said poultry farmer Syaizul Abdullah Syamil Zulkaffly.
>
> Previously, Syaizul's farm of broiler chicken was able to harvest as many as seven times a year, with 45,000 birds harvested per cycle. This year [2022] he expects only five harvest cycles.
>
> Syaizul, who started feeling the pinch of higher operating costs during the pandemic, says the export ban will only make things worse for poultry farmers.
>
> "I don't know if this industry can sustain me … for the next five or 10 years," he said, adding that he's had to go into debt to keep up with costs.[635]

Consider the strength of an hypothetical Singaporean claim in the WTO under the *DSU* against Malaysia for breach of GATT Article XI:1. (No such case occurred.)

That there was an export embargo was clear. Malaysia doubtless would have invoked GATT Article XI:2(a). Setting aside whether Malaysia's ban was "temporary," was it, in the words of that exception, "applied to prevent or relieve critical shortages of foodstuffs or other products essential to" Malaysia? Arguably, no. If chicken rice is like McDonald's hamburgers, then is it veritably an "essential foodstuff"? And if Singapore was able to shift its sourcing, then would – or should – that matter as to a claim?

- **Do Some Crops Matter More Than Others?**

Some crops are easy to identify as "essential." Rice "is a food staple for about half of the world's population."[636] But putting other crops in this category is not so obvious. Perhaps the best guide to what is an "essential" foodstuff are dietary trends. Those trends have changed, along with income levels and health consciousness. That means they have converged on rice, wheat, and maize are indisputably "essential" to any WTO Member:

> Bagels in New York. Cakes in Beijing. Instant noodles in Jakarta. Daily habits for billions, yet just a generation or so ago Indonesians would have likely reached for a bowl of rice or the Chinese a sweet potato.
>
> Wheat, now an integral part of most diets, is produced predominantly by just a handful of countries. When [on 24 February 2022, as discussed in a separate Chapter] Russia's invasion of Ukraine disrupted trade, global prices spiked almost 40%. In the resulting scramble for supplies, more than

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635 Chen Lin & Mei Mei Chu, *Singapore's De Facto National Dish in the Crossfire as Malaysia Bans Chicken Exports*, REUTERS, 1 June 2022, www.reuters.com/markets/commodities/singapores-de-facto-national-dish-crossfire-malaysia-bans-chicken-exports-2022-06-01/.

636 *India Further Tightens Rice Shipments*.

20 countries imposed agriculture export restrictions, compounding the global food crisis.

It's not just war that can cause wild fluctuations in the pricing and availability of imports: extreme weather – growing more frequent with climate change – and currency fluctuations can also wreak havoc. While these are issues for everyone, it's poorer countries that are most exposed.

A combination of rising incomes, the impact of Western culture, and industrial farming focused on specific crops means we are all eating increasingly alike. And that means more of us than ever depend on imported food.

…

Of the 6,000 plant species humans have eaten over time, the world now mostly eats nine, of which just three – rice, wheat, and maize – provide 50% of all calories. Consumption of meat and dairy has soared, with pork the most widely consumed meat.

…

The shifting diets in some cases signify rising incomes: China was overwhelmingly rural and poor in 1961, for instance, and has since leapt into the upper middle-income range.

…

However, what these dietary changes almost universally mean is that countries have become more dependent on imports, with production of the world's major staple crops controlled by a handful of countries with the climate and the industrial farming technology to produce food at scale.

Despite warnings from experts, for decades this didn't seem much of a problem, as a global oversupply in key crops meant cheap foreign grown food helped alleviate hunger and offer choice to millions.

…

Another headache is the strong U.S. dollar – global agriculture commodities are typically priced in dollars. Thousands of containers loaded with food recently piled up at ports in Pakistan as the importers scrambled to access currency.

Extreme weather is also posing a risk to supplies, with floods in Australia to scorching heat in India threatening harvests. Climate change is likely to worsen the situation. Global crop yields could fall about 30% because of climate change, while food demand is expected to jump 50% in the coming decades, according to United Nations' estimates.

While these are also issues for rich countries – the former head of Britain's domestic intelligence services Eliza Manningham-Buller recently called for food supplies there to be treated as a national security priority – it's less

wealthy countries that are most vulnerable.[637]

Simply asked, do some crops matter more than others? If so, then what (if any) should be the legal implications concerning them, not only under GATT, but also other the WTO *Agriculture*, *SPS*, and *SCM Agreements*?

IV. COVID-19 Pandemic, Export Restrictions, and Vaccine Nationalism

● Limits of Capitalism and Indian Drugs

"Capitalism has its limits."[638] That March 2020 tweet came from Karl Lauterbach, the Spokesman on Health Policy for the Social Democrat Party, which was the junior partner in Germany's coalition government led by Chancellor Angela Merkel. What prompted this assertion was a report in the newspaper, *Die Welt am Sonntag*, that U.S. President Donald J. Trump (1946-, President, 2017-2021) was trying to lure to the U.S. a German company, researching a vaccine against COVID-19, to move its operations to the U.S., and provide a supply of any successful coronavirus treatment it discovered, exclusively to America. Simply put, Germany feared "Washington may seek a monopoly on any breakthrough in the fight against the disease." Under German foreign trade law, the "government can scrutinise bids from non-EU countries "if national or European security interests are at stake." Thus, at issue was whether Germany might need to block a U.S. takeover of CureVac that would see CureVac decamp for America.

Closely related to FDI restrictions is the matter of export bans – both ask what ought to be the limits on Capitalism? Suppose CureVac stays in Germany and it finds a viable COVID-19 treatment. Depending on the demand-supply relationship for that medicine, the German government would be faced with the question of imposing an export barrier on it. That is the question India faced, not only with respect to foodstuffs such as onions, but also medicines and public health equipment.

As to two more Indian export bans, the argument for the essentiality of medicines was strong, as were concerns about cross-border supply disruptions. As the Chief Economist of the EBRD, Beata Javorcik, wrote amidst the COVID-19 pandemic:

> COVID-19 has exposed what many may consider an excessive reliance on suppliers located in China. The province of Hubei, where the outbreak began, is a high-tech manufacturing hub, home to local and foreign firms that are highly integrated in the automotive, electronics and pharmaceuticals industries. The province accounts for 4.5 per cent of Chinese gross domestic

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637 *How Changing Diets Leave Us Exposed to War, Extreme Weather and Market Turbulence*, BLOOMBERG, 22 December 2022, www.bloomberg.com/graphics/2022-global-diet-homogeneous-food-security-risk/?ai=eyJpc1N1YnNjcmliZWQiOnRydWUsImFydGljbGVSZWFkIjpmYWxzZSwiYXJ0aWNsZUNvdW50IjowLCJ3YWxsSGVpZ2h0IjoxfQ&leadSource=uverify%20wall&sref=7sxw9Sxl.

638 *Quoted in* Guy Chazan, *Berlin Acts to Stop U.S. Poaching German Coronavirus Vaccine Company*, FINANCIAL TIMES, 15 March 2020, www.ft.com/content/cf7ec42a-66bb-11ea-800d-da70cff6e4d3?shareType=nongift.

> product; 300 of the world's top 500 companies have facilities in Wuhan [where, as discussed below, COVID-19 apparently originated], Hubei's capital. The outbreak of coronavirus there caused disruptions to supply chains on all continents before it became a pandemic.
>
> The quest to find the most cost-effective suppliers has left many companies without a plan B. …
>
> Many countries are now discovering how dependent they are on supplies from China. For instance, almost three-quarters of blood thinners imported by Italy come from China. The same is true for 60 per cent of antibiotics imported by Japan and 40 per cent imported by Germany, Italy and France. Political tensions increase as leaders stress where the virus originated, especially those who have not done enough to prepare their countries for a robust response. This will add another layer of uncertainty over trade policies.
>
> Businesses will be forced to rethink their global value chains. These chains were shaped to maximise efficiency and profits. And while just-in-time manufacturing may be the optimal way of producing a highly complex item such as a car, the disadvantages of a system that requires all of its elements to work like clockwork have now been exposed.[639]

Among those businesses forced to rethink their sourcing patterns were Indian pharmaceutical companies.

That was because China is the source for 80% of the essential raw materials Indian pharmaceutical companies need to make drugs.[640] The COVID-19 (coronavirus), which

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639 Beata Javorcik, *Coronavirus Will Change the Way the World Does Business for Good*, FINANCIAL TIMES, 2 April 2020, www.ft.com/content/cc2ff3f4-6dc1-11ea-89df-41bea055720b?shareType=nongift.

640 *See* Karan Kashyap, *India's Economy Feels The Pain Of The Coronavirus Outbreak In Neighboring China*, FORBES, 4 March 2020, www.forbes.com/sites/krnkashyap/2020/03/04/indias-economy-feels-the-pain-of-the-coronavirus-outbreak-in-neighboring-china/#426d73bed7cc. [Hereinafter, *India's Economy Feels*.]

Note the vulnerability of the U.S. pharmaceutical supply chain. Roughly 80% of America's medicines are imported from China or India, and 97% of its antibiotics are sourced in China. *See* Gideon Rachman, *Nationalism is a Side Effect of Coronavirus*, FINANCIAL TIMES, 23 March 2020, www.ft.com/content/644fd920-6cea-11ea-9bca-bf503995cd6f?shareType=nongift (arguing "[w]hen the pandemic passes, the most extreme barriers to travel will be lifted," "[b]ut it is unlikely that there will be a full restoration of the globalised world, as it existed before Covid-19," *i.e.*, "[t]he nation-state is making a comeback, fuelled by this extraordinary crisis."). On the vulnerability of the U.S. supply chain with respect to medical equipment (*e.g.*, gloves, gowns, and masks), see, e.g., William Feuer, *Coronavirus Has Now Spread to All 50 States and D.C., U.S. Death Toll Passes 100*, CNBC, 17 March 2020, www.cnbc.com/2020/03/17/coronavirus-has-now-spread-to-all-50-states-us-death-toll-passes-100.html. Given these vulnerabilities, the USTR – not surprisingly – declared to G-20 Ministers of Trade on 30 March that America was too dependent on inexpensive medical imports. That is, "the United States would seek to promote more domestic manufacturing of key medical supplies in light of the strategic vulnerabilities laid bare by the coronavirus pandemic." *Coronavirus Shows U.S. Too Dependent on Cheap Medical Imports, USTR Says*, REUTERS, 30 March 2020, www.reuters.com/article/us-health-coronavirus-trade-

emerged in a wet market in Wuhan in late 2019, and which (according to U.S. intelligence agency assessments, the CCP initially covered up via under-reporting the number of infections and frequently changing its methodology for counting coronavirus cases),[641] led to sourcing constraints that doubled the cost of these APIs (as China itself needed them to treat the epidemic). Indian companies thus ran down their inventories of APIs they needed to treat that virus to less than three months' supply. Not surprisingly, India took action against exports of APIs:

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ustr/coronavirus-shows-u-s-too-dependent-on-cheap-medical-imports-ustr-says-idUSKBN21I042. [Hereinafter, *Coronavirus Shows*.] Ambassador Lighthizer said:

> Unfortunately, like others, we are learning in this crisis that *over-dependence on other countries* as a source of cheap medical products and supplies has created a *strategic vulnerability* to our economy. … For the United States, we are encouraging *diversification of supply chains* and seeking to promote more manufacturing *at home*.

Id. (Emphasis added.) The italicized language evinces an economic nationalist framework (which, indeed, underlay the "America First" trade policy of the Administration of President Donald J. Trump), in particular, a nexus from import dependence to national security impairment, and the consequent emphasis on on-shoring production of vital merchandise, notwithstanding comparative advantage calculations.

641 *See* Paul Rincon, *Coronavirus: Is There Any Evidence for Lab Release Theory?*, BBC NEWS, 16 April 2020, www.bbc.com/news/science-environment-52318539 (reporting that November 2019 U.S. diplomatic cables reveal that American science diplomats who "were sent on repeated visits" to the Wuhan Institute of Virology "sent two warnings to Washington [the State Department] about inadequate safety at the lab," expressing they "were worried about safety and management weaknesses … and called for more help," and that "the lab's research on bat coronaviruses could risk a new, SARS-like pandemic"); Katrina Manson, *Hunt for Origin of Coronavirus Raises New U.S.-China Tensions*, FINANCIAL TIMES, 16 April 2020, www.ft.com/content/aa5f37ab-4d67-494c-9434-3b044524c4fe?shareType=nongift (reporting "there are signs that China is not sharing all the information the rest of the world is eager to see," "[a]lthough it has been widely presumed that the virus emerged from animals in a live food market in Wuhan, scientists who have studied its genetics say there is no clear evidence this was the source," "U.S. officials are pressing for China to share more data about the disease from the period before December 31, the day the authorities reported to the World Health Organization a cluster of cases of pneumonia in Wuhan," but "aa senior Trump Administration official said access to Wuhan had been restricted since the coronavirus outbreak"); Ken Dilanian, Robert Windrem & Courtney Kube, *U.S. Spy Agencies Collected Raw Intelligence Hinting at Public Health Crisis in Wuhan, China, in November*, NBC NEWS, 9 April 2020, www.nbcnews.com/politics/national-security/u-s-spy-agencies-collected-raw-intel-hinting-public-health-n1180646 (also observing "[w]hile [President] Trump touts his decision to stop flights from China coming to the U.S. on Jan. 31 [2020], about 381,000 people had flown from China to the U.S. in January); Julian E. Barnes, *C.I.A. Hunts for Authentic Virus Totals in China, Dismissing Government Tallies*, THE NEW YORK TIMES, 2 April 2020, www.nytimes.com/2020/04/02/us/politics/cia-coronavirus-china.html?referringSource=articleShare. Indeed:

> American intelligence agencies have concluded that the Chinese government itself does not know the extent of the virus and is as blind as the rest of the world. Midlevel bureaucrats in the city of Wuhan, where the virus originated, and elsewhere in China have been lying about infection rates, testing and death counts, fearful that if they report numbers that are too high they will be punished, lose their position or worse, current and former intelligence officials said.

Id. Bureaucratic misreporting is a chronic problem for any government, but it has grown worse in China as the Communist leadership has taken a more authoritarian turn in recent years under Mr. Xi [*i.e.*, President Xi Jinping].

> India, the world's largest maker of generic drugs [and by volume accounts for 20% of the world's total supply of all medicines[642]], restricted on Tuesday [3 March 2020] the exports of certain common medicines and 25 active pharmaceutical ingredients, as it looked to prevent shortages amid concerns of the coronavirus outbreak turning into a pandemic. Besides over-the-counter paracetamol, the restricted list includes common antibiotics such as metronidazole and Vitamin B1 and B12 ingredients.
>
> A notification by the Directorate General of Foreign Trade said the export of 26 APIs and formulations would require licence. "Export of specified APIs and formulations made from these APIs is hereby restricted with immediate effect and till further orders," the DGFT said in the notification. Though India is a source of about 20 percent of the world's generic drugs supply, pharma companies in the country are dependent on China for two-thirds of the chemical components needed to make them. The coronavirus outbreak has shut factories in China and impacted supplies, leading to fears of a shortage of drugs and medicines. On Feb. 18 [2020], industry body India Pharmaceutical Alliance said the sector has enough stock of APIs for 2-3 months only.
>
> Restrictions on the exports are important as there would be an increase in demand for these products in the country. … Apart from paracetamol, Vitamin B1, B6 and B12, other APIs and formulations over which the export restrictions have been imposed include tinidazole, metronidazole, acyclovir, progesterone, chloramphenicol, ornidazole, formulations made of chloramphenicol, clindamycin salts, neomycin, and paracetamol.[643]

Note the dependence of India on China for certain APIs (ampicillin, ciprofloxacin, metformin, paracetamol) was 100%, and for others nearly so (90-95% for amoxicillin, and 85%-95% for ibuprofen).[644] Overall, "[]f the 373 drugs listed under India's national

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642 *See India's Economy Feels*.

643 *India Restricts Drug Exports As Threat Of Coronavirus Rises*, BLOOMBERG QUINT (Mumbai), 3 March 2020, www.bloombergquint.com/business/coronavirus-fallout-india-puts-exports-of-paracetamol-certain-apis-under-restricted-category?utm_campaign=website&utm_source=sendgrid&utm_medium=newsletter. [Hereinafter, *India Restricts Drug*.] Also included in the ban was the pain reliever, paracetamol. *See* Neha Dasgupta & Sanjeev Miglani, *India Allows Limited Exports of Anti-Malaria Drug After Trump Warns of Retaliation*, REUTERS, 6 April 2020, www.reuters.com/article/us-health-coronavirus-india-drugs/india-allows-limited-exports-of-anti-malaria-drug-after-trump-warns-of-retaliation-idUSKBN21O34B. [Hereinafter, *India Allows*.]

Supply-demand imbalances were manifest in an array of anti-coronavirus merchandise, from sanitized wipes to surgeon's masks. Indeed, 10 days after India's action, Indonesia banned exports of face masks. *See Indonesia to Ban Face Mask Exports to Ensure Domestic Supply*, REUTERS, 13 March 2020, www.reuters.com/article/us-health-coronavirus-indonesia-masks/indonesia-to-ban-face-mask-exports-to-ensure-domestic-supply-idUSKBN2100JB.

644 *See* Shruti Srivasta, *India to Boost Drug Ingredient Output to Pare China Reliance*, BLOOMBERG QUINT (Mumbai), 13 April 2020, www.bloombergquint.com/global-economics/india-to-boost-drug-ingredient-output-to-pare-china-s-dominance. [Hereinafter, *India to Boost*.]

essential medicines list, some 200 are imported as APIs, mostly from China."[645] However, would the fact "[t]he restrictions can also be seen as a breather for an industry already grappling with declining sales for the past two months" undermine India's GATT Article XI:2(a) defense, should it be challenged on its QRs?[646]

On 4 April 2020, India imposed another export ban. As per the DGFT's order, the ban pertained, without any exception, to hydroxychloroquine, which was touted as a possible (yet unproven) cure for COVID-19.[647] Two days later, amidst a threat from

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645 *India to Boost*.

646 *India Restricts Drug*.

647 *See Hydroxychloroquine: Can India Help Trump with Unproven "Corona Drug"?*, BBC NEWS, 6 April 2020, www.bbc.com/news/world-asia-india-52180660 (noting "[h]ydroxychloroquine is very similar to [c]hloroquine, one of the oldest and best-known anti-malarial drugs," and that it "can also treat auto-immune diseases like rheumatoid arthritis and lupus"); Rajesh Kumar Singh, *India Bans All Exports of Virus Drug Often Touted by Trump*, BLOOMBERG, 5 April 2020, www.bloomberg.com/news/articles/2020-04-05/india-bans-all-exports-of-trump-s-game-changer-virus-drug?sref=7sxw9Sxl.

It appears the export ban on hydroxychloroquine, for which India "has some of the world's largest manufacturers," including "Cadila Healthcare Ltd., the Indian company that is the world's largest maker of the drug," was ordered by India's DGFT in March 2020. *See Global Rush for Trump-Backed Virus Drug Sparks India Export Ban*, BLOOMBERG QUINT (Mumbai), 25 March 2020, www.bloombergquint.com/business/india-bans-exports-of-trump-backed-virus-drug-as-demand-surges (reporting "[e]xports of hydroxychloroquine will be limited to fulfilling fully paid existing contracts, while certain shipments on humanitarian grounds may also be allowed on a case-by-case basis," and that "[t]he ban also does not apply to factories in its special economic zones").

Interestingly, Finland established a *de facto* ban on this potential COVID-19 medication:

> Amneal Pharmaceuticals could soon run out of the raw ingredients to make more of the antimalarial drug hydroxychloroquine that has been touted as a potential treatment for COVID-19 because Finland is keeping the drug for domestic use….
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> …
>
> "As the demand has increased all across the globe... the Finnish government has put out an emergency order to prioritize their domestic use for local needs," co-CEO Chintu Patel said….
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> …
>
> Demand for the drug has soared worldwide and some countries, like India, have placed restrictions on its export. Amneal currently manufactures hydroxychloroquine in India and the … company was working with India to provide an exception to ship its finished product to the U.S.
>
> Finland has not yet issued any bans or restrictions on drug exports, according to the Finnish Medicines Agency, Fimea.
>
> But even under normal circumstances, Finnish law requires pharmaceutical companies to commit themselves to fulfilling national needs first. Because the demand for hydroxychloroquine and its active agents has surged in Finland, Finnish makers have less to export, Fimea said.
>
> …
>
> The Finnish government, on the basis of the state of emergency it has issued, is preparing an amendment which if adopted would allow restricting exports of certain medicines.
>
> Orion Corp and its subsidiary, Fermion, are the two Finnish companies that make hydroxychloroquine and its raw materials. Fermion is Amneal's supplier….

President Trump to retaliate against India and pleas from Nepal (which was reliant on India for essential medicines), India offered a limited exception to the ban, plus agreed to license production in appropriate volumes to neighboring countries dependent on exports from India.[648] India also lifted its ban on 24 APIs and medicines made from them (including antibiotics such as erythromycin and tinidazole, the hormone progesterone, and Vitamin B-12).[649]

Query whether India's case for this ban met the terms of GATT Article XI:2(a). Ashok Kumar Madan of the Indian Drug Manufacturer's Association stated:

> India definitely has capacity to cater to both global and local markets. Of course, domestic considerations must come first, but we have the capacity.[650]

If India had domestic production capacity to fulfil both its and the world's needs, then how could it claim, as per Article XI:2(a) hydroxychloroquine, it applied its ban "to prevent or relieve [a] critical shortage[]"? Moreover, if the medicine was unproven as an effective treatment for the coronavirus, was it an "essential product[]"?

The "raw material shortages and … dependence on Chinese imports" that the COVID-19 crisis exposed in India's pharmaceutical industry catalyzed another policy initiative, one designed to make use of the country's production capacity. In March-April 2020, India declared a "China Plus One" strategy whereby it (presumably, the "Plus One") would "identify[] essential drug ingredients, provid[e] incentives to domestic manufacturers, and reviv[e] ailing state-run drug makers."[651] In particular:

> After announcing a 140-billion-*rupee* ($1.8 billion) fund last month [March] for setting up three drug manufacturing hubs, the government has identified 53 key starting materials and … APIs whose output will be boosted on priority…. These include fever-medicine paracetamol and

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> Orion said … securing its own raw materials from abroad is challenging….
>
> "Finnish authorities have far-reaching rights to intervene in the operations of the actors in our field of business. In the exceptional situation Finland's needs have priority," Orion said. "Demand for the agent in question (API) is heavy around the world at the moment but unfortunately we cannot respond to the demand commensurately."

Michael Erman & Anne Kauranen, *Exclusive: Amneal Running Out of Hydroxychloroquine Raw Material Due to Finnish Restrictions*, REUTERS, 10 April 2020, www.reuters.com/article/us-health-coronavirus-amneal-exclusive/exclusive-amneal-running-out-of-hydroxychloroquine-raw-material-due-to-finnish-restrictions-idUSKCN21S1LE. Consider the similarities and differences between the Finnish law and U.S. *DPA* (discussed below).

[648] *See India Allows*.

[649] *See India Allows*.

[650] *Quoted in India Restricts*. Likewise, with respect to the 24 APIs and medicines therefrom, the Ministry of Foreign Affairs said: "After having confirmed the availability of medicines for all possible contingencies currently envisaged, these restrictions have been largely lifted." India Allows (*quoting* Ministry Spokesman Anurag Srivastava).

[651] *India to Boost*.

> antibiotics such as penicillin and ciprofloxacin.
>
> [India also considered] the viability of reviving on loss-making state-owned drug makers Hindustan Antibiotics Ltd. and Indian Drugs and Pharmaceuticals Ltd. to speed up this process and ensure affordable medicines….
>
> …
>
> [Additionally,] Sudhir Vaid, Chairman and Managing Director, Concord Biotech Ltd, said the government should support local companies by giving low cost power, subsidies and faster approvals. It takes as long as three years to get approvals, Vaid said.[652]

The strategy was a version, concocted for the pharma sector, of Prime Minister Narendra Modi's "*Make in India*" policy, which not only could safeguard India's place in global medicines trade, but also "challenge China's stronghold on supplying basic drug ingredients."[653]

- **U.S. Coronavirus-Related Export Bans under 1950 *Defense Production Act***

Enacted to mobilize civilian resources in the Korean War (1950-1953), the *Defense Production Act of 1950* (Public Law Number 81-774, 64 Stat. 798 (8 September 150), codified at 50 U.S.C Sections 4501 *et seq*.), authorizes the President to mandate that a business give priority in its contracts for materials necessary for national defense to the Federal government.[654] As its long title indicates, the *DPA* is:

> An *Act* to establish a system of priorities and allocations for materials and facilities, authorize the requisitioning thereof, provide financial assistance for expansion of productive capacity and supply, provide for price and wage stabilization, provide for the settlement of labor disputes, strengthen controls over credit, and by these measures facilitate the production of goods and services necessary for the national security, and for other purposes.

Thus, the President can order a domestic producer to cease supplying a necessary item to a private buyer, and re-direct the merchandise to government-determined interests – regardless of any loss that business might suffer by delaying or defaulting on its pre-existing private-sector contractual arrangement.

More specifically, the three Sections of the *DPA* empower the President to:[655]

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652 India to Boost.

653 *India to Boost*.

654 *See* Congressional Research Service, *The Defense Production Act of 1950: History, Authorities, and Considerations for Congress*, R43767 (2 March 2020), https://fas.org/sgp/crs/natsec/R43767.pdf [hereinafter, March 2020 CRS *DPA Report*]; *The Defense Production Act: Choice as to Allocations*, 51 COLUMBIA LAW REVIEW issue 3, 350-361 (March 1951).

655 *See* March 2020 CRS *DPA Report*, Summary, 2, 4-20.

(1) In Title I, order firms to elevate priority on merchandise necessary for national defense to government-determined uses, *i.e.*, establish contractual priorities, and identify goods that must not be hoarded, and on which there must be no price gouging.[656]

(2) In Title III, issue regulations and orders to allocate resources (goods, including natural resources, services, and facilities) for national defense purposes, including ordering a business to expand production or requisition property from a business, and provide incentives for them to do so through, for instance, loans and loan guarantees, purchases, and procuring and installing equipment in private factories.

(3) In Title VII, impose controls on the private sector to ensure materials necessary for national defense are available for defense purposes, including wages, prices, and consumer and real estate credit, settle (*i.e.*, set the terms to resolve) disputes between labor and management, and block proposed or pending foreign mergers and acquisitions that threaten national security.

The DOD and DOC are typically involved in *DPA* matters.

These radical interventions in a free market economy raise theoretical and practical problems. In theory, markets ought to be able to allocate resources most efficiently to their highest and best uses. Through price discovery, they ought to be able to do so in practice rather quickly. However, the *DPA* over-rides conventional supply-demand forces based on an implicit presumption of market failure. On the supply side, businesses cannot see the urgent national defense needs, or if they do, are unwilling to adjust their behavior toward less profitable outcomes. They may even engage in price gouging. On the demand side, consumers are unable or unwilling to shift their purchase patterns in ways to accommodate defense needs. Some may engage in hoarding.

President Harry S. Truman (1884-1972, President, 1945-1953) first invoked the *DPA* during the Korean War. He set priorities and determined allocations for short-supply industrial merchandise, regulated production in mining, steel, and other heavy industries, set wage and price controls, and even mandated the geographic diversification of industrial factories across the U.S. (to avoid concentration in any one area). Public health, too, can – and, indeed, has – been the trigger for using the *DPA*.

On 18 March 2020, amidst the COVID-19 pandemic, President Trump issued an *Executive Order* in which he defined "ventilators and productive equipment" as "essential to the national defense" under the *DPA*.[657] After initial reluctance to invoke the *DPA* and

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656 The priorities are set according to the Defense Priorities and Allocations System institutes a rating system for contracts, with three broad tiers: "DX;" "DO;" and "unrated" contracts, the first of which the Secretary of Defense must approve.

657 *See* The White House, *Executive Order on Prioritizing and Allocating Health and Medical Resources to Respond to the Spread of Covid-19*, Executive Order 13909 (18 March 2020), www.whitehouse.gov/presidential-actions/executive-order-prioritizing-allocating-health-medical-resources-respond-spread-covid-19/.

effectively break private-sector contracts to accelerate production, and direct the use, of medical merchandise to fight the coronavirus, he took action. On 23 March he issued another *Executive Order* listing "health and medical resources necessary to respond to the spread of COVID-19" as subject to the *DPA* rules against price gouging and hoarding.[658] On 27 March, he invoked the *DPA* to order General Motors to prioritize contracts for as many ventilators as his Administration deemed appropriate to fight the virus. And, on 2 April, he ordered 3M, General Electric, and Medtronic to boost output of protective masks (specifically, N-95 respirators), which he said were essential to protect healthcare workers in the U.S., and these companies obtain parts they need to make ventilators.[659]

President Trump's *DPA* moves amounted to an export ban on certain items.[660]

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658 *See* Executive Office of the President, *Preventing Hoarding of Health and Medical Resources To Respond to the Spread of COVID-19*, Executive Order 13910, (23 March 2020), www.federalregister.gov/documents/2020/03/26/2020-06478/preventing-hoarding-of-health-and-medical-resources-to-respond-to-the-spread-of-covid-19.

659 *See* The White House, *Memorandum on Order Under the Defense Production Act Regarding 3M Company* (2 April 2020), www.whitehouse.gov/presidential-actions/memorandum-order-defense-production-act-regarding-3m-company/; Peter Sullivan, Trump *To Expand Use of Defense Production Act to Build Ventilators*, THE HILL, 2 April 2020, https://thehill.com/policy/defense/490881-trump-to-expand-use-of-defense-product-act-to-build-ventilators.

660 FEMA issued a temporary rule blocking exports through 10 August 2020 of five types PPE merchandise (including N95 filtering facepiece respirators, PPE surgical masks and PPE gloves or surgical gloves), dubbing them "certain scarce or threatened materials." Department of Homeland Security, Federal Emergency Management Agency, *Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use*, 85 Federal Register number 70, 20195-20200 (10 April 2020); www.govinfo.gov/content/pkg/FR-2020-04-10/pdf/2020-07659.pdf; Department of Homeland Security, Federal Emergency Management Agency, *Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use* (7 April 2020), https://s3.amazonaws.com/public-inspection.federalregister.gov/2020-07659.pdf?utm_medium=email&utm_campaign=pi+subscription+mailing+list&utm_source=federalregister.gov [hereinafter, April 2020 FEMA Rule]; Ben Livesey, *FEMA to Issue Temporary Rule Blocking Export of PPE Supplies*, BLOOMBERG LAW, 7 April 2020, www.bloomberglaw.com/document/X6G9857G000000?bna_news_filter=health-law-and-business&jcsearch=BNA%252000000017156b1d675a77bfef1208e0000#jcite. The rule allowed a U.S. producer to export the five types of covered merchandise pursuant to contracts into which it had entered before 2 January 2020, but only if at least 80% of the firm's domestic production of that merchandise (on a per item basis) was distributed in the U.S. in the preceding 12 months.

The FEMA rule was hastily crafted. It permitted exceptions to the export ban based on obtaining an export permit, yet it laid out no procedures as to how to obtain a permit, failed to make use of standard CCL short supply procedures, and created no general exception for shipments to Canada. Thus, FEMA published a subsequent notice that listed 10 exceptions to the temporary export ban on covered merchandise shipments:

(1) To a U.S. commonwealth or territory (*e.g.*, Puerto Rico).
(2) By an NGO or non-profit group for donation and free distribution (not sale) to a foreign charity or government.
(3) That are an intra-company transfer by the domestic facility of a U.S. company to a foreign facility owned by that company or its affiliate.
(4) For assembly in a medical or diagnostic testing kit that is intended for delivery and sale in the U.S.
(5) Of a sealed, sterile, medical or diagnostic testing kit where a portion of that kit consists of one or more of the covered materials that cannot easily be removed from the kit.

Indeed, on 3 April, he ordered 3M to cease all exports to Canada and Latin America of N-95 respirators that it makes in the U.S.[661] (The ban on exports to Canada was ironic, if not self-defeating, because many Canadians cross the border daily into Detroit to work in that

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(6) From a foreign government's Embassy or Consulate in the U.S. to its home country government (*i.e.*, declared diplomatic shipments).
(7) To overseas U.S. military and foreign service personnel, or U.S. Embassies.
(8) In transit through the U.S. with a foreign shipper and consignee (including a shipment temporarily entered into a warehouse or temporarily admitted to an FTZ.
(9) To Canada or Mexico as a final destination.
(10) Shipments by the U.S. government (including the DOD).

See Department of Homeland Security, *Prioritization and Allocation of Certain Scarce or Threatened Health and Medical Resources for Domestic Use; Exemptions* , 85 Federal Register number 77, 22021-22024 (21 April 2020), www.govinfo.gov/content/pkg/FR-2020-04-21/pdf/2020-08542.pdf. If CBP suspects a shipment of covered materials does not meet one of these exceptions, then it "must temporarily detain any shipment of such covered materials pending the [FEMA] Administrator's determination whether to return for domestic use, issue a rated order for, or allow the export of part or all of the shipment." *Id.*, 22022. FEMA will make that decision based on:

> the totality of the circumstances, including: (1) The need to ensure that scarce or threatened items are appropriately allocated for domestic use; (2) minimization of disruption to the supply chain, both domestically and abroad; (3) the circumstances surrounding the distribution of the materials and potential hoarding or price-gouging concerns; (4) the quantity and quality of the materials; (5) humanitarian considerations; and (6) international relations and diplomatic considerations

Id., 22022. Note the lack of an exception for non-commercial values and volumes (*e.g.*, for family or domestic purposes), which could be the source of a dispute necessitating temporary detention and FEMA intervention.

[661] *See* The White House, *Memorandum on Allocating Certain Scarce or Threatened Health and Medical Resources to Domestic Use* (3 April 2020), www.whitehouse.gov/presidential-actions/memorandum-allocating-certain-scarce-threatened-health-medical-resources-domestic-use/; Richard Lough & Andreas Rinke, *U.S. Coronavirus Supply Spree Sparks Outrage Among Allies*, REUTERS, 3 April 2020, www.reuters.com/article/us-health-coronavirus-masks/u-s-coronavirus-supply-spree-sparks-outrage-among-allies-idUSKBN21L253 [hereinafter, *U.S. Coronavirus Supply*]; *Trump Invokes Defense Production Act to Stop Export of Masks*, REUTERS, 3 April 2020, www.reuters.com/article/us-health-coronavirus-usa-memo/trump-invokes-defense-production-act-to-stop-export-of-masks-idUSKBN21M00E.

Subsequently, the President and 3M reached an arrangement whereby 3M could proceed with N-95 shipments to existing Canadian and Latin American customers. The arrangement was *sui generis*: 3M was among the largest (if not the largest) source of N-95 respirators to Canada, and based on an exception that (because of its size), only 3M likely could satisfy:

> The [FEMA] Administrator has determined in the interest of promoting the national defense to generally allow the export of covered materials from shipments made by or on behalf of U.S. manufacturers with continuous export agreements with customers in other countries since at least January 1, 2020, so long as at least 80 percent of such manufacturer's domestic production of such covered materials, on a per item basis, was distributed in the United States in the preceding 12 months. If FEMA determines that a shipment of covered materials falls within this exemption, such materials may be exported without further review by FEMA ….

April 2020 FEMA Rule, page 20; 44 C.F.R. § 328.102(d)(1). In justifying this exemption, FEMA said "The Administrator decided that this exemption is necessary or appropriate to promote the national defense because it would limit the impact of this order on pre-existing commercial relationships, in recognition of the importance of these commercial relationships to the international supply chain, and for humanitarian reasons, in consideration of the global nature of the COVID-19 pandemic." April 2020 FEMA Rule, page 10.

city's healthcare sector.) And, dramatically, he ordered the seizure in Bangkok of a shipment of 200,000 N-95 respirators (plus 130,000 surgeon's masks, and 600,000 gloves) made by 3M in China for the Berlin Police Force; the confiscated masks were re-directed from Germany to the U.S.[662] The President said: "We need these items immediately for domestic use. We have to have them."[663]

Though permissible under U.S. law, and arguably GATT Article XI:2(a), the QRs attracted howls from America's European and South American allies. Blocking shipments of vital medical supplies already under contract was the worst of the President's "America First" trade policy: American lives mattered more amidst the scientific reality that COVID-19 disrespected geographical boundaries and, therefore, humanity faced a common lethal danger. "Contracts no longer guaranteed delivery,"[664] because humanitarian concerns were irrelevant. Thus, Berlin Secretary of Interior Andreas Geisel, characterized the President's N-95 respirator seizure as an "act of modern piracy," and intoned, "This is not how you deal with Transatlantic trade partners. Even in times of global crisis you shouldn't use Wild West methods."[665]

Notwithstanding their howling at the U.S., European leaders rethought their relationship with China. They expressed significant doubt about the quality and reliability of data about the origins and spread of the coronavirus in China, and decried the lack of transparency from the CCP. Their suspicions suggested that in the post-pandemic world, it would not be "business as usual" with China:

> European governments struggling with the fallout from the Covid-19 pandemic are hardening their positions toward China as suspicions grow over the level of transparency in the coronavirus's country of origin.
>
> French President Emmanuel Macron accused Beijing of not being upfront over its handling of the epidemic ….
>
> The European Union's position on China has been relatively measured, but leaders are beginning to call for a more thorough examination of its activities amid accusations Beijing has covered up the true scale of the epidemic. American intelligence officials are said to have concluded that China concealed the extent of its outbreak and under-reported the number of cases and deaths.
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> …
>
> "Let's not be so naive as to say it's been much better at handling this," Macron … [said], referring to China. "We don't know – there are clearly

662 *See U.S. Coronavirus Supply*; *Coronavirus: U.S. Accused of "Piracy" Over Mask "Confiscation,"* BBC NEWS, 4 April 2020, www.bbc.com/news/world-52161995 [hereinafter, *Coronavirus: U.S. Accused*] (also reporting 3M makes "about 100 million N-95 masks per month – about a third are made in the US, and the rest produced overseas").

663 *Quoted in Coronavirus: U.S. Accused*.

664 *U.S. Coronavirus Supply*.

665 *Quoted in U.S. Coronavirus Supply*; *Coronavirus: U.S. Accused*. U.S. buyers also traveled overseas to procure medical equipment, outbidding other prospective buyers. *See id*.

> things that have happened that we don't know about."[666]

Overall, European governments and businesses were unlikely to rush headlong back into trade and FDI arrangements with China at the expense of securing their supply chain for essential medicines and essential public health equipment. For China, which experienced its worst economic performance in several decades, the reluctance of European – along with U.S. and Indian – partners to regard the *status quo ante* as desirable surely would impede the CCP's efforts to re-ignite output and employment.

Notably, as President-Elect, in December 2020, Joseph R. Biden (1942-, President, 2021-) announced he would invoke the *DPA* to speed up production of the COVID-19 vaccine and achieve mass vaccinations by summer 2020.[667] Almost immediately after becoming President, he did so via an *Executive Order*.[668] The Biden *Order* heightened concerns about "vaccine nationalism," whereby countries able to do so would build up supplies of coronavirus vaccines and not share them with countries unable to manufacture or otherwise obtain those vaccines. So, for example, in India, despite its huge manufacturing capacity, there were warnings about protectionism:

> Two of India's top vaccine manufacturers making AstraZeneca and Johnson & Johnson shots have warned that the world's vaccine production is being threatened by America's pandemic export controls. Mahima Datla, Chief Executive of pharmaceutical company Biological E, said U.S. suppliers claim they may not be able to fulfil orders to global clients because of Washington's use of the *Defense Production Act*. Calling for urgent international intervention, Datla … [said]: "It's not only going to make the scale up for Covid vaccines difficult, but because of this it's going to make manufacturing of routine vaccines extremely difficult." Both U.S. President Joe Biden and his predecessor Donald Trump have invoked the Korean War era *DPA* during the pandemic to secure priority supplies of materials needed to control the disease. But with the U.S. having ordered more than enough

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666 Patrick Donahue & Ania Nussbaum, *Europe Is Taking a Harder Look at China After Virus Suspicions*, BLOOMBERG, 17 April 2020, www.bloomberg.com/news/articles/2020-04-17/europe-is-taking-a-harder-look-at-china-after-virus-suspicions?sref=7sxw9Sxl.

667 *See* Bailey Aldridge, *What's the Defense Production Act? Biden Plans to Use it for COVID Vaccine Production*, THE KANSAS CITY STAR, 28 December 2020, www.kansascity.com/news/coronavirus/article248126580.html.

668 *See* Kiran Stacey, *Biden to Use Wartime Powers to Boost Production of COVID Supplies*, FINANCIAL TIMES, 21 January 2021, www.ft.com/content/d54bde97-076f-485e-9989-9d5a594f026e (reporting: "The Biden Administration has identified critical supply shortages of 12 items needed to help fight the coronavirus pandemic and promised to use wartime powers to help solve them. Joe Biden, who took office as President on Wednesday [20 January 2021], will on Thursday sign an *Executive Order* instructing U.S. government agencies to use the *Defense Production Act* to increase supplies of several items including coronavirus tests, N95 masks and vaccine syringes. The *Order* is one of several such documents the president is signing as he lays out what he promises will be a more robust and transparent strategy to bringing the pandemic under control. Jeff Zients, Mr Biden's Covid-19 task force co-ordinator, said: 'We have identified 12 immediate supply shortfalls that are critical for the pandemic response right now, like N95 and high-quality surgical masks, isolation gowns, nitrile gloves, sample testing swabs, test reagents, pipette tips, additional laboratory analysis machines and more.' He added: 'Where we can produce more we will, where we need to use the *Defense Production Act* to help more be made we'll do that too.'").

doses for every adult in the U.S., American suppliers are struggling to make enough to fulfil contracts outside the country.

…

Drug makers around the world are struggling to increase production as countries trade accusations of "vaccine nationalism." Last week, European Council President Charles Michel said the U.K. had introduced a ban on vaccine exports, a claim denounced by Boris Johnson's government. The EU has urged the U.S. to allow free flow of drug supplies to address its vaccine shortage.

…

… Tedros Adhanom Ghebreyesus, World Health Organization Director-General, also warned of global shortages of vital components, which were limiting the production of Covid-19 shots but also jabs used for routine childhood immunizations. He said some countries had imposed legal restrictions, which was "putting lives at risk" and called on nations not to stockpile supplies. "We're all interdependent," he said. "No country can simply vaccinate its way out of this."

Datla, whose company is manufacturing Johnson & Johnson's vaccine, said the *DPA* meant suppliers were "reluctant to commit that they will stick to their delivery timelines."

"The supply chain challenges are going to make scaling up extremely difficult."

The materials that are a crucial part of vaccine production include plastics, such as disposable fermenters and bags made by a limited number of companies. Some vaccine makers have been days away from stopping production, because of a lack of these large sterile liners. Supplies of lab reagents, used for chemical tests, were also a concern, she added.

Biological E, a family run pharmaceutical business based in Hyderabad, supplies vaccines to WHO and Unicef for distribution around the world.

It is developing a Covid-19 vaccine in partnership with U.S. pharmaceutical company Dynavax Technologies Corporation and the Baylor College of Medicine with a target of producing 1 bn doses. The company is also manufacturing at least 1 bn doses of the Johnson & Johnson vaccine by the end of 2022.

Datla's remarks come after Adar Poonawalla, the Chief Cxecutive of the Serum Institute of India, the world's largest vaccine manufacturer, warned that the *Defense Production Act* could undermine the global vaccination effort.

> "The Novavax vaccine, which we're a major manufacturer for, needs these items from the U.S.," Poonawalla said. "We are talking about having free global access to vaccines but if we can't get the raw materials out of the U.S. – that's going to be a serious limiting factor."[669]

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669 Stephanie Findlay & Donato Paolo Mancini, *Indian Vaccine Makers Decry U.S. Use of Wartime Powers to Protect Supplies*, FINANCIAL TIMES, 14 March 2021, www.ft.com/content/7225cbad-8523-425f-b82c-d49b80c39417?shareType=nongift.

The aforementioned concerns became a reality in March 2021, when India ordered a temporary halt to all vaccine exports. *See* Stephanie Findlay, Michael Peel & Donato Paolo Mancini, *India Blocks Vaccine Exports in Blow to Dozens of Nations*, FINANCIAL TIMES, 25 March 2021, www.ft.com/content/5349389c-8313-41e0-9a67-58274e24a019?shareType=nongift (reporting: "India, one of the world's biggest vaccine producers, has imposed a *de facto* ban on jab exports as it seeks to prioritize local vaccinations amid an accelerating second wave of coronavirus infections. The Serum Institute of India, the largest manufacturer of vaccines in the world and the biggest supplier to the international Covax program, has been told to halt exports and that the measures could last as long as two to three months…. Gavi, the U.N.-backed international vaccine alliance, immediately warned that the controls would have a direct impact on the Covax scheme, set up with the World Health Organization to ensure the equitable global distribution of at least 2 bn Covid-19 vaccine doses in 2021.") [hereinafter, *India Blocks Vaccine Exports*]; Jeffrey Gettleman, Emily Schmall & Mujib Mashal, *India Cuts Back On Vaccine Exports As Infections Surge At Home*, THE NEW YORK TIMES, 25 March 2021, www.nytimes.com/2021/03/25/world/asia/india-covid-vaccine-astrazeneca.html?referringSource=articleShare (reporting: "With its own battle against the coronavirus taking a sharp turn for the worse, India has severely curtailed exports of Covid-19 vaccines, triggering setbacks for vaccination drives in many other countries. The government of India is now holding back nearly all of the 2.4 million doses that the Serum Institute of India, the private company that is one of the world's largest producers of the AstraZeneca vaccine, makes each day. India is desperate for all the doses it can get. Infections are soaring, topping 50,000 per day, more than double the number less than two weeks ago. And the Indian vaccine drive has been sluggish, with less than 4 percent of India's nearly 1.4 billion people getting a jab, far behind the rates of the United States, Britain and most European countries.") [hereinafter, *India Cuts Back*]. However, by the time of the ban, India had "exported 60 m[illion] vaccines to countries around the world – more than the 54 m[illion] doses it has given to its own people – and some states, including the eastern state of Odisha, … reported … they … [were] running low on vaccine stocks." *India Blocks Vaccine Exports*. In fact, until the ban, India had been "a major exporter of the AstraZeneca vaccine, and it was using that to exert influence in South Asia and around the world," as "[m]ore than 70 countries, from Djibouti to Britain, received vaccines made in India, with a total of more than 60 million doses." *India Cuts Back*. India's export ban affected 190 countries that were participating in the WHO-led Covax scheme that aimed "to ensure vaccines are shared fairly among all nations." *See Coronavirus: India Temporarily Halts Oxford-AstraZeneca Vaccine Exports*, BBC NEWS, 25 March 2021, 24 March 2021, www.bbc.com/news/world-asia-india-56513371. Likewise, in April, India banned exports of a drug used to treat the coronavirus. *See* Bibhudhatta Pradhan, *India Bans Exports of Covid Drug Remdesivir Amid Virus Surge*, BLOOMBERG, 11 April 2021, www.bloomberg.com/news/articles/2021-04-11/india-bans-exports-of-covid-drug-remdesivir-amid-virus-surge?sref=7sxw9Sxl (reporting: "India has prohibited exports of the drug Remdesivir, used to treat Covid-19, as the country registered a record number of daily new coronavirus cases. The government took the step amid a sudden spike in demand for the injection, the health ministry said….").

Tragically, India's export restrictions could not help it tame the coronavirus. *See Indian States Run Out of COVID Vaccines Amid Record Infections*, NIKKEI ASIA, 30 April 2021, https://asia.nikkei.com/Spotlight/Coronavirus/Indian-states-run-out-of-COVID-vaccines-amid-record-infections (reporting: "Several Indian states have run out of COVID-19 vaccines a day before a planned widening of a nationwide inoculation drive, authorities said on Friday, as new infections in the crisis-hit country surged to another daily record. … The world's second-most populous nation is in deep crisis, with hospitals and morgues overwhelmed by the pandemic, medicines and oxygen in short supply and strict curbs on movement in its biggest cities. India is the world's biggest producer of vaccines but does not have enough stockpiles to keep up with the second deadly COVID-19 wave, despite Prime Minister Narendra Modi's government planning to vaccinate all adults starting May 1 [2021]. Only about 9% of India's 1.4 billion people have received a vaccine dose since January."); Gideon Rachman, *Narendra Modi and the Perils of*

Questions persisted as to whether there was a *de facto* export ban on COVID-19 vaccines:

> There is no formal export ban on vaccines or vaccine components, like syringes, vials, and filters. Companies manufacturing vaccines, or items needed by jab makers elsewhere in the world, are free to export them.
>
> However, Washington has used a wartime power … [,] the *Defense Production Act* [,] to compel private companies to fulfil its contracts ahead of other orders. This has prompted manufacturers elsewhere in the world, like the Serum Institute in India, to complain of not being able to buy items they would normally import from the US. In normal times, the US is the top global exporter of syringes and needles, according to the OECD.[670]

And, in respect of Constitutional separation of powers and restraints on the Executive branch, there were concerns that the Presidents – both Trump and Biden – were exercising too much power in invoking the *DPA* for COVID-19 purposes.

- **Canada, Too**

By no means was the U.S. the only major country in the Western Alliance to implement an export ban on health care products amidst the COVID-19 pandemic. In November 2020, Canada announced it was banning mass exportation of some prescription

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COVID Hubris, FINANCIAL TIMES, 26 April 2021, www.ft.com/content/fa3096ff-4325-4a02-97fd-89095e44d5c1?shareType=nongift. The country that boasted it was the "pharmacy to the world" was not even a pharmacy to itself, as COVID-19 and its variants swept across the country killing more than authorities could (or, in some cases, were willing) to count. *See id*. (reporting: "Surveys of mortuaries suggest that the number of Covid-19 deaths may be two to five times higher than the official figure of around 2,000 a day."). Hubristic nationalism and governmental incompetence led to a premature declaration of victory in the pandemic in February 2021, and the *BJP* foolishly permitted huge, non-socially distant, election rallies (*e.g.*, in West Bengal) and Hindu religious festivals in March-April 2021. *See id*. (reporting: "The pandemic punishes hubris. Narendra Modi is not the first world leader to have paid the price for acting too slowly – or declaring victory too early. In China, where the virus originated, the Xi Jinping government's first disastrous reaction was to suppress bad news coming out of Wuhan. In the U.S., Donald Trump, then President, repeatedly predicted that the virus would miraculously disappear. In Brazil, President Jair Bolsonaro addressed rallies of anti-lockdown protesters. In Britain, Prime Minister Boris Johnson locked down the country too late. The EU messed up the purchase of vaccines. But the Modi government has made some distinctive and disastrous errors. Having called the end of the crisis too early, the Indian government opened up too fast. Driven by a desire to win the crucial state of West Bengal, the *BJP* staged mass election rallies. Modi declared himself 'elated' by a large crowd that turned out to hear him speak a few days ago, even as Covid-19 cases soared. The *Kumbh Mela*, a religious festival that allows millions of pilgrims to converge on a single town, was allowed to go ahead and even promoted by the Hindu nationalist *BJP*. The Indian government failed to use the decline in infection after the first wave to prepare properly for a second wave. Emergency oxygen supplies were clearly too low. Despite the fact that India is the world's largest producer of vaccines of all sorts, the government was woefully slow to place orders from local manufacturers. It also slowed the approval of proven foreign vaccines for Covid-19, such as the BioNTech/Pfizer jab, while promoting a more experimental Indian-designed vaccine.").

670 Aime Williams & Kiran Stacey, *Is There a Ban on Covid Vaccine Exports in the U.S.?*, FINANCIAL TIMES, 1 May 2021, www.ft.com/content/82fa8fb4-a867-4005-b6c2-a79969139119?shareType=nongift

pharmaceuticals to prevent a domestic shortage of them.[671] Canada's ban was prompted by President Donald J. Trump's plan (via *Executive Orders*) to allow importation of those medicines from Canada and thereby reduce their cost to Americans.[672]

Canada sourced 68% of its medicines from overseas, and wanted to prevent any disruption in supply to its citizens that might be cause by mass exports to the U.S. Under the Canadian measure, companies had "to provide information to assess existing or potential shortages when requested, and within 24 hours if there is a serious or imminent health risk."[673] Certainly, if the Canadian measure were put to the test under the GATT Article XI:1 rule against QRs, Canada would cite Article XI:2(a) in defense. Canada's Health Minister, Patty Hajdu, essentially did so when she announced the ban: "Certain drugs intended for the Canadian market are prohibited from being distributed for consumption outside of Canada *if that sale would cause or worsen a drug shortage*."[674] The Canadian ban took effect on 27 November 2020, a few days before the President's *Executive Order* allowing importation of prescription drugs entered into force.

- **U.S. Meatpacking**

In another invocation of the 1950 *DPA*, President Trump issued an *Executive Order* to keep open meat packing facilities.[675] Several meat packing facilities closed because COVID-19 outbreaks at them among their workers, generating concerns about America's beef, eggs, pork, and poultry supplies. For example, the largest U.S. meat processor, Tyson Foods, "warned that the nation's food supply chain was 'breaking' as the number of coronavirus cases at plants rose," and forced it "to close three slaughterhouses over the past week [21-28 April 2020]."[676] Iowa alone "produces one-third of the nation's pork supply."[677] Overall, "[t]he United Food and Commercial Workers Union, which represents 250,000 meatpacking and food processing workers, said 20 people in the sector had died and 6,500 had been infected or exposed to the virus," and 22 plants nationwide had been

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671 *See Canada Bans Mass Exports of Prescription Drugs*, BBC NEWS, 29 November 2020, www.bbc.com/news/world-us-canada-55119428. [Hereinafter, *Canada Bans Mass*.]

672 *See* The White House, *Executive Order on An America-First Health Care Plan*, 24 September 2020, www.whitehouse.gov/presidential-actions/executive-order-america-first-healthcare-plan/; Executive Order 13939 of July 24, 2020, *Lowering Prices for Patients by Eliminating Kickbacks to Middlemen*, 85 Federal Register Number 146, 45759-45760 (29 July 2020), www.govinfo.gov/content/pkg/FR-2020-07-29/pdf/2020-16625.pdf.

673 *Canada Bans Mass* (*quoting* the Canadian Ministry of Health).

674 *Quoted in* Steve Scherer, *Canada Blocks Bulk Exports of Some Prescription Drugs in Response to Trump Import Plan*, REUTERS, 28 November 2020, www.reuters.com/article/usa-healthcare-canada/canada-blocks-bulk-exports-of-some-prescription-drugs-in-response-to-trump-import-plan-idUSKBN2880RJ. (Emphasis added.)

675 *See* Jennifer Jacobs & Lydia Mulvany, *Trump Orders Meat Plants to Stay Open in Move Unions Slam*, BLOOMBERG, 28 April 2020, www.bloomberg.com/news/articles/2020-04-28/trump-says-he-s-issuing-order-for-tyson-s-unique-liability?sref=7sxw9Sxl [hereinafter, *Trump Orders Meat*]; Demetri Sevastopulo, Aime Williams & Gregory Meyer, *Donald Trump Orders Meat Processing Plants to Stay Open*, FINANCIAL TIMES, 28 April 2020, www.ft.com/content/2c7e1a34-2cd7-4b80-ae2d-a8549f565423?shareType=nongift [hereinafter, *Donald Trump Orders*].

676 *Donald Trump Orders*.

677 *Trump Orders Meat*.

temporarily shuttered.[678] The closure of those plants "reduc[ed] pork processing capacity by 25% and beef processing capacity by 10%."[679] Within about 10 days, the figures worsened: at least 30 workers had died from the coronavirus, and 10,000 were infected with it, and the pandemic had forced 30 meatpacking plant closures, a 40% drop in pork production capacity, and a 25% drop in beef production capacity.[680]

Nevertheless, the President issued the *Order* following "estimates that as much as 80% of U.S. meat production capacity could shut down."[681] And, "[t]otal American meat supplies in cold-storage facilities are equal to roughly two weeks of production."[682] Even Federal inspectors "responsible for inspecting meat plants … [were] falling ill," with "[m]ore than 100 inspection-service employees hav[ing] tested positive for Covid-19."[683]

Thus, in the *Order*, the President declared "such closures threaten the continued functioning of the national meat and poultry supply chain, undermining critical infrastructure during the national emergency."[684] The *Order*, effectively declaring meat processing to be part of America's critical infrastructure and thus compelling workers therein to stay on the job, attracted criticism for elevating food products over workplace safety: "We only wish that this administration cared as much about the lives of working people as it does about meat, pork and poultry products," said Stuart Appelbaum, President of the Retail, Wholesale and Department Store Union."[685] Arguably, "develop[ing] meaningful safety requirements … would have helped contain the [supply chain] disruptions," yet the Order lacked such innovations. It did, however, immunize the facilities from legal liability for staying open during the pandemic.

Moreover, the supply chain disruptions were due in part to changes in demand. With stay-at-home orders across much of the U.S., restaurants were closed. Restaurant demand for mean products plummeted, and suppliers could not easily shift their restaurant-product lines to grocery-product lines, especially in respect of fresh versus frozen meat.[686] Indeed:

> With the pandemic hobbling the meat-packing industry, Iowa farmer Al Van Beek had nowhere to ship his full-grown pigs to make room for the 7,500 piglets he expected from his breeding operation. The crisis forced a

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678 *Donald Trump Orders*.

679 *Trump Orders Meat*.

680 *See Union Opposes Reopening U.S. Meat Plants as More Workers Die*, REUTERS, 8 May 2020, www.reuters.com/article/us-health-coronavirus-usa-meat/union-opposes-reopening-u-s-meat-plants-as-more-workers-die-idUSKBN22K2WP.

681 *Trump Orders Meat*.

682 *Trump Orders Meat*.

683 Michael Hirtzer & Tatiana Freitas, *U.S. Could Be Weeks From Meat Shortages With Shutdowns Spreading*, BLOOMBERG, 24 April 2020, www.bloomberg.com/news/articles/2020-04-24/meat-threats-grow-with-first-brazil-shutdown-u-s-turkey-halt?sref=7sxw9Sxl. [Hereinafter, *U.S. Could Be*.]

684 *Quoted in Trump Orders Meat*.

685 *Quoted in Donald Trump Orders*.

686 *See* Corky Siemaszko, *Groceries Could See Meat Shortages by End of Week Amid Plant Closings*, NBC NEWS, 27 April 2020, www.nbcnews.com/news/us-news/groceries-could-see-meat-shortages-end-week-amid-plant-closings-n1193401.

> decision that still troubles him: He ordered his employees to give injections to the pregnant sows, one by one, that would cause them to abort their baby pigs.
>
> …
>
> Van Beek's piglets are victims of a sprawling food-industry crisis that began with the mass closure of restaurants - upending that sector's supply chain, overwhelming storage and forcing farmers and processors to destroy everything from milk to salad greens to animals. Processors geared up to serve the food-service industry can't immediately switch to supplying grocery stores.
>
> Millions of pigs, chickens and cattle will be euthanized because of slaughterhouse closures, limiting supplies at grocers….
>
> …
>
> Farmers take pride in the fact that their crops and animals are meant to feed people, especially in a crisis that has idled millions of workers and forced many to rely on food banks. Now, they're destroying crops and killing animals for no purpose.
>
> Farmers flinch when talking about killing off animals early or plowing crops into the ground, for fear of public wrath. Two Wisconsin dairy farmers, forced to dump milk by their buyers, told Reuters they recently received anonymous death threats.
>
> "They say, 'How dare you throw away food when so many people are hungry?'," said one farmer, speaking on condition of anonymity. "They don't know how farming works. This makes me sick, too."[687]

In sum, there were rigidities in supply-chain infrastructure and distribution networks, which exacerbated food shortages at grocery stores (and food banks). For their part, despite impending shortages, it was unclear whether grocery stores could absorb quickly the surplus quantity from the collapse in restaurant demand.[688]

The *Order* did not explicitly ban exportation of meat. However, it was issued "at a time when global meat supplies were already tight."[689] For example, "China, the world's top hog producer, has been battling an outbreak of African swine fever, which destroyed millions of the country's pigs." Likewise, Brazil closed several of its poultry processing facilities.[690] Hence, QRs on exports were conceivable.

- **April 2020 WTO *Report* on Trade in Medical Products**

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687 Tom Polansek & P.J. Huffstutter, *Piglets Aborted, Chickens Gassed as Pandemic Slams Meat Sector*, REUTERS, 27 April 2020, www.reuters.com/article/us-health-coronavirus-livestock-insight/piglets-aborted-chickens-gassed-as-pandemic-slams-meat-sector-idUSKCN2292YS.

688 *See Trump Orders Meat*.

689 *Trump Order Meat*.

690 *See U.S. Could Be*.

In reading the excerpt from the WTO *Repor*t below, consider the following questions. First, to what extent does trade in medical products create a network of interdependence among WTO Members that, ideally, increases their ability to procure merchandise essential to fight pandemics? Second, to what extent are import barriers (such as high applied MFN duties) a self-inflicted wound, *i.e.*, do they undermine efforts at forging a reliable supply chain for medical products? Third, why as the Uruguay Round *Pharma Agreement* not been successful, either in terms of Members joining it, or in terms of product scope?

WORLD TRADE ORGANIZATION, *TRADE IN MEDICAL GOODS IN THE CONTEXT OF TACKLING COVID-19* (3 APRIL 2020)[691]

Key Points:

(1) Germany, the United States…, and Switzerland supply 35% of medical products;
(2) China, Germany and the U.S. export 40% of personal protective products;
(3) Imports and exports of medical products totalled about $2 trillion, including intra-EU trade, which represented approximately 5% of total world merchandise trade in 2019;

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691 www.wto.org/english/news_e/news20_e/rese_03apr20_e.pdf. In December 2020, the WTO published updated statistics on trade in medical products during the pandemic, the key points of which were:

(1) While total world trade declined by 14 per cent in the first half of 2020 compared to the same time period in 2019, imports and exports of medical goods increased by 16 per cent, reaching U.S. $ 1,139 billion in value.
(2) Trade played a critical role in meeting skyrocketing demand for products considered critical in the COVID-19 pandemic, with global trade in these products growing by 29 per cent.
(3) Total imports of face protection products in the first half of 2020 increased by 90 per cent compared to the same period last year. Trade in textile face masks has grown about six-fold.
(4) China was the top supplier of face masks, accounting for 56 per cent of world exports. To ramp up mask manufacturing, China leaned heavily on imports of intermediate input materials: its imports of non-woven fabric tripled in April 2020 compared with the same month of 2019, with Japan and the United States as the leading suppliers. China was also the sixth-largest importer of face masks in the first half of 2020.
(5) Among the different types of face masks, textile masks are the most traded despite facing the highest tariffs.
(6) Leading importers of COVID-19-critical products registered double-digit import growth compared to 2019, including 62 per cent in France and 52 per cent in Italy.
(7) Chinese exports of COVID-19-critical medical products more than tripled based on year-on-year data for the first half of the year, from U.S. $ 18 billion to U.S. $ 55 billion.

See World Trade Organization, *WTO Updates Report on Trade in Medical Goods in the Context of COVID-19* (22 December 2020), www.wto.org/english/news_e/news20_e/covid_22dec20_e.htm. The full report is World Trade Organization, Trade in Medical Goods in the Context of Tackling COVID-19: Developments in the First Half of 2020 – Information Note (22 December 2020), www.wto.org/english/tratop_e/covid19_e/medical_goods_update_e.pdf.

(4) Trade of products described as critical and in severe shortage in COVID-19 crisis totalled about $597 billion, or 1.7% of total world trade in 2019;
(5) Tariffs on some products remain very high. For example, the average applied tariff for hand soap is 17% and some WTO Members apply tariffs as high as 65%;
(6) Protective supplies used in the fight against COVID-19 attract an average tariff of 11.5% and goes as high as 27% in some countries;
(7) The WTO has contributed to the liberalization of trade medical products in three main ways:
    (a) The results of tariff negotiations scheduled at the inception of the WTO in 1995;
    (b) Conclusion of the plurilateral sectoral *Agreement on Pharmaceutical Products* ("*Pharma Agreement*") in the Uruguay Round and its four subsequent reviews;
    (c) The Expansion of the *Information Technology Agreement* in 2015.

1. Introduction

The COVID-19 pandemic has brought considerable attention to trade in medical products, and specifically trade in products for prevention, testing and treatment. …

…

2. Product Scope

Medical products, in general, are widely spread in different Chapters of the … HS classification [at the 6-digit Sub-Heading level]. … These COVID-19 relevant medical products are categorized into four main groups:

1. Medicines (Pharmaceuticals) – including both dosified and bulk medicines;
2. Medical supplies – refers to consumables for hospital and laboratory use (*e.g.*, alcohol, syringes, gauze, reagents, etc);
3. Medical equipment and technology; and
4. Personal protective products [also called personal protective equipment, or PPE] – hand soap and sanitizer, face masks, protective spectacles.

…

A subset of medical products has been frequently mentioned by governments, international organizations and in news reports as in short supply for the fight against COVID-19. These include: disinfectants/sterilization products; face masks; gloves; hand soap and sanitizer; patient monitors and pulse oximeters; protective spectacles and visors; sterilizers; syringes; thermometers; ultrasonic scanning apparatus; ventilators, oxygen masks; X-ray equipment; and other devices such as computer tomography apparatus. Trade in these products collectively amounts to 1.7% of world merchandise trade.

3. Trade Patterns

Imports:

…

Medical products account for approximately 5% of total world trade (imports and

exports); more than half of imports are medicines.

…

Top importers: the U.S., Germany, and China account for 34% of total world imports of medical goods.

During the last three years, the United States was the largest importer of medical products, accounting for 19% of total world imports in 2019. The ranking and shares are consistent during the 2017-2019 period. … Germany had a share of 9%, followed by China and Belgium (6%). The other importers who make up the top 10 importers include the Netherlands, Japan, U.K., France, Italy, and Switzerland.

…

Personal protective products represent 13% of medical imports.

The import value of personal protective products (hand soap and sanitizer, face masks, and protective spectacles) in 2019 was $135 billion. The U.S., followed by Germany, are the biggest importers and together account for more than 22% of total world imports of these products.

The U.S. and Germany are the biggest bilateral trade partners for medical products; and both the U.S. and Germany are the main suppliers to China.

The U.S., Germany, and China were consistently the top-three importers for the years 2017 to 2019, and their ranking did not change for the past three years. These three Members accounted for a third of world imports in 2019. …

The U.S. imported medical products mostly from Ireland, Germany, Switzerland, China, and Mexico. Together, these five Members accounted for more than half of all US imports of medical products, with Ireland having a 17% share of the U.S. market and Mexico 6%.

…

Germany imports medical products mostly from other European countries, except the U.S. which accounts for a 14% share of its imports. Collectively these top 5 partners account for 54% of Germany's imports of medical products.

Germany followed by the U.S. are the largest source of imports for China, with shares of 20% and 19% respectively. The relative shares had changed since 2018 when the U.S. was the largest exporter to China. China imported about 10% of medical products from Japan in 2019.

Exports:

Germany, the U.S., and Switzerland supply 35% of medical products to the world; The top 10 exporters account for almost three-quarters of world exports.

… Germany is the top exporter with a 14% share. The top 10 exporters account for almost three-quarters of world exports. This is a more concentrated distribution compared to imports in which the top 10 importers account for only 65% of the market.

Despite not being among the top-10 importers, Ireland ranks is the sixth largest exporter with a 7% share of exports. Medical exports of Ireland and Switzerland amounted to 38% and 29% respectively of their total goods exports, which highlights the importance of these products to their respective economies. In contrast, exports of medical products only account for less than 2% in China.

…

40% of personal protective products exports come from China, Germany, and the U.S.

Total exports of protective products, including face masks, hand soap, sanitizer and protective spectacles, were valued at $135 billion on average for the period 2017-2019. About 17% or $23 billion came from China, the top exporter, followed by Germany and the U.S. …. These three exporters account for more than 40% of world exports of protective supplies.

…

China is the top exporter of face masks with 25% share.

China supplied 25% world exports of face masks in 2019, and together with Germany and the U.S., the three contribute to almost half of the world face mask supply.

Singapore, U.S., Netherlands, and China export more than half the world's respirators and ventilators.

Breathing apparatus, including respirators and ventilators, are supplied by a small number of Members notably, Singapore which has 18% market share, followed by the U.S. with 16%, Netherlands 10% and China 10%.

4. MFN Applied Tariffs

Average applied tariff on medical products is 4.8%.

The tariff statistics show that the average … MFN applied tariff on COVID-19 relevant medical products for WTO Members is around 4.8% based on the latest data available…. This is lower compared to the latest average of applied tariff for all non-agricultural products, which is 7.6%.

More than half of Members impose applied tariffs lower than 5%.

… The statistics show that more than half of Members (70 of 134 Members or 52%) impose MFN tariffs of 5% or lower. Among them, four Members do not levy any tariffs at all for all medical products (*i.e.*, these essential products enter duty-free). They are Hong Kong, China; Iceland; Macao, China; and Singapore. Thirty-one Members (23%) have average tariffs between 0 and 2.5% and 35 Members (26%) have average tariffs between 2.5% and 5%.

…

In China, where the COVID-19 virus was first detected, the average MFN applied tariff is

4.5%, which is slightly below the global average. Republic of Korea (the second most affected Asian country in terms of the number of confirmed cases) applies tariffs at 5.9% on average. European Union members apply the EU Common External Tariff with an average of 1.5%, and Switzerland has an average applied tariff of 0.7%. The comparable applied tariff rate statistic for the U.S. is 0.9%.

… [There is a] large variation in the level of tariffs applied between different product categories in this bundle of products relevant to COVID-19 prevention and medical treatment. Overall averages by product groups range from around 2.1% for medicines to 11.5% for personal protective products.

…

Medicines subject to 2.1% tariffs, lower than other relevant products.

The average MFN applied tariff on medicine is the lowest among different categories of medical products, at 2.1%. More than half of the Members have no tariff in place on medicines. Thirty-nine Members impose tariffs at 5% or below and no Member levies tariff higher than 15%.

… [D]uring the Uruguay Round negotiations, some Members concluded a so-called zero-for-zero plurilateral sectoral initiative on pharmaceutical products. This is referred to as the 1994 WTO *Pharmaceutical Agreement* or "*Pharma*." [*See* www.wto.org/gatt_docs/English/SULPDF/91770009.pdf.] The current participants in this agreement include Canada; the European Union; Japan; Macao, China; Norway; Switzerland; and the U.S. The agreement covers pharmaceutical products, including active ingredients defined by the WHO International Non-proprietary Names (INNs) and other substances used in the production of these products.

3.4% is the average applied duty on medical equipment, including products covered by ITA Expansion.

On average, the MFN applied tariff on medical equipment is 3.4%. Medical equipment ranges in complexity from microscopes to ultrasonic scanners, and include respirators or ventilators. Nineteen Members provide duty-free access for medical equipment and an additional half of WTO Members impose duties at 5% or below. Three Members apply tariffs higher than 10% on medical equipment.

Medical equipment is another area in which the WTO has achieved some trade liberalisation. Eighty per cent of the medical equipment covered by this category are covered by the Expansion of the *Information Technology Agreement* (*ITA-Exp*). *ITA-Exp* will eliminate the tariffs and lower the cost for imports of technology-intensive medical equipment by 2023. The average MFN applied tariff of all Participants to the *ITA-Exp* on all medical equipment is 0.4% compared to 4.1% for Members that do not participate in this initiative.

Respirators or ventilators, which are in shortage of in the current health crisis, are not covered by the *ITA* nor *ITA-Exp*. The world average tariff on this product is 3.3% but some

Members apply higher rates. Among Latin American countries Brazil, Argentina, and Venezuela levy 14% applied import tariff. Among Asian economies, India's duty for respirators is 10% while for China, the rate is 4%. Sixty-seven Members provide duty-free treatment to respirators or ventilators, including the EU, U.S., Republic of Korea, and Switzerland.

Relatively high tariff of 6.2% on hospital & laboratory inputs and materials.

The average MFN tariff applied on medical supplies is 6.2%, the highest among the medical product categories included in this analysis.

About 11.5% tariff on COVID-19 relevant personal protective products.

The World Health Organization recommends to regularly wash hands with soap and water or use hand sanitizers to disinfect and stop the spread of the virus. Protective supplies include those related to prevention like hand soap and sanitizer, hand gloves, and face masks. These protective medical supplies have an average applied tariff of 11.5%, more than five times higher than those for medicines.

The variation between Members in the tariffs they apply on personal protective products is extensive. There are 29 Members that apply an average duty of 5% or less, but there are 47 Members that apply an average tariff of at least 15% on personal protective products.

The global average applied tariff for hand soap is 17%. Seventy-two Members apply duty greater than 15%. Some tariffs could be as high as 50% (Dominica) or 56.7% (Egypt).

Hand sanitizers have an average tariff of 5%. Four Members apply a tariff higher than 10%, namely Djibouti, Bangladesh, Tonga, and Mauritania. A third of all WTO Members apply tariff for hand sanitizers in the range of 2.5% to 5% – significantly lower than for soap.

Face masks are another critical personal protective product, which are subject to 9.1% MFN applied tariff on average. Five Latin American countries (Ecuador, Bolivia, Venezuela, Brazil, and Argentina) have the highest tariffs on face masks. The average tariff for Ecuador is 19%, with some product lines levied at 55% tariff. Bolivia and Venezuela have an average applied tariff of 20% while Brazil and Argentina have 17% average tariffs. Fifteen Members maintain MFN applied duty of more than 15%. Almost a third of all WTO Members apply tariffs of between 10 to 15%.

For protective spectacles and visors, … [there is] a higher number of Members without levying any duty (23 duty-free compared to 7 for face masks). It also indicates that many Members (29) have tariffs higher than 15%. Ecuador and Jordan have the highest applied tariffs for protective glasses at 30%. For almost half of the Members, this product is dutiable, but the duty is less than or equal to 7.5%.

…

5. Bound Tariffs

More than 75% tariffs have been bound.

On average, WTO Members made commitments not to raise their applied duty above a fixed ceiling (i.e. a bound duty rate) for over three out of four medical products. There is no large difference in binding coverage among the product groups, ranging from 75% to 82%.

Large gap between bound and MFN applied tariff.

… [B]y how much, on average, WTO Members could lower their committed ceilings before reaching their applied levels [?] In general, there is a significant policy space (water), with the average bound rates five times as higher than average applied. In terms of percentage points, the ceiling bound tariff could be reduced by some 17 percentage points in each category before it reached the average MFN applied tariff rate.

…

Only two Members (Hong Kong, China and Macao, China) have bound all their medical products at duty-free levels. Twenty-nine Members have an average bound of 50 per cent or more. All WTO Members have made commitments in their tariff schedules on a least one medical product. While for categories "medicine" there are many more Members with binding at zero, there are also over 20 Members who have not made any binding commitments for this product category.

…

- **April 2020 *Joint Ministerial Statement on Supply Chain Connectivity* and *Declaration on Trade in Essential Goods for Combatting COVID-19***

Amidst the COVID-19 pandemic, nine Asia-Pacific countries opted to fight the trend of export restraints on medicines, medical products, and food. On 6 April 2020, they issued a *Joint Ministerial Statement* committing themselves to integrated supply chains and open trade on merchandise necessary to combat the coronavirus.

***JOINT MINISTERIAL STATEMENT AFFIRMING COMMITMENT TO ENSURING SUPPLY CHAIN CONNECTIVITY AMIDST THE COVID-19 SITUATION* (6 APRIL 2020)**[692]

The COVID-19 pandemic is a serious global crisis. As part of our collective response to combat COVID-19, Australia, Brunei Darussalam, Canada, Chile, Lao People's Democratic Republic, the Republic of the Union of Myanmar, New Zealand, Singapore and Uruguay are *committed to maintaining open and connected supply chains*. We will also work closely to identify and address trade disruptions with ramifications on the flow of necessities.

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[692] This *Statement* is available at New Zealand Ministry of Foreign Affairs, www.mfat.govt.nz/en/media-and-resources/ministry-statements-and-speeches/joint-ministerial-statement-affirming-commitment-to-ensuring-supply-chain-connectivity-amidst-the-covid-19-situation/, and Singapore Ministry of Foreign Affairs, www.mfa.gov.sg/Overseas-Mission/Geneva/Mission-Updates/2020/04/JOINT-MINISTERIAL-STATEMENT-SUPPLY-CHAIN-CONNECTIVITY--COVID-19-SITUATION.

We recognise that it is in our mutual interest to *ensure that trade lines remain open*, including via air and sea freight, to facilitate the flow of goods including essential supplies.

We affirm the importance of *refraining from the imposition of export controls or tariffs and non-tariff barriers and of removing any existing trade restrictive measures on essential goods, especially medical supplies*, at this time.

We are committed to *working with all like-minded countries* to ensure that trade continues to flow unimpeded, and that critical infrastructure such as our air and seaports remain open to support the viability and integrity of supply chains globally.

Note that seven of the nine countries (all but Laos and Uruguay) are *CPTPP* Parties. That suggests they are disposed to trade liberalization and FDI integration. However, query whether their *Statement*, and particularly the *Declaration* that followed it, are commercially meaningful.

To be sure, Annex I of the *Declaration* covered 124 pharmaceutical and medical products, and Annex II included 180 food products, intimating a half-hearted ambition. But, though open to any WTO Member to sign, only New Zealand and Singapore did so. The pledge to refrain from QRs on exports applied only to Annex I, not Annex II, items. Both are low-tariff countries and have an FTA, which entered into force on 1 January 2001, and which they upgraded effective 1 January 2020 (to cover, *inter alia*, e-commerce, MRAs on conformity assessments, and professional qualification recognition), with one another.[693] Neither of them is a major producer-exporter of drugs and health care items, and as to food, New Zealand's export base is narrow (focused on dairy, lamb meat, and wine), and Singapore is a net food importer. Did the *Declaration* operate mainly to assure New Zealand market access for those exports, and Singapore a reliable supply source? In general, what use is it to call for open trade and supply chain connectivity, when trade routes and supply chain configurations run through countries not making the same commitments?

NEW ZEALAND-SINGAPORE *DECLARATION ON TRADE IN ESSENTIAL GOODS FOR COMBATING THE COVID-19 PANDEMIC* (15 APRIL 2020)[694]

Tariff Elimination and Implementation

1. Each Participant will eliminate all customs duties and all other duties and charges of any kind, within the meaning of Article II:1(b) of … GATT 1994, with respect to all products listed in Annex I.

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693 *See* New Zealand Ministry of Foreign Affairs and Trade, *CEP Overview*, www.mfat.govt.nz/en/trade/free-trade-agreements/free-trade-agreements-in-force/nz-singapore-closer-economic-partnership/cep-overview/.

694 *See* Singapore Ministry of Trade and Industry, www.mti.gov.sg/-/media/MTI/Newsroom/Press-Releases/2020/04/Singapore-New-Zealand-Declaration-on-Trade-in--Essential-Goods.pdf.

Export Restrictions

2. The Participants will not apply export prohibitions or restrictions, within the meaning of Article XI:1 of the GATT 1994, with respect to all products listed in Annex I.

Non-tariff Barriers

3. The Participants will intensify consultations with a view to removing non-tariff barriers on all products listed in Annex I and Annex II. [In total, 304 products are listed, 124 in Annex I, plus 180 in Annex II.]

Facilitation of Trade in Essential Goods

4. The Participants will, consistent with their obligations under the World Trade Organisation Trade Facilitation Agreement, expedite and facilitate the flow and transit of all products listed in Annex I and Annex II through their respective sea and air ports.

5. The Participants will endeavour to expedite the release of such products upon arrival including adopting or maintaining procedures allowing for submission of import documentation and other required information, including manifests, in order to begin processing prior to the arrival of products.

6. The Participants will endeavour to abide by the World Health Organisation International Health Regulations (IHR) to allow free pratique to cargo ships – *i.e.*, the permission to enter a port, discharge or load cargo or stores [that is, to deal with the port, after quarantine and/or proof of good health].[1] [Footnote 1 states: "Participants may subject granting free pratique to inspection, and, if a source of infection or contamination is found on board, the carrying out of necessary, disinfection, decontamination, disinsection or deratting, or other measures necessary to prevent spread of the infection or contamination, pursuant to the IHR.]

7. The Participants will uphold ICAO *Covid-19 Declaration*, adopted by the ICAO Council on 9 March 2020, and will endeavour to facilitate, entry, transit and departure of air cargo containing essential medical supplies.

Additional Products

8. Participants will endeavor to not apply export prohibitions or restrictions with respect to the products listed in Annex II, unless they fall within exceptions set out in GATT 1994.

9. If imposed, the Participant instituting these prohibitions or restrictions under Paragraph 8 will give notice in writing to the other Participants of the measure as far in advance as practicable.

10. Participants may enter into arrangements with one or more of the other Participants to also apply Paragraph 1 to products listed in Annex II.

Acceptance and Expansion of Membership

11. This *Declaration* will be open to participation by any Member of the WTO, or State or separate customs territory in the process of acceding to the WTO.

12. The term "Participant" means any Member of the WTO that has notified its acceptance of this *Declaration*.

Final considerations

13. Participants will review periodically, and at least one year prior to regular amendments to the Harmonized System nomenclature by the World Customs Organization, and no later than 15 April 2021 for the first review, the paragraphs of this *Declaration* and the product coverage specified in Annex I and Annex II and consider whether, in the light of the Covid-19 pandemic, or changes to the HS nomenclature, the paragraphs of this *Declaration* should be amended or Annex I and Annex II should be updated to incorporate additional products.

ANNEX I
PRODUCTS COVERED

…

[124 six-digit HS Product Descriptions, across 21 Chapters, ranging from 190110 ("Food preparations; of flour, meal, starch, malt extract or milk products, suitable for infants or young children, put up for retail sale") to 961900 ("Sanitary towels (pads) and tampons, napkins and napkin liners for babies and similar articles, of any material"), including an array of antibiotics and vitamins in Chapter 29, and medicaments in Chapter 30.]

ANNEX II
PRODUCTS COVERED

…

[180 four-digit HS Product Descriptions, across 22 Chapters, ranging from 0101 ("Live horses asses mules & hinnies") to 2206 ("Other fermented beverages mixtures of fermented beverages & mixtures of fermented beverages & non-alcoholic beverages nes [not elsewhere specified]"), including dairy goods in Chapter 4, vegetables in Chapter 7, and fruit in Chapter 8).

V. Russia's War Against Ukraine and Food Nationalism

The 23 February 2022 invasion by Russia of Ukraine triggered not only the imposition of a diverse array of sanctions by the U.S. and its Allies (discussed in a separate Chapter), but also a global food crisis. Amidst shortages of wheat and other grains caused in part by Russia's embargo of Ukrainian exports and its seizure, destruction and/or

diversion of Ukrainian output, country after country imposed limits on food exports.

> Export restrictions have been imposed on nearly a fifth of global food trade, according to the latest figures, as countries respond to the food security crisis exacerbated by Russia's invasion of Ukraine.
>
> Export bans, higher tariffs and other barriers have been imposed on 17% of the international food market on a caloric basis as of June 28 [2022]….
>
> Export curbs have become especially prominent for categories produced in large quantities by Russia and Ukraine. Wheat is subject to restrictions by 13 countries, the highest count for a single agricultural product. Corn is the next most restricted item at 10 countries.
>
> The world has seen two other food security crises in the past 14 years. The pandemic caused one in 2020 while a sharp uptick in demand from emerging nations staging dramatic economic growth caused another in 2008.
>
> This current crisis, however, has become prolonged with wider-reaching impact. Food prices had already been on an upward trend from pandemic-induced supply chain issues. The war in Ukraine opened another front on skyrocketing prices.
>
> On a caloric basis, wheat, and palm oil each account for about 30% of the restricted agricultural products. Palm oil, in particular, is not just used in food, it is also an ingredient in beauty products. Prices have risen because the commodity is seen as a substitute for sunflower oil, a staple product of Ukraine.
>
> The Indonesian government banned exports of palm oil in April [2022], which sparked a firestorm of opposition worldwide. The ban was lifted in May, but Indonesia continues to prioritize domestic demand.
>
> Another factor is Indonesia’s shift toward biofuels, with palm oil seen as a significant source of energy.
>
> …
>
> In past food crises, staples such as rice, wheat and buckwheat were subject to wide-ranging controls. In the future, there could be a chain reaction of countries limiting exports of rice as an alternative, according to David Kleimann, fellow at the Brussels-based think tank Bruegel.
>
> Wheat prices have risen 20% since the start of the year, while corn prices climbed 30% at one point. Rice also faces upward pressure, and many other products are fetching historic prices.

> The current food situation risks developing into famine and unrest affecting entire regions, said Kleimann. Haiti saw riots that erupted in 2008 after food prices spiraled upward, and the violence ushered in a change of government. High food prices also were seen as a contributing factor in triggering the Arab Spring in 2011.[695]

Manifestly, food export prohibitions exacerbated inflationary pressures. They also worsened the plight of NFIDCs. Those prohibitions and that plight were worsened further by bans on yet another product category: fertilizers, such as phosphoric acid and potassium chloride. Governments worried about fertilizer shortages that might cause a diminution in agricultural output – a vicious cycle.

Legally, all such measures were QRs that GATT Article XI:1 barred. But, they could be justified under one or more of the Article XI:2 exceptions.

VI. Rise and Demise of America's Oil Export Ban (1975-2015)

Following the October 1973 Arab Oil Embargo of Israel and its allies, including the U.S., America maintained export controls on crude oil. Technically, which took effect in 1975, the export ban covered most crude oil exports to other countries. Traditionally, using concepts embodied in GATT Article XI:2(a), the U.S. justified the export controls by saying crude oil was an "other product" in "short supply." But, the controls came under significant pressure with the 2014 global glut of oil, and dramatic decline in oil prices. With the revolution that started in 2005, known as "fracking," that is, hydraulic fracturing, and also horizontal drilling, the U.S. boosted output of oil and NG, and had exportable surpluses of each. Notwithstanding controversies about the environmental effects of these production techniques, and concerns about long-term domestic supply shortages and price rises, the U.S. terminated the ban in December 2015.

In particular, American producers found new energy sources through fracking. Further downward pressure on West Texas Intermediate and Brent Crude prices came with the decision of OPEC exporters (especially Saudi Arabia) not to cut production (presumably so as to drive out competition from fracking). To stay afloat, many U.S. producers needed foreign markets as an outlet for their new-found American supply. Additionally, the *NEI* of the Administration of President Barack H. Obama: the U.S. sought

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695 Anna Nishino, *Food Nationalism: Export Curbs Hit Nearly a Fifth of Global Market*, NIKKEI ASIA, 7 July 2022, https://asia.nikkei.com/Spotlight/Supply-Chain/Food-nationalism-Export-curbs-hit-nearly-a-fifth-of-global-market#. For an argument that "[t]he most obvious shortcoming in the [multilateral trade] rules is that WTO Members are largely free to restrict exports," and that, therefore, (1) "existing WTO agreements [should] be used as a basis to provide guidelines for the sharing of food to global markets," (2) the WTO *Agreement on Agriculture* needs to be updated to take into account climate change, extreme weather, military conflicts, pandemics, and other factors that interfere with food production, and (3) the WTO should "specify factors that an exporting country must take into account when imposing an export restriction on food, and it can require consultations to deal with severe disruptions in world food trade" and "mediate the interests of food exporters and importers in enhancing the latter's food security," see Ambassador Alan Wm. Wolff & Joseph W. Glauber, *Food Insecurity: What Can the World Trading System Do About It*, Peterson Institute of International Economics (PIIE) Policy Brief 23-15 (October 2023), www.piie.com/sites/default/files/2023-10/pb23-15.pdf.

to double exports between the Presidents' 2010 State of the Union Address (when the *NEI* was announced) and year-end 2014.[696] But, that goal was nearly impossible to achieve through manufactured goods. In the absence of Congressional action to repeal the 40-year old ban on U.S. crude oil exports, the DOC's BIS acted.

The BIS affirmed "lease condensate" is crude oil under EAR Part 754:2(a).[697] But, the BIS said if condensate is processed through a crude oil distillation tower, then it no longer is crude oil. It is a "petroleum product." Most such products are not subject to export controls. The BIS gave a non-exhaustive list of criteria to discern if condensate processing is sufficient to convert it from crude oil to a petroleum product, namely, a change in API gravity (*i.e.*, an inverse measure of density by the American Petroleum Institute as to how light or heavy oil is, with 10 indicating the oil is light and will float on water), the purpose of the product, and a material transformation in the crude oil.

Actually, the BIS ratified the behavior of American oil exporters. Several of them were unwilling (or perhaps financially unable) to wait for the Administration's clarification. They commenced exportation based on their own legal interpretation of Part 754(a) of the EAR, and earlier BIS rulings.

So, the days of the export ban itself were numbered. Given the paradigmatic shift in the world oil market, query whether America still could argue in defense of a WTO case that oil is an "other product" eligible for the Article XI:2(a) "short supply" exception? Moreover, the Arab Oil Embargo ended in March 1974. Yet, Article X1:2(a) demands an export prohibition be aimed at relieving a "temporary," "critical" shortage.

Exportation under the BIS exception to the crude oil export ban raised a different problem: what if the U.S. did not administer this exception in an MFN manner, as was alleged with respect to LNG export controls (discussed in a separate Chapter)? Suppose the U.S. shipped oil to some WTO Members, like Japan, India, and Korea, but not others, like China? Could the U.S. defend an Article I:1 MFN violation with an Article XI:2(a) critical shortages exception?

VII. 2012 *China Raw Materials* Case on Article XI:2(a)

● Facts

This case concerned export restraints imposed by China on raw materials. The Chinese measures (63 in total) were part of a larger trend of restraints imposed by several countries on commodity exports.[698] In the present era of globalization, much attention is focused on global value-added chains. That is for good reason, because MNCs do source

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696 *See* Executive Order 13534, *National Export Initiative*, 11 March 2010, www.whitehouse.gov.

697 U.S. Short Supply Export Controls are in EAR Part 754, *posted at* www.bis.doc.gov/index.php/regulations/export-administration-regulations-ear.

698 Daniel Pruzin, *EU Starts Campaign to End Export Curbs on Raw Materials, May initiate WTO case*, 25 International Trade Reporter (BNA) 1406 (2 October 2008). [Hereinafter, *EU Starts Campaign*.] *See also* Daniel Pruzin, *Survey Sees G-20 Warding off Protectionism, as Limits on Exports, Bailouts Cause Concern*, 27 International Trade Reporter (BNA) 886 (17 June 2010) (discussing the case).

inputs from multiple jurisdictions, making a "Made in the World" label appropriate. But, that is only part of the story. Export restraints as a deliberate effort to disengage, or disconnect from, global value-added chains are another part of the story. Some countries seek to create a domestic value-added chain, and establish vertically integrated production of a high value-added product, with as little dependence on imported inputs as possible. They do so for a medley of reasons, including national security.

So, not surprisingly, before lodging a WTO complaint, the EU said it found:

> restrictions on the export of metals, wood, leather, ceramics, chemicals, textiles, and energy, everything from high-volume products to highly specialized rare materials … and that at least 450 export restrictions are now in place world-wide.[699]

One restriction at issue in the present case was a Chinese export quota on refractory grade bauxite. Refractory-grade bauxite is often used in the iron, steel, glass, and cement kiln industries. Countries that lack raw materials like bauxite have a significant economic incentive to gain access to inexpensive manufacturing inputs. They use these inputs to produce hybrid cars, semiconductors, and other products high up on the value chain. Low-cost imported inputs obviously help reduce the cost of the finished product, thus enhancing its price competitiveness.

The EU was particularly keen to arrest the global increase of export restraints on commodities. According to the EU:

> Our competitive advantage is already acutely sensitive to the supply and the costs of these inputs…. On average, raw material costs make up around a sixth of the costs of manufactured goods in the EU. In industries like plastics, chemicals, and paper, the costs of raw materials can be easily as much as a third or more.[700]

Export restraints on raw material inputs drive up the price of these inputs for European countries, which in turn increases the cost of the finished product. According to the EU, the resulting higher price tag it suffers reduces its competitive advantage.[701]

At the same time, the price of these inputs decrease in the country imposing the export restraints. That is precisely the point: the exporting nation seeks to assure domestic users of those inputs a low-cost source of supply of them, to ensure those users produce an internationally price-competitive product. To be sure, neither the GATT nor other WTO agreements ban all export restraints. An export tax imposed on an MFN basis, in keeping with Article I:1, would be lawful. For example, suppose South Africa seeks to assure its jewelry producers have a low-cost source of supply of rough, uncut, unpolished diamonds. South Africa seeks to assist in the development of a vertically integrated jewelry industry,

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699 *EU Starts Campaign*.
700 *EU Starts Campaign*.
701 *EU Starts Campaign*.

from mining of diamonds and other precious gems to designing and producing world-class finish jewelry. So, South Africa imposes a 50% export tax on unfinished diamonds. If it does so only with respect to exports to the EU, then its measure would violate the MFN clause. But, if it imposes the measure in regards of all export destinations, then its measure comports with Article I:1. (Note that under MFN jurisprudence, the aim, purpose, or intent of South Africa in resorting to the measure in the first place is irrelevant.)

However, as the *China Raw Materials* case suggests, export restraints other than taxes, *i.e.*, the mirror image of NTBs, raise problems under the GATT-WTO regime. Most obviously, there is the prophylactic ban on quantitative restrictions under GATT Article XI, a ban that the Chinese measure tested.

In *China Raw Materials*, the U.S., EU, and Mexico accused China of imposing unfair export restraints on various forms of nine raw materials.[702] The raw materials at issue included forms of bauxite, coke, fluorspar, magnesium, manganese, silicon carbide, silicon metal, yellow phosphorus, and zinc.[703] These raw materials "either occur naturally or have undergone initial processing."[704] (That is, the forms differed as to whether they were extracted without processing, or whether they underwent processing.) The disputed export restraints China imposed on these raw materials fell into four broad categories:

(1) Export Duties
(2) Export Quotas
(3) Export licensing
(4) Minimum export price requirements

The EU. U.S., and Mexico also disputed the allocation and administration of export quotas, export licensing, and minimum export price requirements. They "collectively identified 40 specific measures in connection with their claims concerning [these export restraints]."[705] China admitted to 23 additional measures concerning the imposition of export duties and the imposition, administration, and allocation of export quotas.[706]

The appeals concerned the export quota on refractory-grade bauxite imposed by China. China allocated this export quota through a bidding process overseen by its MOFCOM. A document called *Export Quota Bidding Measures* established the rules for quota bidding. It described quota bidding as:

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[702] *See* WTO Panel Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/R, WT/DS395/R, WT/DS398/R, ¶ 1.1 (adopted as modified by the Appellate Body, 22 February 2012). [Hereinafter, *China Raw Materials* Panel Report.]

The Panel combined the complaints from the U.S., EU, and Mexico into a single report, with separate findings and conclusions.

[703] *See China Raw Materials* Panel Report, ¶¶ 1.1, 2.1. A complete chart of Chinese HS Numbers for each product at issue is reproduced in the Panel Report. *See id*. at ¶ 2.2.

[704] *China Raw Materials* Panel Report, ¶¶ 1.1, 2.1.

[705] *China Raw Materials* Panel Report, ¶ 2.3.

[706] *See China Raw Materials* Panel Report, ¶ 2.5.

> the procedure through which "an export enterprise may obtain with certain compensation the quotas" through "voluntary bidding."[707]

MOFCOM determined which products are eligible for export bidding, and how many export quotas are eligible to be bid upon.

> MOFCOM also oversaw the Bidding Committee. The Bidding Committee:
>
> shall, according to the types of commodities subject to bidding, establish the corresponding offices of quota bidding for export commodities under the relevant chambers of commerce for import and export.[708]

An enterprise (including any foreign company) interested in bidding must meet preliminary eligibility criteria, and is subject to approval by MOFCOM. Bidders must submit a "bidding price and bidding quantity to China's Bidding Office."[709]

An enterprise must "win" a quota allocation through the bidding process to export bauxite. The Bidding Office derived the winning bid price from the multiplication of the bidding price and bidding quantity. The bidding price "represents the amount per metric ton that a bidding enterprise is willing to pay for the right to export."[710] The bidding quantity represents "the amount of the relevant material the enterprise seeks to export."[711]

The Bidding Office sorted the bids in descending order according to bidding price. Then, the Office added the bidding quantities on this list, until the total equals the total amount of quota available.[712] Consequently, the Bidding Office awarded export quotas to enterprises with the highest bid prices. For example, if the Bidding Office received four bids, then it would arrange them as such in the Table 43-1. Note that an enterprise was required to submit a bit as to both price and quantity, and the example in the Table assumes a decreasing monotonic sequence as to both variables. However, in practice, some bidders with low prices might have low quantities, and some with higher prices might have high quantities. Nonetheless, the Bidding Office would sort the bids by price, and then make an ultimate decision about quota quantity allocations.

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707 *China Raw Materials* Panel Report, ¶ 7.188 (*quoting Measures of Quota Bidding for Export Commodities* (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted at the 9th Ministerial Office Meeting of the Ministry of Foreign Trade and Economic Cooperation, January 1, 2002, Article 2).

708 *China Raw Materials* Panel Report, ¶ 7.191 (*quoting Measures of Quota Bidding for Export Commodities* (Decree of the Ministry of Foreign Trade and Economic Cooperation No. 11, adopted at the 9th Ministerial Office Meeting of the Ministry of Foreign Trade and Economic Cooperation, 1 January 2002), Article 9).

709 *China Raw Materials* Panel Report, ¶ 7.198.

710 *China Raw Materials* Panel Report, ¶ 7.198.

711 *China Raw Materials* Panel Report, ¶ 7.198.

712 *See China Raw Materials* Panel Report, ¶ 7.199. The 2009 quota allocation for bauxite was 930,000 metric tons. *See id.*, ¶ 7.201.

Table 43-1
Hypothetical Example of Bidding Office Arrangement of Bids

Bidding Enterprise	**Bidding Price** **Per metric ton, in Chinese *Yuan* (CNY)**	**Bidding Quantity** **In metric tons**
Enterprise A	10 CNY	20
Enterprise B	8 CNY	15
Enterprise C	7 CNY	12
Enterprise D	6 CNY	11

Suppose in the above example the total quota allocation is 30 metric tons. Then, the Bidding Office would award export quota allocations to Enterprises A and B. After Enterprise A is awarded an allocation, it may choose to export a quantity equivalent to or less than the amount specified in the bid. To illustrate, suppose Enterprise A, having bid for 20 metric tons, is awarded this quantity. Enterprise A could choose to export any amount up to this figure, and cannot exceed it. But, it could export less than 20 tons. Why might it not fulfill its quota allocation?

One reason is a slump in overseas demand for the item, owing to changed market conditions. Such conditions could include an increase in the international supply of the product. (In fact, Chinese export constraints created an incentive for new suppliers in other countries, from Australia to Brazil, to come "on line." The U.S. has encouraged diversification of supply of key inputs, for national security reasons, namely, avoiding excessive dependence on China.) Another reason is a robust domestic Chinese market, into which it decides to sell a portion of its quota.

The winning bidders "must pay the balance of the bid-winning price and a security deposit."[713] A bid-winning enterprise "may pay the full award price where it wishes to export the full allocation or a proportionate amount where it wishes to export less than the full allocation."[714] So, in the above example, if Enterprise A chooses to export 15 of its metric ton allocation, then the Chinese government may refunded it with a portion of the award price. However, security deposits are non-refundable.

The Bidding Office awards the winning bidders a certificate of quota. Exporters must have a certificate of quota to apply "for an export license within the quota's validity period."[715] The enterprise must present its export license to Chinese customs officials for clearance before it exports its goods.

- **Issues**

713 *China Raw Materials* Panel Report, ¶ 7.200.
714 *China Raw Materials* Panel Report, ¶ 7.200.
715 *China Raw Materials* Panel Report, ¶¶ 7.200, 7.189.

China raised three key issues on appeal.[716] First, China asserted it may utilize GATT Article XX "to justify a violation of China's export duty commitments contained in Paragraph 11:3 of China's *Accession Protocol*."[717] China lost this appeal, as the answer is "no." The Appellate Body applied the 1969 *Vienna Convention on the Law of Treaties* (*Vienna Convention*) guidelines for treaty interpretation. It held the GATT Article XX exceptions are not available to justify violations to Paragraph 11:3 of the *Accession Protocol of the People's Republic of China* (*Accession Protocol*). In its 2014 *Rare Earths* case (discussed in a separate Chapter), the Appellate Body amplified on this holding.

Second, China argued its export quota on refractory-grade bauxite was "'temporarily applied to prevent or relieve a critical shortage.'"[718] Therefore, China argued its measure does not violate Article XI:1, because Article XI:2(a) justified it. China lost its appeal. The Appellate Body said the export quota was not temporarily applied, and refractory-grade bauxite was not in critical shortage. Therefore, the export restraint violated Article XI:2(a).

Finally, China successfully appealed a Panel interpretation of the GATT Article XX(g) phrase "made effective in conjunction with." China disagreed with the Panel statement that the "purpose of the export restriction [must] be to ensure the effectiveness of restriction on domestic production and consumption."[719] The Appellate Body decided the Panel incorrectly interpreted Article XX(g), and reversed the Panel interpretation.[720]

- **Panel Holding and Chinese Appellate Arguments**

The Panel determined the Chinese export quota on refractory-grade bauxite violated the general prohibition on QRs in GATT Article XI:1. China asserted its quota falls within the scope of the Article XI:2(a), and therefore does not violate Article XI:1. In making this argument, China emphasized the temporal nature of its quota. The Chinese

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716 Several other appeals were argued by China, the U.S., EU, and Mexico. *See* WTO Appellate Body Report, *China – Measures Related to the Exportation of Various Raw Materials*, WT/DS394/AB/R, WT/DS395/AB/R, WT/DS398/AB/R, ¶ 207-210 (adopted 22 February 2012). [Hereinafter, *China Raw Materials* Appellate Body Report.] The U.S., EU, and Mexico made several conditional appeals. *See id*. at ¶ 267-268. However, those preconditions were not met, and, consequently, the Appellate Body did not address any of them. *See id*. at ¶ 269. China accused the Panel of violating Articles 6:2, 7:1, 11, and 19:1 of the *DSU*. *See id*. at ¶ 207. The Appellate Body found the Panel violated Article 6:2 and declared several Panel findings moot. *See id*. at ¶ 235. The Appellate Body also held the Panel did not violate Article 7:1, and it dismissed the Article 11 and 19:1 claims. *See id*. at ¶ 266.

717 *China Raw Materials* Appellate Body Report, ¶ 207.

718 *China Raw Materials* Appellate Body Report, ¶ 344. China also accused the Panel of violating Article 11 of the *DSU*, in two respects. First, according to China, the Panel failed to make an objective assessment regarding the annual renewal of the Chinese export quota on refractory-grade bauxite. *See id*. ¶ 338. The Appellate Body quickly rejected this claim after a brief review of the record. *See id*. ¶¶ 339-341. Second, China said the Panel reasoning was too inconsistent and incoherent. *See id*. ¶ 342. The Appellate Body said it is possible for inconsistent reasoning to rise to the level of an Article 11 violation, but that was not the case here. *See id*. ¶ 343 The Appellate Body held the Panel did not violate Article 11. *See id*. ¶ 343.

719 *China Raw Materials* Appellate Body Report, ¶ 207.

720 *China Raw Materials* Appellate Body Report, ¶ 360.

argument was novel (or nearly so), as there have been no (or precious few) adopted decisions on the Article XI:2(a) exception to Article XI:1.

The Panel agreed refractory-grade bauxite is "essential" within the meaning of Article XI:2(a). But, the Article XI:2(a) exemption did not apply, because China could not show it applied the quota "temporarily" or there was a "critical shortage" of refractory-grade bauxite. The Panel emphasized the adjective "critical," claiming:

> even if we were to accept China's assertion that natural reserves of refractory-grade bauxite would be depleted in 16 years, as contented by China, this would not demonstrate a situation "of decisive importance," or one that is "grave," rising to the level of a "crisis."[721]

Furthermore, the Panel said the Chinese export quota:

> had "already been in place for at least a decade with no indication of when it will be withdrawn and every indication that it will remain in place until the reserves have been depleted."[722]

On appeal, China claimed the Panel incorrectly interpreted and applied the terms "temporarily applied" and "critical shortage" in GATT Article XI:2(a).

China argued the Panel should not have excluded "'long-term' export restrictions" from the scope of Article XI:2(a)."[723] According to China, there is no bright line rule as to the length of time a measure may be "temporarily applied."[724] Rather, all that Article XI:2(a) requires is "that the duration of a restriction be limited and bound in relation to the achievement of the stated goal."[725]

China said the Panel erred in its application of "temporarily," because it did not consider the export quota at issue underwent annual reviews. China also said the Panel erred in finding "Article XI:2(a) and Article XX(g) are mutually exclusive," which China said the Panel used to bolster its interpretation of "temporarily applied."[726] With respect to the Panel interpretation of "critical shortage," China said the Panel mistakenly "exclude[d] shortages caused by the 'finite' nature or 'limited reserve' of a product."[727]

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721 *China Raw Materials* Appellate Body Report, ¶ 313. It is interesting to note that before the Panel, the U.S. and Mexico asserted the "remaining lifespan [*i.e.*, estimated Chinese reserves of refractory-grade bauxite] was 91 years," a stark contrast to the Chinese contention of 16 years. *Id*. at footnote 610 to ¶ 313.

722 *China Raw Materials* Appellate Body Report, ¶ 311.

723 *China Raw Materials* Appellate Body Report, ¶ 314.

724 *China Raw Materials* Appellate Body Report, ¶ 329.

725 *China Raw Materials* Appellate Body Report, ¶ 329.

726 *China Raw Materials* Appellate Body Report, ¶ 329.

727 *China Raw Materials* Appellate Body Report, ¶ 314.

The EU countered that a quota is not applied temporarily, regardless of how often it is reviewed, if it "has effectively been in place for more than ten years."[728] America and Mexico also argued:

> the existence of a limited amount of reserves constitutes only a degree of shortage, and a mere degree of shortage does not constitute a "critical" shortage, which is one rising to the level of a crisis.[729]

- **Appellate Body Holding**

The Appellate Body ultimately agreed with the Panel, and the European, American, and Mexican arguments, and determined China failed to prove its export quota was "temporarily applied" to "prevent or relieve a 'critical shortage.'"[730]

Before examining the issue, the Appellate Body explained that Article XI:2(a) must be read together with Article XI:1. The Appellate Body also noted the scope of Article XI:2 is no broader than the scope of Article XI:1. The Appellate Body focused on the meaning of the Article XI:2(a) phrase "temporarily applied to prevent or relieve critical shortages of foodstuffs or other products essential to the exporting Member."[731]

The Appellate Body said the use of the adverb "temporarily" "suggests that Article XI:2(a) refers to measures that are applied in the interim."[732] (This point was yet another example, replete in Appellate Body jurisprudence, of a statement of the obvious.) The term "foodstuffs," said the Appellate Body, is merely an example of "what might be considered a product "essential to the exporting Member."[733] However, the disputed measure need not be restricted to exported foodstuffs.

As regards the term "critical shortage," the Appellate Body looked not only at its ordinary meaning (*á propos* the *Vienna Convention*), but also its context. It pointed out GATT Article XX(j) does not include the adjective "critical," or any similar qualifier.[734]

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728 *China Raw Materials* Appellate Body Report, ¶ 315.
729 *China Raw Materials* Appellate Body Report, ¶ 316.
730 *China Raw Materials* Appellate Body Report, ¶ 344.
731 *China Raw Materials* Appellate Body Report, ¶ 322.
732 *China Raw Materials* Appellate Body Report, ¶ 323.
733 *China Raw Materials* Appellate Body Report, ¶ 326.
734 *See China Raw Materials* Appellate Body Report, ¶ 325. Article XX(j) states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> …
>
> (j) essential to the acquisition or distribution of products *in general or local short supply*; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the

The difference suggests, said the Appellate Body, "the kinds of shortages that fall within Article XI:2(a) are more narrowly circumscribed than those falling within the scope of Article XX(j)."[735] The Appellate Body added Article XI:2(a) applies to measures "adopted to alleviate or reduce an existing critical shortage, as well as for preventative or anticipatory measure adopted to pre-empt an imminent critical shortage."[736]

The Appellate Body stated the concepts in Article XI:2(a) give meaning to one another. So, for example, "whether a shortage is "critical" may be informed by how "essential" a particular product is."[737] Furthermore, "inherent in the notion of criticality" is the temporal nature of a shortage. The Appellate Body would have done well to put its points more directly for the benefit of WTO Members and their lawyers.

What it could and should have said is this: First, there is a direct relationship between "essential" and "critical." The more "essential" a product is, the more likely a shortage of it is "critical." Second, there is an inverse relationship between "critical" and time. A shortage is more likely to be "critical," and becomes more so, the longer it lasts (under the assumption of *ceteris paribus*, that is, all other factors are equal, and in particular, there are no substitutes developed for that product). Third, at some point, a shortage ceases to be critical (for example, because alternative sources of supply are found), and a measure adopted to relieve the critical shortage becomes unnecessary.

In any event, the Appellate Body determined the Panel correctly interpreted "temporarily" within the meaning of GATT Article XI:2(a). Indeed (and obviously), "temporarily" refers to a measure applied for a "limited duration and not indefinite."[738] The Appellate Body said the phrases "long term" and "short term" are not the same as determining the meaning of "temporary." The Appellate Body clarified the Panel did not assert the adverb "'temporarily' excludes "'long-term' application of export restrictions."[739] Additionally, the Appellate Body said China was incorrect in stating the Panel found Articles XI:2(a) and XX(g) are mutually exclusive. Instead, the Panel merely meant to confirm its interpretation was correct, and aligned with "the principle of effective treaty interpretation."[740]

The Appellate Body also disagreed with China that the Panel "presumed that a shortage of an exhaustible non-renewable resource cannot be "critical" within the meaning of Article XI:2(a)."[741] Instead, the Panel correctly determined "Articles XI:2(a) and XX(g) have different functions and contain different obligations."[742] However, the Appellate

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> conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960. (Emphasis added.)

735 *China Raw Materials* Appellate Body Report, ¶ 325.
736 *China Raw Materials* Appellate Body Report, ¶ 327.
737 *China Raw Materials* Appellate Body Report, ¶ 328.
738 *China Raw Materials* Appellate Body Report, ¶ 330.
739 *China Raw Materials* Appellate Body Report, ¶ 332.
740 *China Raw Materials* Appellate Body Report, ¶ 334.
741 *China Raw Materials* Appellate Body Report, ¶ 337.
742 *China Raw Materials* Appellate Body Report, ¶ 337.

Body also acknowledged there may be some overlap, because "a measure falling within the ambit of Article XI:2(a) could relate to the same product as a measure relating to [Article XX:(g)]."[743] Furthermore, the Appellate Body said "an Article XI:2(a) measure might operate simultaneously with a conservation measure complying with the requirements of Article XX(g)."[744]

In sum, the Appellate Body upheld the Panel finding the Chinese export restraints on refractory-grade bauxite are not justified under GATT Article XI:2(a). That was because the export quotas were neither "temporarily applied" (lasting for over a decade), nor did they address a "critical shortage" within the meaning of Article XI:2(a) (as China failed to adduce evidence that it had such a shortage).

- **Significance of Ruling**

This case was a significant victory for countries with manufacturing and technology sectors that rely upon inexpensive imports for inputs. China "produces more than 95% of rare earth minerals, but has been limiting exports on environmental grounds."[745] The purpose touted by China for imposing export restraints was environmental protection. Yet, ultimately China was unable to overcome the accusation its export restraints were "discriminatory."[746]

The Chinese explanation in this case is redolent of that in the 2010 *China Audiovisual Products* case (discussed in a separate Chapter).[747] There, China argued public morality under GATT Article XX(a) justified its impediments to market access for foreign (especially American) IP products, such as books, journals, magazines, movies, and music. The true underlying purpose was censorship, and steering profitable trading and distribution opportunities to favored domestic entities, including SOEs. If China wanted to censor such products, it had a less trade restrictive means to monitor them for content than the complex web of restrictions it deployed.

VIII. GATT Article XI:2(b) "Classification and Grading" Exception

One exception to the general proscription against QRs is GATT Article XI:2(b), which is technical yet easiest to treat. It allows a government to apply classification, grading, or marketing rules. At first glance, it appears to overlap with Article XX(d), which permits derogations from GATT obligations necessary for the administration of laws and regulations. However, the focus of the Article XX exception is on a domestic law and compliance therewith, while Article XI:2(b) deals with the need among all countries to deal

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743 *China Raw Materials* Appellate Body Report, ¶ 337.

744 *China Raw Materials* Appellate Body Report, ¶ 337.

745 Daniel Pruzin, *WTO Affirms Chinese Export Restrictions on Raw Materials Violate Global Trade Rules*, 29 International Trade Reporter (BNA) 164 (2 February 2012).

746 Amy Tsui, *WTO Raw Materials Decision Could Affect All Export Restrictions, Trade Official Says*, 28 International Trade Reporter (BNA) 1242 (28 July 2011).

747 *See China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/AB/R (adopted 19 January 2010).

with the classification, grading, and marketing of imported merchandise.[748] Article XX(d) is invoked because of a specific policy in a country, whereas Article XI:2(b) addresses a concern common to all trading nations. In this respect, it links to the *TBT Agreement* (discussed in a separate Chapter).

For example, suppose Japan seeks to classify imported apples as "Red delicious" or "Rome," or Brazil seeks to permit the stamp of "Grade A" on packaging for the best quality imported beef. Japanese and Brazilian officials need time and space to perform their respective tasks. Suppose their governments permit them to hold imported shipments of apples and beef for up to 24 hours in a warehouse at the port of importation to permit classification and grading. Assuming this warehouse hold is "necessary," in the language of Paragraph 2(b), to the application of classification, grading, or marketing rules, then it is permitted. Otherwise, the restriction might be characterized by exporting WTO Members as an "other measure" illegal under Article XI:1.

Perhaps, then, Article XI:2(b) is most accurately viewed as an administrative exception of general interest. Without this exception, a WTO Member would be vulnerable to an Article XI:1 charge if it impeded trade as an unintentional by-product of applying rules. To be sure, there is plenty of room for debate about whether a particular measure is "necessary" to make operational classification, grading, or marketing rules. At least until challenged by another Member, the decision will be left to the government of an importing country relying on this exception.

In other words, in practice, the exception is self-judging, unless litigation ensues following its invocation. This practice should not provide much comfort, as Canada found out in a 1988 GATT Panel case. In the 1989 *Canada – Measures Affecting Exports of Unprocessed Herring and Salmon* case, the GATT Panel concluded the Canadian measure in controversy was not "necessary" to apply its standards.[749]

Significantly, of the three exceptions to Article XI:1, Paragraph XI:2(b) is the only limitation that authorizes a WTO Member to impose an import or export restriction or ban. Paragraph 2(a) allows only export restraints. Paragraph 2(c) allows only import restraints. Moreover, Paragraph 2(b) is the only exception not expressly limited to a particular kind of merchandise. The exception covers any "commodity." In contrast, the remaining two limitations on Article XI:1, found in Article XI:2(a) and 2(c), focus on agricultural trade.

IX. GATT Article XI:2(c) "Agriculture" Exception

The third exception to the ban on QRs in Article XI:1, which is in Article XI:2(c), expressly covers "agricultural" and "fisheries" products. At the outset, three points must

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748 *See* JACKSON 1969 §13.4 at 317. The specific contexts in which the concern arises may differ from one country to another, or among groups of countries. Professor Jackson gives as examples a scheme for marketing butter, and a system to control orderly marketing of commodities in relation to domestic storage facilities in the countries of importation and exportation. *See id*.

749 *See* B.I.S.D. (35th Supp.) 98, 112 at ¶ 4.2 (1989) (adopted 22 March 1988). The GATT Panel observed that Canada prohibited exports of certain herring and salmon, even if they satisfied Canadian standards. For this reason, the Panel held the measure was not necessary to the application of the standards.

be made. First, the exception does not permit a complete ban on importation. Rather, it allows for a "restriction" on them. Of course, in theory that word could mean a restriction to zero, but in fact it is not interpreted to connote a prohibition.[750]

Second, the exception in Article XI:2(c) never has been used successfully. For example, in a 1989 GATT Panel case, *Canada – Import Restrictions on Ice Cream and Yoghurt*, the Government of Canada invoked Article XI:2(c)(i), in particular.[751] Canada sought to justify QRs on imported ice cream and yoghurt, which were illegal under Article XI:1. Canada lost the case for two reasons. First, it could not prove the restrictions were "necessary," as the *chapeau* to Paragraph 2(c) demands. Second, it could not prove ice cream and yoghurt are "like products" in comparison with milk produced in Canada, as the text of Paragraph 2(c)(i) requires. (Both requirements are discussed below.)

The third point to appreciate at the outset is the contentious nature of the exception. Of the three exceptions Paragraph 2 contains, from a policy perspective, Paragraph 2(c) is by far the most controversial. Professor Jackson explains why:

> This special exception from the quota prohibition for agricultural goods was particularly resented by the less developed and primary product-producing countries, who saw themselves prohibited [by virtue of Article XI:1] from using quantitative restriction[s] to protect their fledgling industries, while the industrial nations were allowed to use this device to protect their local producers from the very type of imports most likely to be produced in the less developed and primary product-producing nations. This gave the appearance of discrimination against the products of the non-industrialized nations….[752]

This kind of policy argument – that GATT and WTO rules favor protected interests in the First World, but obligate trade liberalization in the Third World, continues to the present day. It is especially heated in the agricultural area, just as it was when GATT was drafted.

However, the merits of the argument hinge on what the rules actually say, who interprets them, and how they are interpreted. As a corollary to this second point, it might be added Paragraph 2(c) is the most technical of the two exceptions in Article XI:2.

The Article XI:2(c) exception does not apply to a fully processed agricultural or fisheries good. The Interpretative Note, *Ad Article XI, Paragraph 2(c)*, says:

> The term "in any form" in this paragraph covers the same products when in an *early stage of processing and still perishable*, which compete directly with the fresh product and if freely imported would tend to make the restriction on the fresh product ineffective.[753]

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750 *See* MATSUSHITA ET AL., 124-125.

751 *See* B.I.S.D. (36th Supp.) 68, 93 at ¶ 84 (1990) (adopted 5 December 1989).

752 JACKSON 1969 §13.4 at 317.

753 Emphasis added.

Thus, for example, Paragraph 2(c) would permit a restriction on cocoa, but not refined chocolates, or on peaches, but not frozen peach pies. That said, the line dividing "early" from more advanced processing stages is not easy to draw. Case-by-case assessments may be needed. For example, might a frozen peach pie fall within the zone of the exception, because a peach pie is perishable if left out on a kitchen counter for too long? To their credit, the GATT drafters did not want Paragraph 2(c) to be too wide an exception, and the limited applicability to raw or slightly processed agricultural and fishing products is consistent with the limitation to import restrictions.

Of course, to consider whether a product is processed or not is to beg a key interpretative question: is the item an agricultural or fisheries product? No generic definition emerges from the drafting history of GATT. Rather, there are products suggested as included. The history from the Havana Conference, recounted by Professor Jackson, indicates gums, resins, sericultural products, and syrups are on this non-exclusive list.[754] Arguably, reference may be made to the HTS, and specifically the chapters categorizing agricultural and fisheries products.

Once it is agreed Article XI:2(c) embraces a quantitative restriction on imports of an agricultural or fisheries product, it is necessary to interpret and apply 3 other key terms in the *chapeau*. First, the import limitation must be "necessary." As the 1989 *Canada Ice Cream* case shows. An approach to this word, in line with jurisprudence on Article XX(a), XX(b), XX(d), and XX(i), is to think of "necessity" in terms of a least- (or lesser-) restrictive means test. Is there a less trade-distorting measure than the import limitation imposed by the government it reasonably could have used to achieve the same result? Second, the limitation must be for the "enforcement" of a measure. Third, the measure must be an official one.

Suppose an import limitation satisfies these three criteria in the *chapeau*. That is not sufficient to exempt it from the discipline of Article XI:1. The limitation must pass a fourth test, which relates to the purpose of the limitation. The three Sub-Paragraphs, *i.e.*, (i), (ii), (iii), in Paragraph 2(c), spell out permissible purposes. In summary form, these purposes, which are alternatives, relate to supply management, surplus elimination, and animal product regulation. Each Sub-Paragraph, if invoked, requires the importing WTO Member to give public notice of the total quantity or value of the import restriction, of the specific period in the future in which that restriction applies, and of any change in the restriction. That transparency requirement is set forth in the first sentence of the last Paragraph of Article II.

Two presumptions underlie the Sub-paragraph (i) supply management test. First, the importing WTO Member produces a like or directly substitutable product in comparison with the import merchandise at issue. Here, again, the 1989 *Canada Ice Cream* case (discussed at the outset) demonstrates the point. Second, the importing Member restricts production or marketing of the like or substitutable domestic product. For example, assume the U.S. limits the supply of beef jerky provided and sold by American

754 *See* JACKSON 1969, §13.4 at 317 (*citing* U.N. Document E/Conf.2/C.3/66 at 8 (1947-1948).

companies. Without a restriction on imports of beef jerky from Australia (and other foreign suppliers), foreign suppliers would fill the void created by this limitation on domestic companies. Article XI:2(c)(i) condones the import restriction.

There is good reason for the presumption that the Member restricts production or marketing of the like domestic product. Suppose it did not, then what point would there be to a restriction on imports other than to protect domestic producers of the like product, and boost output of that product at the expense of foreign competitors? The presumption assures the exception does not become an expansive one to justify outright protectionist quantitative restrictions. Indeed, this reason is precisely that set forth in a 1947 Report from the U.S. Department of State on the *Charter for an International Trade Organization* (*ITO Charter*).[755]

In the preceding hypothetical case, would Article XI:2(c)(i) also except from Article XI:1 an import restriction on kangaroo jerky or turkey jerky? The answer would depend on whether American beef jerky is a "like" or "directly substitutable" domestic product. The latter category is broader than the former one, *i.e.*, every "directly substitutable" product would also be a "like" product, but the converse would not be true. The question may implicate a related one, namely, whether there is "substantial" production of a "like" product.

Suppose an importing WTO Member produces kangaroo and turkey jerky in modest quantities. Are these quantities "substantial"? If so, then it would be correct to consider whether they are "like" imported beef jerky. But if these quantities are insubstantial, then "likeness" is not relevant. The question is whether they are "directly substitutable" with beef jerky. If they are not "direct substitutes," then Article XI:2(c)(i) cannot be used to justify the import restriction. So, whether a product is produced in a "substantial" quantity can affect whether an importing Member analogizes the product as "like" or "directly substitutable" and, in turn, whether it can use Paragraph 2(c)(i) successfully.

Significantly, the reason an importing WTO Member seeks to restrict domestic production or supply is almost, but not entirely, immaterial to its invocation of the exception. One purpose may be to facilitate an agricultural support program, which calls for farmers to set aside part of their acreage from production. Another purpose may be to promote the health or welfare of the domestic populace. The one impermissible purpose would be protection of the domestic industry producing a like or directly substitutable product where no supply management scheme governs that industry. It is important to appreciate that Paragraph 2(c)(i) is interpreted narrowly, or at least has been in GATT history. Indeed, this narrow approach to it spurred the U.S., in the 1950s, to obtain an important waiver for its agricultural support programs.[756]

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755 *See* U.S. Department of State, *The Geneva Charter for an International Trade Organization*, DEPARTMENT OF STATE PUBLICATION NUMBER 2950 at 6 (1947).

756 *See Import Restrictions Imposed by the United States Under Section 22 of the Agricultural Adjustment Act*, B.I.S.D. (5th Supp.) 136 (1957) (adopted 16 November 1956).

It also is important not to neglect the final two sentences of Article XI:2, which supplement Article XI:2(c)(i) in particular, along with an Interpretative Note, *Ad Article XI:2*. There are 3 sentences in that final Paragraph to Article II. The first sentence applies to the entirety of Paragraph 2(c). Professor Jackson's treatment of the second two sentences is insufficiently precise.[757] That treatment suggests they also apply to all of Paragraph 2(c). In fact, the second sentence focuses on Paragraph 2(c)(i), and the third sentence is related to the second sentence. In other words, the final 2 sentences are relevant to Paragraph 2(c)(i), but not to Paragraph 2(c)(ii)-(iii).

Simply put, according to the final two sentences, import restrictions used in conjunction with a domestic supply management scheme should not distort trade, or do so to the least extent possible. Otherwise, an importing WTO Member might try to use import restrictions to channel business toward favored foreign suppliers, and thereby undermine the MFN obligation in Article XI:1. In addition, or in the alternative, the Member might abuse Article XI:2(c)(i) as a "backdoor safeguard" rule, whereby the Member limits imports from particular exporting countries on a non-MFN basis without satisfying the criteria of Article XIX.

The final sentences of Article XI:2 provide a numerical measure of whether trade distortion has occurred. There should be no drop in imports relative to domestic production after the measure is imposed in comparison with the relative level that reasonably would have been expected had there been no such measure. These sentences do not specify whether the computation should be made in terms of the value or the volume of trade, implying either (or both) kind of data would be appropriate.

Presumably, it is left to the importing Member to compute the relevant statistic (as no reference in Article XI:2 suggests the WTO Members initiate the calculation and perform it jointly). Possibly as a device to guide the importing Member away from the temptation to calculate imports relative to domestic production in too biased a manner, the final sentence of Article XI:2 calls upon the Member to use a prior "representative" period (which, by GATT and WTO customs and practice, would be three years), and to account for an "special factors" that might affect the calculation.

An Interpretative Note, *Ad Article II, Paragraph 2, Last Sub-paragraph*, explains

> The term "special factors" *includes* changes in relative *productive efficiency* as between domestic and foreign producers, or as between different foreign producers, but *not* changes artificially brought about by means not permitted under the Agreement.[758]

So, if foreign suppliers had become more productive, evidenced by increased output per labor-hour or other appropriate statistic, then that trend would be a "special factor" that explains an increase in imports relative to domestic production. Would this explanation

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757 *See* JACKSON 1969 §13.4 at 320.

758 Emphasis added.

offset the increase, and allow the importing Member to proceed with the import restriction? That question could be the topic of some dispute with other Members.

Sub-Paragraph (ii) is rather similar to Sub-Paragraph (i), in that both contemplate the existence of supply-side limits on a like or directly competitive domestic product. Thus, again, invocation of the exception to the ban on quantitative restrictions must not be for ordinary protectionist-type purposes. Both Sub-paragraphs authorize complementary foreign trade restrictions. The difference is Article XI:2(c)(ii) concerns a temporary surplus. Thus, it does not require a government program to regulate domestic production and marketing. Yet, Paragraph 2(c)(ii) does not exclude that kind of a program either. An importing government might justify an import restriction under Sub-Paragraph (ii) until a surplus is eliminated, and thereafter use Sub-paragraph (i) to justify the same or another restriction in conjunction with mandated production limits.

The gist of the purpose laid out by Sub-Paragraph (ii) is surplus disposal. The scenario envisioned is not a general price stabilization program, as is evident from preparatory work in the 1948 Havana Conference.[759] Conversely, a scheme to smooth out short term, or seasonal fluctuations would qualify under this Sub-Paragraph. Moreover, any import restriction under Sub-Paragraph (ii) has to involve giving the surfeit to certain groups of consumers, or sold to them at a below-market price. Technically, it need not be the government transferring the excess product to consumers. Rather, the government could authorize private sector entities, including the producers themselves, to arrange the transfer. Further, there is no need that every consumer, or even the majority of them, be a transferee. As long as "certain groups of domestic consumers" get the surplus, that will do. Does this term refer only to human beings?

The answer is "no," as a 1955 GATT Working Party *Report* indicates in response to a proposal from Sweden:

> The Working Party examined a proposal by the Swedish delegation to insert two interpretative notes to Article XI. [The first note would have stated Paragraph 2(a) covers temporary export restrictions applied to respond to a considerable increase in domestic foodstuff prices, which in turn result from a rise in prices in other countries. The Working Party rejected the proposal, stating Article XI:2(a) already covers this scenario.] … The other proposed note would have indicated that the provision of sub-paragraph 2(c) was applicable to *surpluses of grain made available as feeding-stuffs free of charge or at reduced prices to small holders and similar categories with a low standard of living*. The Working Party considered that such an interpretative note was also unnecessary; the case is clearly covered by the terms of that provision.[760]

So, animals can be consumers, and the matter consumed can be grain to feed livestock.

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759 *See Report of the Havana Conference*, U.N. Document ICITO/1/8 at 91-92 (1948).

760 *Reports Relating to the Review of the Agreement, Quantitative Restrictions*, B.I.S.D. (3rd Supp.) 170, 191 at ¶ 73 (1955) (adopted 2, 4-5 March 1955). (Emphasis added.)

Suppose the consumers are people, and they must pay for the product. As long as they are not paying the full prevailing market price – which, given the excess supply of the product, would be a depressed one anyway – but instead something beneath it, that will suffice. Indeed, a 1955 GATT Working Party Report refers expressly to small, poor farmers. It would be expected these groups would not pay full price. Is there a minimum degree by which the price charged must differ from the market price? The answer is "no," *i.e.*, any haircut, however significant, will do.

The third purpose that may justify an import restriction under Article II:2(c) appears rather odd. At least, it may be "odd" in the sense of how frequently it may arise in practice. Sub-Paragraph (iii) envisions a scenario in which an importing WTO Member is trying to restrict domestic production of an animal product, and this production depends totally or partly on an imported product.

Consider a hypothetical example. Tanzania seeks to restrict production of jewelry made from ivory. While there is little domestic output of ivory jewelry, *i.e.*, it is "relatively negligible" in the words of the Sub-Paragraph, Tanzanian officials fear unscrupulous businesses might import elephants, or their tusks, from surrounding East African countries. Ivory production in Tanzania, were it allowed to flourish, would depend nearly entirely on these imports. So, Tanzania bans importation of elephants and tusks. Assuming an elephant or tusks is an "agricultural product" – which it might be, it is bred and raised professionally for commercial trade – then the Tanzanian measure might qualify under Article XI:2(c)(iii) as an exception to Article II:1.

A final point about Article XI:2(c) is of interest. There is a contrast to be appreciated between Article XX and Article XI:2(c). The jurisprudence of Article XX is evolved to the point at which the order of the analytical steps is certain. First, an importing WTO Member must prove its trade-restrictive measure falls within an itemized exceptions in Article XX. Assuming the answer is "yes," then the Member must show its measure meets the criteria in the *chapeau* of Article XX. Is this logical Two-Step procedure also mandatory for an Article XI:2(c) issue? That is, must an importing Member show, first, its measure fits within Sub-paragraph (i), (ii), or (iii), and if so, then show that the measure satisfies the *chapeau* terms? The answer is not clear.

Chapter 19

FOURTH PILLAR (CONTINUED): CASE LAW ON GATT ARTICLE XI RELATIONSHIPS[761]

I. 1989 *U.S. Sugar* Case and Relationship between Articles II and XI:1

GATT Article XI:1 stands alongside other pillar obligations of GATT, adding to the support for freer and more open trade.[762] In some cases, the same facts can give rise to multiple causes of action, *i.e.*, allegations of breach of more than one pillar obligation. In other cases, one pillar obligation can be set against another, raising a potential or even actual conflict between different Articles. For example, consider the 1989 GATT Panel Report in *United States – Restrictions on Imports of Sugar*.[763] In this dispute, Article II was used as a defense – unsuccessfully – to a breach of Article XI:1.

● History of American Sugar Import Quotas

The facts of the *U.S. Sugar* case date from the 1949 Annecy Round. During this Round, America negotiated a tariff concession on imports of raw and refined sugar. America made this concession subject to a provision relating to Title II of its *Sugar Act of 1948* or substantially equivalent legislation. Title II of the *Sugar Act* required the American Secretary of Agriculture to establish quotas on the imports of sugar based on his yearly determination as to how much sugar would be needed to satisfy consumer demand in America. Thus, the tariff concession was limited in that America preserved the ability to impose quotas on sugar imports. Indeed, this possibility of imposing sugar import quotas is called the "limitation" or "limiting provision," because it restricts the tariff concession.

The U.S. was careful to include both the sugar tariff concession and the limitation on this concession in its Schedule. Both, therefore, became an integral part of GATT by virtue of Article II:7. After the Annecy Round, the U.S. enlarged the limiting provision to allow the President to set a sugar import quota if the 1948 *Sugar Act*, or substantially equivalent legislation, expired. That is, the enlargement concerned delegated power from Congress – if Congress failed to take action, then the President had the delegated authority to do so. Following the Torquay, Geneva, Dillon, Kennedy, and Tokyo Rounds, the U.S. included the enlarged limiting provision in its Schedule of Concessions.

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761 Documents References:
(1) *Havana (ITO) Charter* Articles 4, 6, 13, 20-21, 38-39
(2) GATT Article XI and XVIII:B
(3) *NAFTA* 1.0 Chapters 9, 18
(4) Relevant provisions in other FTAs

762 In addition to the 1989 *U.S. Sugar* and 2001 *Korea Beef* cases dealing with the interaction between Article XI and other provisions of GATT, see the 1989 *Dessert Apples* case, which is treated in Raj Bhala, *Modern GATT Law*, Chapter 38, Sections VIII (discussing the narrow interpretation given to Article XI:2(c)) and XI (concerning Articles XI:2 and XXXVII).

763 *See* B.I.S.D. (36th Supp.) 331 (1989) (adopted 22 June 1989). [Hereinafter, *U.S. Sugar* GATT Panel Report.]

By Proclamation 3822 of 16 December 1967, President Lyndon Johnson added to the Tariff Schedule this limiting provision as a Head Note. When, in 1988, the U.S. modified its Schedule to accord with the HS, it included the limiting provision in its HTS as a Head Note. In effect, the Head Note authorized the President to raise the American sugar import tariff above the bound rate, or to impose quotas on sugar imports. It stated:

> 2. The rates in Sub-Headings 1701.11, 1701.12, 1701.91.20, 1701.99, 1702.90.30, 1702.90.40, 1806.10.40 and 2106.90.10, on 1 January 1968, shall be effective only during such time as Title II of the *Sugar Act of 1948* or substantially equivalent legislation is in effect in the United States, whether or not the quotas, or any of them, authorized by such legislation, are being applied or are suspended:
>
> *Provided,*
>
> (a) That, if the President finds that a particular rate not lower than such 1 January 1968 rate, limited by a particular quota, may be established for any articles provided for in the above-mentioned subheadings, which will give due consideration to the interests in the United States sugar market of domestic producers and materially affected contracting parties to the General Agreement on Tariffs and Trade, he shall proclaim such particular rate and such quota limitation, to be effective not later than the 90th day following the termination of the effectiveness of such legislation;
>
> (b) That any rate and quota limitation so established shall be modified if the President finds and proclaims that such modification is required or appropriate to give effect to the above considerations; and
>
> (c) That the 1 January 1968 rates shall resume full effectiveness, subject to the provisions of this note, if legislation substantially equivalent to Title II of the *Sugar Act of 1948* should subsequently become effective.[764]

Interestingly, the enlargement went unchallenged, that is, no case was brought under Article XXIII challenging the legality of the American action under GATT to expand the limiting provision. In fact, until the 1989 *U.S. Sugar* case, no challenge was brought against the original limiting provision itself.

On 31 December 1974, well before the Tokyo Round was finished, the 1948 *Sugar Act* expired. Congress did not replace this *Act* with substantially equivalent legislation. At that point, the HTS Head Note became legally relevant, and President Ronald Reagan invoked it on 5 May 1982. He issued Presidential Proclamation 4941 through which he

764 *Quoted in U.S. Sugar* GATT Panel Report, 331, 332 at ¶ 2.3.

imposed quotas on imported sugar. These quotas were part of an emergency program to regulate sugar imports generally, and thus sugar supply, in the U.S. Following this Proclamation, the Secretary of Agriculture determined the total size of the global sugar import quota, and allocated the quota allotments to various sugar-exporting countries. Australia received 8.3% of the total American sugar import market.

Under America's Uruguay Round commitments, the minimum annual total imports of sugar to which it agreed was 1.7 million metric tons. Through its TRQ regime, the U.S. stuck to this minimum, and from 2008-2017, three countries accounted for nearly one-half of all imports: Dominican Republic (17%); Brazil (14%); and Philippines (13%). In August 2017, USDA announced an increase in permissible sugar imports of 244,690 metric tons, so as to address domestic shortages.[765] Overall, the TRQs limit imported sugar to about 85% of U.S. sales, thereby reserving 15% of the market for American producers and refiners.[766] However, the U.S. is in a chronic shortage state, because it regularly consumes more sugar than it produces. But, consumer preferences exacerbated the shortage. America's refined sugar traditionally comes from GM beets, but health-conscious consumers prefer non-GMO sugar cane. American producers cannot meet demand for that source, hence the need for the USDA to allow higher TRQ volumes.

- **Winning Australian Argument**

In the GATT dispute, Australia was unhappy with its changed allotment, so it sued the U.S. The gravamen of its complaint, which was successful, was the American sugar import quota violates Article XI:1. Australia recalled this pillar obligation precludes a contracting party from maintaining any prohibition or restriction, other than tariffs, and thus bars quotas or import licensing schemes. Anticipating the American defense of its quota regime, Australia argued Article XI:2(c)(i) was inapplicable to the case. Article XI:2 contains exceptions from the broad Article XI:1 proscription, but there are criteria to be satisfied if the exception is to be invoked successfully in defense of a quantitative restriction.

First, that restriction must be necessary to enforce an existing government program. The *chapeau* to Paragraph 2(c) contains this criterion. Second, the program must be designed to restrict the quantity of a like domestic product (*e.g.*, a price support scheme that pays farmers not to produce). Paragraph 2(c)(i) sets forth this criterion. Third, the restriction must not reduce the total of imports relative to the total of domestic production. The penultimate sentence of Paragraph 2(c) houses this criterion.

Australia said the U.S. failed to fulfill these criteria. The U.S. could not claim enforcement necessity, because it had no domestic measure. There was no Government measure regarding sugar designed to limit the quantity of cane or beet sugar produced in

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765 *See* USDA, *USDA Increases the Fiscal Year 2017 Raw Sugar Tariff-Rate Quota*, 82 Federal Register 34472 (25 July 2017), www.federalregister.gov/documents/2017/07/25/2017-15572/usda-increases-the-fiscal-year-2017-raw-sugar-tariff-rate-quota.

766 *See* Justin Villamil, *Sugar Barons Amass $8.2 Billion Fortune by Inflating U.S. Prices*, 34 International Trade Reporter (BNA) (17 August 2017).

the U.S. For example, there was no USDA program paying sugar farmers not to produce more than a specified amount. Further, owing to American sugar import quotas, total sugar imports had declined, while total production in the U.S. had risen.

On the offensive, Australia argued the U.S. sought to use 1 provision of GATT to overrule another provision.[767] In particular, a qualification to a tariff concession, which may be valid under Article II:1(b), cannot be justified if the qualification runs afoul of Article XI:1. That is, a qualification made in accordance with Article II:1(b) to a tariff concession cannot justify measures contrary to other provisions of GATT. Yet, the limiting provision in the American Schedule of Concessions was in its operation inconsistent with other parts of GATT. If the U.S. were permitted to maintain this qualification on the ground it is consistent with Article II:1(b), then any contracting party could impose a quantitative restriction on a tariff concession with impunity. The consequence would be to vitiate the concession, and render Article XI:1 meaningless. A mockery would be made of multilateral trade law, as contracting parties could act unilaterally to derogate from their promises on tariff bindings, which once embodied in a Schedule, would be free of the discipline under other fundamental obligations.

- **Unsuccessful American Rebuttal**

The U.S. replied the tariff concession it negotiated in the Annecy Round was the basis for its sugar import quota scheme, and that it had included the concession – with the limitation – in its Tariff Schedule in every Round since then. It urged the concession was consistent with Article II:1(b). To be sure, this obligation requires merchandise described in a Schedule to be exempt from OCDs in excess of those set forth in the Schedule. But, the first sentence of this obligation also says this requirement is "subject to the terms, conditions or qualifications set forth in that Schedule." By virtue of Article II:7, once a negotiated provision is included in a tariff schedule, it becomes an integral part of GATT, *i.e.*, the Schedules are annexed to GATT and made an integral part thereof.

Essentially, America accused Australia of asking a GATT Panel to do what Australia could not get by negotiation in a Round, namely, terminate or modify a tariff concession. It also accused Australia of hypocrisy, observing there had been many occasions on which a contracting party, including Australia, has put non-tariff conditions in its tariff schedule. Underlying this defense was the proposition that a Tariff Schedule is not limited in scope to containing only tariff conditions. A Schedule also can contain non-tariff conditions, including quantitative restrictions. After all, if the only type of condition a contracting party could put in a Schedule was one consistent with the rest of GATT, *i.e.*, if a contracting party could do in a Schedule only what it could do elsewhere under GATT, then qualifications and Article II:1(b) would be largely meaningless.

The U.S. had a rebuttal to the Australian argument about the relationship between Articles II and XI. One provision of GATT, said the U.S., cannot overrule another. Its negotiated concession is valid under Article II. Therefore, Article XI:1 cannot strike it

767 *See U.S. Sugar* GATT Panel Report, 331, 336 at ¶ 3.10.

down. To be sure, this rebuttal was ironic, if not hypocritical. America used one provision (Article II:1(b)) to strike down another provision (Article XI:1).

- **Issue**

The central issue in the *U.S. Sugar* case thus was joined: could a qualification made pursuant to Article II:1(b) to a negotiated tariff concession, which is set forth in the Tariff Schedule of a contracting party and, therefore, is an integral part of GATT by virtue of Article II:7, be struck down because it violates another provision of GATT, such as Article XI:1? Put simply, must a tariff concession qualification be consistent with the rest of GATT? The Panel answered the question clearly: "yes."

- **Holding and Rationale**

The Panel held Article II:1(b) does not permit a contracting party to qualify its obligations under other provisions of GATT. Accordingly, the American qualification on the maintenance of QRs on importing sugar, which are inconsistent with Article XI:1, cannot be justified.[768] The fact the U.S. negotiated the limitation on the tariff concession ("subject to the 1948 *Act* or substantially equivalent legislation") freely with Australia in the 1949 Annecy Round was irrelevant. Moreover, the fact the U.S. expanded unilaterally the limitation later (to allow for the President to impose quotas on his own, if the 1948 *Act* or successor legislation expired) hardly helped the American position. Rather, the key fact was the limitation set forth in the U.S. Tariff Schedule violates Article XI:1. Put directly, the Panel held that a country cannot take away, through a limitation under Article II, what Article XI:1 demands.

This ruling implied that from the outset – 1949 – the limiting provision was illegal under GATT for the simple reason it violated Article XI:1, and the U.S. made matters worse when it expanded the limitation. Not surprisingly, the Panel recommended America terminate its sugar import quotas.

- **Two Questions**

One intriguing question the Panel holding raises is why Australia did not bring the case earlier, in particular, in 1949? Apparently, Australians freely negotiated and agreed to the limiting provision, so they were disinclined to sue immediately over this provision. Yet, why not sue in 1974, when the 1948 *Act* and substantially equivalent legislation expired the legislation lapsed. Presumably, Australia was satisfied with the size of its sugar quota (or, put less diplomatically, it was "bought off"), and did not exceed this quota. However, the interests of Australian sugar exporters were damaged when President Reagan, invoking the expanded limitation, imposed a new quota.

Another intriguing question is how to interpret the holding of the Panel. A careful reading of its Report indicates there are 2 possibilities – the "strong form" and the "weak form" of the holding. The "strong form" of the holding is a qualification to a tariff

768 *See especially* U.S. Sugar GATT Panel Report, 331, 343 at ¶ 5.7.

concession must be (1) about that tariff concession, and (2) consistent with all other GATT obligations. The "weak form" of the holding is a qualification to a tariff concession (1) can be about any matter covered by GATT, but (2) must be consistent with all GATT obligations. Of these possibilities, the "strong form" appears more correct. Indeed, the rationale of the Panel squares with this version.

The Panel studied Article II:1(b). It noted the text has the phrase "subject to the … qualifications set forth in that Schedule" in conjunction with the words "shall … be exempt from ordinary customs duties in excess of those set forth in [the Schedule]." The permission to qualify is next to the tariff binding language. This juxtaposition means Article II:1(b) allows a contracting party to qualify its obligation to exempt products from customs duties in excess of the bound levels specified in its Schedule.

But, it does not mean the provision authorizes a contracting party to qualify its obligations under other parts of GATT. Indeed, nothing in the drafting history of Article II suggests the drafters intended the American interpretation. Furthermore, the title of Article II is "Schedules of Concessions." The ordinary (or plain) meaning of "concede" is to grant or yield. The rubric suggests Article II is about a contracting party yielding rights, but not diminishing its own obligations. That is, Article II is about giving up the right to impose tariffs on imports, not about getting out from under non-tariff obligations.

According to the Panel, the purpose of GATT and the practice of the contracting parties reinforces this inference. As for the purpose, the *Preamble* to GATT emphasizes the reduction of tariff and NTBs. It would be inconsistent with that purpose to allow a contracting party to make a tariff concession under Article II, and simultaneously qualify the concession with a quantitative restriction that is otherwise forbidden under Article XI. As for GATT practice, in 1955 the CONTRACTING PARTIES adopted a report of a *Review Working Party on Other Barriers to Trade*. That *Report* stated when a contracting party negotiates for a tariff binding, it is free to negotiate on matters concerning the practical effects of tariff concessions, and to incorporate such matters into its Tariff Schedule.

But, significantly, the *Report* stressed "the results of such negotiations should not conflict with other provisions of the Agreement." In the *Sugar* case, the U.S. urged this Report was a policy recommendation, and Australia called it a legal requirement. The Panel said it does not matter which status it accords to the *Report*. Either way, it is unambiguous that the CONTRACTING PARTIES did not envision the use of qualifications in Schedules to justify measures inconsistent with other parts of GATT.

- **Overstated? Disingenuous?**

Might it be said the American argument was overstated? Is it true that the right to qualify a concession in a Tariff Schedule is meaningless if the qualification has to be consistent with other GATT obligations? To the contrary, horizontal consistency, in the sense of complying with all GATT provisions when limiting the scope or nature of a concession, imparts real meaning to the limitation. That meaning is to give priority to the

rule of law and discipline behavior that is clever but unilateral. Had Australia behaved that way, it is reasonable to believe the U.S. would have insisted on discipline.

In addition, it may be remarked the U.S. was disingenuous in the way it handled sugar import quotas and the limiting provision. The original 1949 Annecy Round limiting provision related to the 1948 *Sugar Act* or substantially equivalent legislation. It did not authorize the President to impose quotas on sugar imports if such legislation expired. Rather, the President could establish quotas only pursuant to the legislation. Yet, after 1949 the limiting provision was enlarged to authorize the President to impose quotas, regardless of whether the 1948 *Act* or substantially equivalent legislation remained "on the books," and this enlarged provision made its way into the HTS Head Note.

Suppose the limiting provision had not been inconsistent with any other GATT provision, and comported with Article XI. Would it not be unreasonable, and possibly illegal under Article II, for the U.S. to enlarge unilaterally the scope of the limiting provision after it initially set this provision in its Tariff Schedule? By this enlargement, the U.S. undermined the value of its tariff concession on sugar. Put differently, surely Australia would have (at least) a claim under Article XXIII:1(b) of non-violation nullification and impairment? In brief, even if what America had done was lawful under Articles II and XI, it negated the value of its Article II concession in the Annecy Round.

Perhaps also it might be said the U.S. was disingenuous as to the limiting provision.[769] In the Annecy Round, the other contracting parties did not authorize the U.S. to set sugar import quotas regardless of the existence of the 1948 *Sugar Act* or substantially equivalent legislation. Rather, the bargain was permission to impose quotas contingent on the life of the *Act* or replacement legislation. So, in 1974, when the 1948 *Act* lapsed and was not replaced, the limiting provision allowing a quota died too.

II. 2001 *Korea Beef* Case and Relationship between Articles III:4 and XI:1

Article XI:1 stands alongside other pillar obligations of GATT, adding to the support for freer and more open trade. In some cases, the same facts can give rise to multiple causes of action, *i.e.*, allegations of breach of more than one pillar obligation. Conversely, the distinction among the pillars is always a clean one. In some instances, it may be difficult to discern which obligation is the relevant one.

Consider the line, as it were, between Articles III:4 and XI:1. Professors Matsushita, Schoenbaum, and Mavroidis delineate it as follows:

> GATT Article XI:1, by its terms, reaches restrictions placed on the "importation" of products or the "exportation or sale for export" of any product. Thus, it is to be distinguished from GATT Article III (national treatment), which deals with *internal* requirements that apply to products after they have cleared customs. Thus, Article XI applies to measures that affect the actual *importation* of products, while Article III deals with

769 Australia suggests this point in Paragraph 3.17 of the *U.S. Sugar* GATT Panel Report.

> measures *affecting* imported products. There is some confusion, however, between Article XI:1 and Article III, because *Ad Article III* states that a measure "enforced or collected in the case of an imported product at the time or point of importation" can be regarded, if appropriate, as an internal measure. The difference between the two Articles can be crucial, because Article III permits internal measures that are non-discriminatory as between domestic and imported products, while Article XI:1 prohibits quotas, import and export licenses, and any other measures that restrain trade other than duties, taxes, and other charges. It is, for example, permissible to enforce a size limitation on imported lobsters equal to that imposed on domestically caught lobsters. Size is an internal regulation even though it is enforced on importation. It is not permissible, however, to ban imported tuna because of the way it is harvested (without regard to dolphin mortality). This ban is an impermissible import measure and not an internal regulation because the *product as such* is unaffected by a requirement relating to the way in which it is harvested or produced. Distinguishing between Article III and Article XI may be difficult in some cases, as these examples show.[770]

To add to this explanation, it is worth considering a case example suggesting an interaction between Articles III:4 and XI:1, namely, the 2001 Appellate Body Report in *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*.[771]

In the 2001 *Korea Beef* case, America successfully challenged the Korean regulatory scheme for imported beef under the national treatment obligation of Article III:4 (the principal American claim), as well as under Article II:1 (the tariff binding rule, which Korea violated because it imposed a mark-up on sales of imported beef, particularly beef from grass-fed cattle, as a result of the operation of its Simultaneous Buy/Sell (SBS) System). In addition, the America was successful in claiming Korea's scheme violated Paragraph 1 of Article XI, the rule against quantitative restrictions, though this success was at the Panel stage, as the ruling was not appealed.[772]

The U.S. charged the violation of Article XI:1 arose out of the operation of the Livestock Product Monitoring Organization. The Government of Korea granted the LPMO a partial monopoly over the importation and distribution of beef. The LPMO imported beef at world market prices through a tender system. On a daily basis, the LPMO set a minimum acceptable wholesale auction price for each cut and brand of imported beef. The LPMO sold the beef it imported only at or above this minimum price to wholesale buyers.

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770 MATSUSHITA ET AL., 124-125 (2003). (Emphasis original.)

771 *See* WT/DS161/AB/R and WT/DS169/AB/R (adopted by 10 January 2001). [Hereinafter, 2001 *Korea Beef* Appellate Body Report.] Australia brought a complaint against Korea on the same basis as the U.S., and the two complaints were treated together. This discussion draws on the Report, ¶¶ 5, 90-92, 94, 107-108, 130.

772 Article XI:1 was not at issue on appeal. *See* 2001 *Korea Beef* Appellate Body Report, ¶ 75. The U.S. also urged – successfully before the Panel, but unsuccessfully on appeal – the same facts constituting a violation of Article XI:1 violated Article 3:2 of the WTO *Agreement on Agriculture*. Finally, claimed the U.S., the limitations on sales of imports to the LPMO and super-groups, contravened Articles 1 and 3 of the WTO *Agreement on Import Licensing Procedures*.

The minimum auction prices reflected a plan drafted annually by the LPMO for purchases and distribution of imported beef that accounted for current and forecast levels of domestic beef demand, supply, and pricing. After the auction, the LPMO-imported beef was sold from the wholesale market, controlled by the LPMO, to specialized imported beef stores. These stores had to display a special sign, which stated "Specialized Imported Beef Store." Further, these stores had to pay for the imported beef with cash. The U.S. examined this auction scheme and, to put it bluntly, found the whole thing amounted to a rigged market.

Two other bases on which the U.S. claimed a violation of Article XI:1 were quite specific. First, between November 1997 and May 1998, the LPMO behaved in such a way as to impose import restrictions on imported grass-fed beef. Aside from its job of importing a portion of the Korean beef quota, the LPMO also was responsible for inviting tenders and selling the beef it had imported at auctions. Indeed, the LPMO arranged for importation of its share of Korea's quota through a tendering system. It then re-sold the beef it imported through via auction to wholesalers, or it transferred the beef directly to processors or the Korean military. America pointed out that, on some occasions, the LPMO failed to call for tenders, while on other occasions it delayed in issuing the call. When the LPMO made a call for tenders, it did so subject to a distinction between grass-fed cattle and grain-fed cattle. The LPMO also delayed in providing quota allocations. In other words, the LPMO's tendering and quota allocation processes were quantitative restrictions inconsistent with Article XI:1.

Second, said the U.S., the LPMO "discharge" practices also were problematical under this GATT provision. These practices concern the storage of imported beef, and its discharge after sale at an auction. Storage and discharge was handled by one of twelve super-groups in the SBS system, namely, the National Livestock Cooperatives Federation (NLCF). In performing these tasks, the NLCF operated on behalf of the LPMO. The NLCF had the discretion to decide the amounts of imported beef discharged from storage. It did so daily, taking into account prices of domestically-produced beef. Here again, urged the U.S., was another unauthorized QR in violation of Article XI:1.

What relationship existed between the Article XI:1 claim and national treatment? Because the aforementioned restrictions applied only to imported beef, they denied national treatment. The U.S. charged there was an additional ground for finding a violation of Article III:4 (*i.e.*, additional to the principal American claim under this provision). Moreover, the LPMO tendering practices provided further grounds for finding a violation of Article II:1(a). The distinction made by the LPMO tendering calls between grass-fed and grain-fed beef, resulted in less favorable treatment to grass-fed beef than was set forth in Korea's Schedule of Concessions.

As intimated earlier, the Panel agreed with the American claims under Article XI:1 (as well as under Articles II:1 and III:4). That is, held the Panel, the LPMO tender practices violated Article XI:1 The matter was not raised on appeal.

III. 2015 *Argentina Import Measures* Case, Relationship between Articles VIII and XI:1, and Criteria for Applying Article XI:1

● Managed Trade in Argentina (Again)

To help protect domestic industries amidst deteriorating global economic conditions, reindustrialize, and reduce its trade deficit, in 2009 Argentina returned to the kinds of managed trade measures for which it was infamous from the 1930s to 1976, impeding imports and boosting domestic production and exports. Indeed, senior Argentine government officials publicly declared their policy to be one of "managed trade" (*comercio administrado*) with the goals of "*inter alia*, substituting imports for domestically produced goods and reducing or eliminating trade deficits."[773] The policy was coordinated by the President, Minister of Industry, and Secretary of Trade, and covered a vast swathe of the economy, including agricultural machinery, automobiles, electronic and office products, foodstuffs, medicines, mining equipment, motorcycles, publications, and T&A.

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

(1) Import Reduction Requirement:

Importers were compelled to limit the value or volume of their imports. Price controls on imports were imposed to reduce prices.

(2) Prior Approval Requirement:

Exporters were mandated to obtain prior registration and approval before shipping merchandise to Argentina. That is, all goods needed pre-approval to be imported.

(3) Import Licensing Requirement:

In addition to prior approval, over 600 tariff lines (at the 8-digit level of the HS) of consumer and industrial products also needed an import license. Among the items subject to these non-automatic import licenses were: air conditioners, autos and auto parts, bicycles, chemicals, electrical machinery, footwear, home appliances, laptops, luggage, machinery and tools, paper, plastics, tires, toys, T&A, and tractors. Getting a license meant navigating bureaucratic, non-transparent rules, waiting for long periods to get one, and sometimes never getting one for no reason at all.

(4) One-to-One Trade Balancing Requirement:

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[773] WTO Appellate Body Report, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, and WT/DS445/AB/R ¶ 4:14 (adopted 26 January 2015). [Hereinafter, *Argentina Import Measures* Appellate Body Report.]

A trade-balancing rule was imposed whereby companies in the country had to export dollar-for-dollar at least as much Argentine-merchandise of an equal or greater value, increase the local content of the good they made, build production facilities in Argentina, refrain from transferring benefits abroad, and/or control the prices of their good, if they hoped to continue importation. The core of this Requirement was firms had to export a value of goods out of Argentina that was linked to the value of goods they imported, namely, annual exports had to be at least the same value of annual imports.

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

(5) Local Content Requirement:

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

(6) Non-Repatriation Requirement:

Companies were barred from repatriating funds, including profits, from Argentina to their home or other foreign country.

(7) Minimum Balance Requirement:

Foreign companies were mandated to keep a certain minimum amount of revenue in Argentina.

(8) Investment Requirement:

Companies had to make or increase their investments, including in production facilities, in Argentina.

(9) Transportation Requirement:

> Foreign mining companies were subjected to the above-mentioned import substitution rules. Further, they were obliged to use Argentine companies for air, land, river, and sea cargo.

It would be an overstatement to say Argentina sought to "shut down trade" and "turn to autarky," but its measures certainly were breathtaking.

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

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

Likewise, as regards the Trade Balancing Requirement, many "household" and/or global luxury brand names signed such accords, including (in the automobile sector), Alfa Romeo, BMW, Fiat, Hyundai, KIA, Mercedes, General Motors, Nissan, Porsche, Peugeot-Citroën, Renault, and Volkswagen.[774] Hyundai's agreement with the Argentine government was an interesting example of how it used the third technique ((c)) to satisfy this Requirement: Hyundai arranged with local producer-exporters to have exports of biodiesel, peanuts, soy flour, and wine, collectively valued at U.S. $157 million, count as offsetting Hyundai's imports of autos and auto parts.

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

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

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774 *See Argentina Import Measures* Appellate Body Report, footnote 190 at ¶ 4:3.

build a new automobile model designed for export, and promised a trade surplus of $231 million by 2012.

Similarly, the government linked the Non-Repatriation Requirement to the Trade Balancing or Local Content Requirement. It did so with respect to firms in the agricultural machinery, car and truck, and mining businesses. For example, Claas (an agricultural machinery manufacturer) agreed with the government not to transfer profits overseas between 2011 and 2014. That pledge was coupled with commitments by Claas to invest $60 million in 2 domestic plants, raise local content of tis combine harvesters to 55% by 2013, increase production in Argentina of those harvesters to 800 units by 2015, and export 600 of them.

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

Argentina also established the so-called "*DJAI* procedure" (*i.e.*, the "Advance Sworn Import Declaration," or "*Declaración Jurada Anticipada de Importación*"). Essentially, the *DJAI* was the means by which Argentina enforced the TRRs, though the Appellate Body, like the Panel before it, characterized it as the second of the 2 disputed measures (the TRRs being the first). The *DJAI* technically applied to any imports for consumption in Argentina. Under the *DJAI*, for importers to obtain the necessary prior government approval, government officials had to "observe" their proposed imports, and only thereafter could bring merchandise into Argentina. The Federal Public Revenue Administration (*Administración Federal de Ingresos Públicos*) (*AFIP*) implemented the *DJAI* pursuant to the AFIP General Resolution 3252/2012, which took effect on 1 February 2012.

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

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

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

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

4.19. If a government agency enters an observation, the *DJAI* will move to "observed" status. Goods covered by a *DJAI* in "observed" status cannot be imported into Argentina. If a *DJAI* moves to "observed" status, prospective importers must: (i) identify the agency that entered the observation; (ii) contact such agency in order to be informed of the supplementary documents or information that must be provided; and (iii) provide the supplementary documents or information. A single *DJAI* may be "observed" by any of the participating agencies, and where multiple agencies enter observations, the importer must consult with each agency separately. A *DJAI* will leave "observed" status, and proceed to "exit" status, only after all observations have been lifted by the relevant agency or agencies.

> 4.20. Of the four agencies that currently participate in the *DJAI* procedure, the Secretariat of Domestic Trade (*Secretaría de Comercio Interior*) (SCI) is of particular relevance to these disputes. According to the *Preamble* of SCI Resolution 1/2012, it is "necessary" for the SCI to have access to the information provided in the *DJAI* procedure "[to perform] analyses aimed at preventing negative effects on the domestic market, since the qualitative and/or quantitative importance of imports to be made has the effect of impacting domestic trade." To this extent, the SCI is entitled to enter observations relating to the importation of any type of product to verify *a priori* whether the importer or declarant has complied with specified Argentine laws. Moreover, the SCI has 15 working days following registration of the *DJAI* to enter observations. The SCI "systematically" imposes on importers requirements that are neither set out in any laws nor indicated in official publications explaining the operation of the *DJAI* procedure. As a condition to lift observations on *DJAIs*, in certain instances, the SCI has also required prospective importers to increase exports, to begin exporting, or to commit to other TRRs so as to achieve a trade balance.
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> 4.21. A *DJAI* will proceed to "exit" status if no government agency enters an observation within the prescribed time period, or if all observations made by agencies are lifted within 180 calendar days from registration. A *DJAI* in "exit" status can be converted automatically into a customs clearance procedure. To initiate the customs clearance procedure, an importer must re-access the *SIM* system and formally request the importation of goods. The *DJAI* will proceed to "voided" status if an importer withdraws its *DJAI*, an observation is not lifted, or a *DJAI* in "exit" status is not used either within 180 calendar days from registration or after the extension period. Once the *DJAI* has been used – *i.e.*, the goods have cleared customs – the *DJAI* will enter into "cancelled" status.[775]

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

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

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[775] *Argentina Import Measures* Appellate Body Report, ¶¶ 4:17-4:21 (footnotes omitted).

> The domestic courts concluded that the challenged *DJAI* procedures had: (i) unreasonably delayed the approval of *DJAIs* beyond the time-limits in the legislation; (ii) made it impossible for applicants to move the procedure forward inasmuch as observations are neither produced in hard copy nor communicated through the website portal; and (iii) affected the applicants' right of defense inasmuch as the circumstances give rise to a prohibition on the import operation, without valid legal grounds.[776]

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

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

Argentina fired back. Rich countries had betrayed poor ones in the Doha Round. Rich countries had failed to commit to eliminate agricultural export subsidies, retained high tariffs on agricultural imports, and erected NTBs of their own under the guise of SPS, environmental, or animal welfare concerns. Yet, rich countries hypocritically pressured poor countries to remove their trade barriers on both agricultural and industrial products, and negotiated deals in small, cabal-like groups outside the auspices of the Doha Round. As the world's number 1 soymeal and soy oil exporter, number 2 corn exporter, number 3 soybean exporter, and number 4 wheat exporter, Argentina was especially hard hit by farm trade barriers to rich country markets.

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

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776 *Argentina Import Measures* Appellate Body Report, footnote 272 at ¶¶ 4:22.

As for lemons, starting in 2001, America closed its market to shipments from northwest Argentina, following lobbying by Arizona and California citrus producers. They were unhappy Argentina sent 20,000 metric tons of lemons to the U.S. following a June 2000 decision by the USDA in June 2000. That decision was to lift a ban on Argentine lemons, but the producers successfully challenged it as arbitrary and capricious.[777] So, the U.S. told Argentina the lemons posed a risk of the *xanthomonas campestris,* a citrus canker disease, but Argentina said its 4 northwest provinces are free of the ailment. The American producers found an ally in President Donald J. Trump, who in January 2017 stayed implementation of an APHIS rule his predecessor had set in December 2016 to allow importation of the northwestern Argentinian fresh lemons.

Argentina launched a counter-attack: in cases launched against the meat and lemon restrictions in August and September 2012, respectively, Argentina alleged the U.S. had no scientific justification for protectionism. Whatever the political appeal of Argentina's contentions might have been, as a legal matter Argentina lost the WTO case. In January 2015, the Appellate Body issued its Report, finding against Argentina on all 3 points:

(1) The Appellate Body held the controversial above-listed trade-related requirements Argentina imposed as a condition to import were a single measure (the TRR measure) that restricted importation in violation of GATT Article XI:1.

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

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

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

- **Argentina's Losing Argument under GATT Articles VIII and XI:1**

Argentina argued unsuccessfully that the Panel erred in holding the *DJAI* violated GATT Article XI:1. The essence of the Panel's rationale was that because approval of a *DJAI* for a prospective importer is not "automatic," the procedure runs afoul of Article XI:1. Only of a procedure led ineluctably to approval for importation would it not be a QR on trade. On appeal, Argentina urged "the mere fact an import formality or requirement does not result in the 'automatic' importation of goods does not render it a restriction under Article XI:1."[778]

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[777] *See Harlan Land Company, et al. v. United States Department of Agriculture, et al*., (U.S. District Court, E.D. Calif., 27 September 2001) (Case #CV-F-00-6106-REC/LJO).

[778] *Argentina Import Restrictions* Appellate Body Report, ¶ 5:207.

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

> 1. (a) All fees and charges of whatever character (other than import and export duties and other than taxes within the purview of Article III) imposed by Members on or in connection with importation or exportation shall be limited in amount to the approximate cost of services rendered and shall not represent an indirect protection to domestic products or a taxation of imports or exports for fiscal purposes.
>
> (b) The Members recognize the need for reducing the number and diversity of fees and charges referred to in subparagraph (a).
>
> (c) The Members also recognize the need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements.
>
> 2. A Member shall, upon request by another Member or by the Ministerial Conference, review the operation of its laws and regulations in the light of the provisions of this Article.
>
> 3. No Member shall impose substantial penalties for minor breaches of customs regulations or procedural requirements. In particular, no penalty in respect of any omission or mistake in customs documentation which is easily rectifiable and obviously made without fraudulent intent or gross negligence shall be greater than necessary to serve merely as a warning.
>
> 4. The provisions of this Article shall extend to fees, charges, formalities and requirements imposed by governmental authorities in connection with importation and exportation, including those relating to:
>
> (a) consular transactions, such as consular invoices and certificates;
> (b) quantitative restrictions;
> (c) licensing;

(d) exchange control;
(e) statistical services;
(f) documents, documentation and certification;
(g) analysis and inspection; and
(h) quarantine, sanitation and fumigation.[779]

As for Article XI:1, it says:

> No *prohibitions or restrictions other than* duties, taxes or other charges, whether made *effective* through quotas, import or export licenses or other measures, shall be instituted or maintained by any Member on the *importation* of any product of the territory of any other Member or on the *exportation* or sale for export of any product destined for the territory of any other Member.[780]

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

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

So, Argentina argued, to interpret the provisions harmoniously, it is necessary to differentiate "the trade-restrictive effect of a formality or requirement itself [a matter for Article VIII] from the trade-restrictive effect of any substantive rule of importation that the measure implements [a matter for Article XI:1]:"[781]

> In Argentina's view, this harmonious interpretation must provide a basis for identifying the point at which an Article VIII import formality or requirement becomes a prohibited "quantitative restriction" under Article XI:1.[782]

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

> [I]mport formalities and requirements can only be found to be inconsistent with [GATT] Article XI:1 … where it is demonstrated that: (a) the formality or requirement *limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any*

779 Footnote omitted.
780 Emphasis added.
781 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:225.
782 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:238.

> *substantive rule* of importation that the formality or requirement implements; and (b) this separate and independent trade-restricting effect is *greater than the effect that would ordinarily be associated with a formality or requirement* of its nature….[783]

This Test, said Argentina, would result in the proper interpretation and application of Article XI:1, and also help differentiate the scope of that provision from Article VIII. To Argentina, "the Panel failed to recognize that an import formality or requirement could have some degree of trade-restricting effect that is 'an ordinary incident of the formality or requirement itself' and that does not render the formality or requirement inconsistent with Article XI:1."[784]

It was a losing argument, and thankfully so. Article XI:1 is a pillar of GATT, embodying a complete ban on QRs. Common sense suggests anything short of automatic approval for importation following completion of a formality would undermine this ban. Governments cleverly could craft procedures in which they, like Argentina, could exercise considerable discretion in the way they administer them and the outcomes that follow. They could sneak into their trade rules violations of Article XI:1 under the (mis-) characterization of the Article VIII "fees and formalities" rubric.

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

> Argentina requests us to … find that import formalities and requirements can be found to be inconsistent with Article XI:1 only where it is demonstrated that: (i) the formality or requirement limits the quantity or amount of imports to a material degree that is separate and independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (ii) this separate and independent trade-restricting effect [of the formality or requirement in controversy] is greater than the effect that would ordinarily be associated with a formality or requirement of its nature.[785]

At issue under Step 1 was "whether an import formality or requirement limits the importation of products independently of any substantive restriction that such formality or requirement may implement."[786] Unpacking this language suggested that under Step 1, multiple questions had to be considered:

(1) Does the disputed requirement "limit" imports?
(2) Is the degree of limitation "material"?
(3) Is there a "substantive" rule concerning importation?
(4) Does the requirement "implement" that substantive rule?

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783 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:208.
784 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:224.
785 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:223.
786 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:244.

(5) Does the substantive rule "restrict" trade?
(6) Is the material limitation caused by the requirement "separate and independent" from any trade-restrictive effect of the substantive rule that the requirement implements?

If the answer to each of these questions were "yes," then the analysis would proceed to Step 2. Under Step 2, still more questions would need resolution:

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

The outcome of Step 2, said Argentina, would delineate the line at which an import formality governed by Article VIII crosses into the ambit of Article XI:1 and is a prohibited QR under the latter provision.

The first question under Step 2 was counterfactual, designed to create a benchmark against the actually-observed trade restrictive effect of the disputed requirement. The second question then was comparative, measuring the trade-restrictiveness of the disputed measure against that of the substantive rule the measure implements. In concocting this Framework, Argentina was characterizing its *DJAI* as a requirement that implemented the TRRs, but that had no greater, separate and independent, trade-restrictive effect from the TRRs. In other words, the *DJAI* was innocent in causing trade damage; the culprit, if there was one, was the TRRs. The Appellate Body aptly characterized the situation as one in which "the complainants challenged the *DJAI* procedure as something other than a customs or import formality [and thereby unlawful under GATT Article XI:1], and Argentina defended the *DJAI* procedure as a customs or import formality [namely, an import licensing procedure, and thereby governed and immunized by Article VIII]."[787] The Panel never characterized the *DJAI* as an import licensing procedure; it simply examined it for consistency under Article XI:1. That was correct, said the Appellate Body.

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

- **Interpreting and Applying GATT Article XI:1 Precedents**

The Panel disagreed with Argentina's characterization of the *DJAI* as a customs risk assessment tool that is a formality or requirement imposed in connection with

787 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:252.

importation subject to GATT Article VIII. It also disagreed that even if it were such, still customs procedures falling within the scope of Article VIII are thereby excluded from the disciplines of Article XI:1.

The Panel explained Article XI:1 forbids WTO Members from instituting or maintaining import or export prohibitions or restrictions, and does not differentiate among categories or types of such measures. The phrase "or other measures" means the scope of Article XI:1 encompasses all prohibitions or restrictions on imports or exports, other than duties, taxes, or other charges (which, of course, Article II governs).[788] To be sure, not any condition on imports or exports is forbidden. What Article XI:1 bars is a condition that is a limitation. That is, the word "restriction" means any condition "with regard to," or "in connection with" imports or exports of a product that has a "limiting effect" on imports or exports.[789] There is no need to prove actual, quantifiable negative effects on the aggregate imports. All that matters is whether the design and structure of a measure imposes a "limiting condition."[790] In other words, potential dampening adverse effects suffice to show inconsistency with Article XI:1.

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

> 5.217. In [the 2012] *China – Raw Materials* [case, cited above], the Appellate Body observed that the term "prohibition" is defined as a "legal ban on the trade or importation of a specified commodity." In that dispute, the Appellate Body also referred to the term

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788 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:212 (*quoting Argentina Import Restrictions* Panel Report, ¶¶ 6:246, 6:248, 6:435, 6:440, 6:440, and 6:450, which in turn cited to the 2001 Panel Report in *Argentina Hides and Leather*, ¶ 11:17 (*i.e.*, WTO Panel Report, *Argentina – Measures Affecting the Export of Bovine Hides and Import of Finished Leather*, WT/DS155/R (not appealed, adopted 16 February 2001), and 1988 pre-WTO GATT Panel Report in *Japan Semiconductors*, ¶ 104 (*i.e.*, GATT Panel Report, *Japan-Trade in Semi-Conductors*, BISD (35th Supp.) 116 (adopted 4 May 1988)).

The *Japan Semiconductors* case is analyzed in Raj Bhala, *Modern GATT Law*, Volume I, Chapter 10 (2nd ed. 2013).

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

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

> "restriction" as "[a] thing which restricts someone or something, a limitation on action, a limiting condition or regulation" and, thus, generally, as something that has a limiting effect. The use of the word "quantitative" in the title of Article XI … informs the interpretation of the words "restriction" and "prohibition" in Article XI:1, suggesting that the coverage of Article XI includes those prohibitions and restrictions that limit the quantity or amount of a product being imported or exported. This provision, however, does not cover simply *any* restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions "on the importation ... or on the exportation or sale for export." Thus, … not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products. Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.
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> 5.218. Article XI:1 … prohibits prohibitions or restrictions other than duties, taxes, or other charges "made effective through quotas, import or export licenses or other measures." The Appellate Body has described the word "effective," when relating to a legal instrument, as "in operation at a given time." … [T]he definition of the term "effective" also includes something "[t]hat is concerned in the production *of* an event or condition." Moreover, the Appellate Body has described the words "made effective," when used in connection with governmental measures, as something that may refer to a measure being "operative," "in force," or as having "come into effect." In Article XI:1, the expression "made effective through" precedes the terms "quotas, import or export licenses or other measures." This suggests to us that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative.[791]

In citing itself at each key point, namely, defining "prohibition," "restriction," and "effective," the Appellate Body pointed to the *Shorter Oxford English Dictionary*.[792] As for so many other multilateral trade treaty terms, for Article XI:1, the *OED* was the irreducible and definitive for Appellate Body interpretation.

For three reasons, the Appellate Body agreed with the Panel, and rejected the Argentine argument. First, said the Appellate Body, Argentina could cite no legal basis in

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791 Footnotes omitted.

792 *See Argentina Import Restrictions* Appellate Body Report, fns. 595 and 596 at ¶ 5:217, footnote 599 at ¶ 5:218.

the text of GATT for its Two-Step Test to determine whether an import formality or requirement under Article VIII is a "restriction" under Article XI:1.

Second, there was no case law to support Argentina's Test. Argentina's effort to invoke the 2001 *Korea Beef* and 2012 *China Raw Materials* Panel Reports missed the mark.[793] They stood for the rather obvious proposition that under Article XI:1, a disputed measure must itself limit importation, and limitations caused by other measures should not be wrongly attributed to the challenged measure. In other words, those Panels rendered what in the context of AD-CVD jurisprudence is a "non-attribution" analysis: for liability to attach to a measure challenged under Article XI:1, it must be that measure, not an underlying restriction like a quota, which causes constriction of imports.

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

> 5.242. Argentina's appeal calls for us to examine whether and under what circumstances measures that qualify as "formalities" or "requirements" under Article VIII … may constitute "restrictions" under Article XI:1…. … *[N]ot every condition or burden placed on importation or exportation will be prohibited by Article XI, but only those that are limiting, that is, those that limit the importation or exportation of products*.
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> 5.243. Formalities and requirements connected to importation that fall within the scope of application of Article VIII … typically involve the use of documentary and procedural tools to collect, process, and verify information in connection with the importation of products. Such import formalities and requirements will often entail a certain burden on the importation of products. At the same time, such formalities and requirements are, at least to some extent, a routine aspect of international trade. Compliance with such formalities and requirements enables trade to occur within a Member's specific regulatory framework. … *[N]ot every burden associated with an import formality or requirement will entail inconsistency with Article XI:1…. Instead, only those that have a limiting effect on the importation of products will do so*.
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> …
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> 5.244. Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative. *If an import formality or requirement does not itself limit the importation of products independently of the limiting effects of another restriction, then such*

[793] *See* WTO Panel Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/R, WT/DS169/R (adopted as modified by the Appellate Body, 10 January 2001).

> *import formality or requirement cannot be said to produce the limiting effect and, thus, it will not amount to a "restriction" captured by the prohibition in Article XI:1*.[794]

Rejecting the Argentine Analytical Framework, and singling out Step 2 as neither "useful or necessary," the Appellate Body intoned that an "analysis under Article XI:1 must be done on a *case-by-case basis*, taking into account the import formality or requirement at issue and the relevant facts of the case."[795]

In this case, both the law and facts were against Argentina. On the law, GATT Article XI:1 precedent ran contrary to Argentina's position the *DJAI* procedure was not an unlawful QR. The *Argentina Import Restrictions* Panel cited to 4 types of "restrictions" that prior GATT and WTO Panels had found illegal. The Appellate Body recounted approvingly the long-standing jurisprudence on unlawful QRs:

(1) Measures that Limit Market Access for Imports, held illegal in the 1988 and 1992 GATT Panel Reports in *Canada Provincial Liquor Boards* (at Paragraphs 4:24-4:25 in the European case, and Paragraph 5:6 in the American case) and 1978 *EEC Minimum Import Prices* (in Paragraph 4:9), respectively.[796]

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

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

(4) Measures that Make Importation Prohibitively Costly, held illegal in the *Brazil Retreaded Tires* Panel Report (at Paragraphs 7:370-372).[797]

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

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794 Emphasis added.

795 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:245. (Emphasis added.)

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

Key issues raised in these GATT Panel Reports are analyzed in Raj Bhala, *Modern GATT Law*, Volume I, Chapters 18, 37-38 (2nd ed., 2013).

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

First, did the *DJAI* "limit" access of imports into the Argentine market? Yes. Obtaining a *DJAI* in exit status was not "automatic" in the following sense. The Argentine government granted exit status only if (1) if no Argentine government agency entered an observation on a *DJAI* application within a prescribed period, or (2) an agency that had entered an observation lifted its previously entered observation thanks to information the importer provided to the agency. Without exit status, importation was forbidden, and that status depended on the non-transparent exercise of discretion of the government. Indeed, in the sense of the *OED* definition of "automatic," namely, "[o]ccuring as a necessary consequence" or "taking effect without further process in set circumstances," the grant of exit status was not "automatic."[798]

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

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

Fourth, did the *DJAI* make importation "prohibitively costly"? Yes. Compliance with the procedures, at the very least, raised transactions costs for importers. Worse yet,

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[798] *Argentina Import Restrictions* Appellate Body Report, ¶ 5:280 (*quoting* the *Shorter Oxford English Dictionary* Vol. 1, 157 (6th ed., W.R. Trumble & A. Stevenson eds., 2007).

The Appellate Body rejected Argentina's argument connecting GATT Article XI:1 to Article 3:2 of the WTO *Agreement on Import Licensing*. Argentina said Article 3:2 differentiates between the trade-distorting effects of (1) an import licensing procedure and (2) an underlying rule that the procedure implements. Argentina thought the Panel interpreted GATT Article XI:1 to forbid any non-automatic import licensing procedure. That interpretation, said Argentina, would mean any such procedure would conflict *per se* with Article 3:2 of the *Agreement*. To avoid this conflict, Argentina said it was critical to recognize an import licensing procedure is not a "restriction" under Article XI:1 merely because that procedure is not "automatic."

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

trade-balancing export commitments were such a significant burden, unrelated to normal importing activity, that importation was prohibitively costly.

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

- **Are GATT Articles VIII and XI:1 Mutually Exclusive?**

Argentina was incorrect in its contention that the Panel erred as to the scope of application of Article VIII in relation to Article XI:1. The Appellate Body explained Article VIII establishes 3 "clear obligations," none of which render it mutually exclusive with Article XI:1.

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

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

> 5.233. Argentina's argument [that the two provisions are mutually exclusive] relies on the language in Article VIII:1(c)…. We do not necessarily disagree with Argentina that the reference, in Article VIII:1(c), to the "need for minimizing the incidence and complexity of import and export formalities and for decreasing and simplifying import and export documentation requirements" implies a recognition by Members that import formalities and requirements can have trade-restricting effects, at least to some degree. We also accept that Article VIII:1(c) constitutes context for the interpretation of Article XI:1 …, and for what amounts to a restriction on importation within the meaning of the latter provision. Yet, such language does not suffice to establish the type of carve-out or derogation from Article XI:1 that Argentina seems to envisage for

> formalities and requirements referred to in Article VIII…. To the contrary, the general and hortatory language of Article VIII:1(c) stands in contrast to, for example, the language of Article VIII:1(a)…. The mandatory language used in Article VIII:1(a) makes clear that fees and charges imposed in connection with importation will be consistent with the obligation set down in that provision only when such fees and charges meet the specific conditions prescribed therein, that is, when they are limited in amount to the approximate cost of services rendered and do not represent an indirect protection to domestic products or a taxation of imports for fiscal purposes.
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> …
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> 5.237. … [W]e agree with the Panel that *formalities or requirements under Article VIII … are not excluded per se from the scope of application of Article XI:*1 …, and that *their consistency could be assessed under either Article VIII or Article XI:1, or under both provisions*. Thus, we *reject* Argentina's *argument that Articles VIII and XI:1 have mutually exclusive spheres of application*.[799]

Here, then, a new precedent was set.

In setting it, the Appellate Body also rejected the Argentine view that the Panel said any formality or requirement that does not result in the automatic importation of goods is necessarily inconsistent with Article XI. In truth, the Panel simply – and correctly – found that the *DJAI* procedure was a prerequisite for importation, and that it "operate[d] as a discretionary system of authorization of imports by which the Argentine authorities decide on an *ad hoc* basis whether to grant the right to import to each applicant on the basis of criteria not specified in advance."[800] The Panel was right to appraise the *DJAI* as: "not directed at a mere observance of forms; it is not a mere formality imposed by Argentina in connection with the importation of goods. Rather, it is a procedure by which Argentina determines the right to import."[801] Argentina was incorrect to infer from this characterization that the Panel erred by implying any import procedure that is a necessary condition to import goods, or by which the right to import is determined, is outside the scope of Article VIII.

- **New Precedent**

In reaching its substantive holding that GATT Articles VIII and XI:1 are not mutually exclusive, the *Argentina Import Restrictions* Appellate Body cited no previous jurisprudence. In support of tis finding, it gave no citations to previous Appellate Body or pre-Uruguay Round GATT Panel jurisprudence – other than for the generic point that "the provisions of the WTO covered agreements should be interpreted in a coherent and

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799 Emphasis added.

800 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:248.

801 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:250 (*quoting Argentina Import Restrictions* Panel Report, ¶ 6:433).

consistent manner, giving meaning to all applicable provisions harmoniously."[802] Its citation to 8 cases on this point easily could be read as a veiled statement that it had the power to interpret textual provisions with a view to ensuring the fabric of GATT-WTO law is as seamless as possible.[803] But, the holding itself was new law the Appellate Body had to find on its own. Doubtless it will apply its teaching in the future.

802 *Argentina Import Restrictions* Appellate Body Report, ¶ 5:236.

803 The eight prior Appellate Body Reports were:

(1) *European Union Fur Seals*, ¶ 5:123, *i.e.*, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (adopted 18 June 2014);

(2) *United States AD-CVD*, ¶ 570, *i.e.*, *United States – Definitive Anti-Dumping and Countervailing Duties on Certain Products from China*, WT/DS379/AB/R (adopted 25 March 2011);

(3) 2005 *Cotton*, ¶ 549, *i.e.*, *United States – Subsidies on Upland Cotton*, WT/DS267/AB/R (adopted 21 March 2005);

(4) 1998 *Argentina Footwear*, ¶ 81, *i.e.*, *Argentina –Safeguard Measures on Imports of Footwear*, WT/DS121/AB/R (adopted 12 January 2000);

(5) 2000 *Korea Dairy*, ¶ 81, *i.e.*, *Korea – Definitive Safeguard Measure on Imports of Certain Dairy Products*, WT/DS98/AB/R (adopted 12 January 2000);

(6) 1998 *India Patent Protection*, ¶ 45, *i.e.*, *India – Patent Protection for Pharmaceutical and Agricultural Chemical Products*, WT/DS50/AB/R (adopted 16 January 1998);

(7) 1996 *Reformulated Gasoline*, at 23, *i.e.*, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996);

(8) 1996 *Japan Alcoholic Beverages*, at 106, *i.e.*, *see* WTO Appellate Body Report, *Japan – Taxes on Alcoholic Beverage*s WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R (adopted 1 November 1996).

Chapter 20

FOURTH PILLAR (CONTINUED): GATT ARTICLE XIII AND ADMINISTERING QRs[804]

I. QRs Persist

The drafters of GATT knew QRs would not be eliminated, despite the prophylactic ban in Paragraph 1 of Article XI. So, they built in to Article XI, in Paragraph 2, exceptions to the ban. Moreover, they dedicated an entire provision – Article XIII – to the subject of administering non-tariff barriers. It is as if the drafters were certain QRs would be a persistent feature in the world trading system.[805] Two leading cases, the 1989 *Dessert Apples* decision by a GATT Panel, and the 1997 *Bananas* decision by the Appellate Body, illustrate these disciplines.

II. Understanding GATT Article XIII through 1989 *Dessert Apples* Case

● Overview

In the 1989 GATT Panel Report in *EEC – Restrictions on Imports of Dessert Applies* (*Dessert Apples*) the respondent, the EEC knew well its defense under Article XI:2(c) of GATT might fail.[806] It did. Accordingly, it had a fall back position, based on

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[804] Documents References:
(1) *Havana (ITO) Charter* Articles 22-23
(2) GATT Articles XI, XIII-XIV

[805] Thus, decades ago, Professor Jackson observed with respect to one type of QR, a quota:

> One of the serious problems of a quota system is the method of granting licenses. Should they be granted on a first-come, first-served basis? Suppose the line at the door of the licensing agency on opening day is too long to accommodate all within the quota? Should equitable allocations among exporting countries be made? Should licenses be auctioned off? (The proceeds of such auction would then be like a tariff, with added protective features over and above those of the quota system.) Can licensing policy contribute to national plans when such plans exist? Is there danger of license officials accepting bribes or extending licenses for political considerations?

JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT §13.1 at 306 (1969). [Hereinafter, JACKSON 1969.]

[806] *See* Report of the GATT Panel, *EEC – Restrictions on Imports of Dessert Apples* (complaint by Chile), B.I.S.D. (36th Supp.) 93 (July 1990) (adopted 22 June 1989). [Hereinafter, *Dessert Apples* GATT Panel Report.]

For additional discussions of this case, see Raj Bhala, *Modern GATT Law* Volume II, Chapters 38 Sections VII (concerning Article XI:2(c)) and XI (concerning Article XXVII) (London: Thomson Sweet & Maxwell, 2nd ed., 2013). This discussion draws on *Modern GATT Law*, Chapter 39, Section II, and Raj Bhala, *Trade, Development, and Social Justice* Chapter 12 (Durham, North Carolina: Carolina Academic Press, 2003).

The *Dessert Apples* case also illustrates principles under Article XI:2(c). The GATT Panel interpretation narrowly the Article XI:2(c) exception to the Article XI:1 prohibition against QRs. Chile offered three reasons why the EEC did not qualify for the exception, and the Panel agreed with the third one.

Article XIII, which concerns the non-discriminatory administration of QRs. The EEC urged its measures against dessert apple imports were restrictions to be tested under Article XIII. They were, and they failed.

Chile prevailed on the Article XIII issues, namely, those arising under Paragraphs 1, 2(d), and 3(b) of that provision. The Chilean victory was not apparent at the outset, because its initial response to the EEC defense was unsuccessful. Evidently, Chile had hoped to avoid fighting each Article XIII issue by arguing the entire Article was inapplicable to the facts. Chile urged Article XIII regulated only quotas and other QRs that were lawful under GATT. It reasoned Article XIII could not rescue the EEC restrictions on imported dessert apples, once they had been condemned under Article XI. The GATT Panel disagreed, and nevertheless adjudicated the Article XIII issues.

Thus, Chile was wise not to end its argumentation with a conclusory statement that Article XIII the provision was inapplicable. Chile itself understood the standards contained

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First, said Chile, the *chapeau* to Article XI:2(c) uses the word "restrictions," but the EEC measures were not merely a "restrictions." They were an outright prohibition against Chilean dessert apples. The Panel agreed with the Chilean reading of Article XI:2(c), but held the facts did not support a conclusion that the EEC "prohibited" imports. At no time had the EEC prohibited all imports of apples. Hence, the EEC measures were "restrictions," not "prohibitions," within the meaning of the *chapeau* to Article XI:2(c). *See id.,* 125 at ¶ 12.5.

Second, Chile said the EEC did not qualify for the Article XI:2(c) exception given the private- public distinction inherent in the *chapeau* to this provision. Of the two price-intervention mechanisms (direct purchases by EEC member states at the "buying-in price," or decentralized withdrawal of apples by producer organizations), Chile pointed out the second one mattered. The government rarely intervened at the buying-in price. The typical intervention mode was voluntary private party action by European producers, who chose whether to establish and join a producer group, through intervention at the withdrawal price followed by compensation from member states. But, the Panel rejected the Chilean point that the EEC measures were not "governmental." Looking to prior GATT jurisprudence, the Panel said informal administrative guidance may qualify as "governmental" action. Even legally non-mandatory measures may be "governmental," if there are sufficient incentives or disincentives for compliance, and if the operation of the measures depends on official action. The EEC measures against dessert apple imports were "governmental," because the EC set up the regime through regulations, operated it through official decisions about reference quantities and pricing, and financed it (for example, by compensating private producer groups for withdrawing domestic apples). *See id*., 126-27 at ¶¶ 12.8-12.9 In brief, substance mattered over form.

The Panel accepted Chile's third reason. *See id.,* 127-29 at ¶¶ 12.11-12.17. Chile disagreed the EEC measures (in the language of Article XI:2(c)(i)) "operated to restrict the quantities of a product permitted to be marketed or produced." The EEC had no measures to control domestic apple production or restrict the quantities of apples that could be marketed. Both of the price intervention mechanisms (direct purchases and withdrawal) had the effect of supporting the price of dessert apples in the EEC. EEC member states made direct purchases at the "buying-in price," and private producer groups were compensated by the states at the "withdrawal price" for withdrawing apples from the European market. Yet, while both mechanisms were price floors, neither had associated with it quantitative targets or limits on the overall quantity of apples that could be marketed, nor on the amount that could be supplied. Without such limits, the Panel said, the minimum price floor might act as an incentive to EEC farmers to produce more apples for sale, because the floor guaranteed a minimum margin of profitability. The exception for restrictions on imports was only in connection with a formal scheme to restrict marketing or production of the like domestic product.

The Panel opined the plain meaning of the key phrases in Article XI:2(c)(i) – specifically, "operate … to restrict the quantities" and "permitted to be marketed or produced" – mean a governmental measure at issue "must include an effective limitation on the quantity that domestic producers are authorized or allowed to sell." *See id*., 128 at ¶ 12.13. Here, form mattered over substance.

in Article XIII were useful to its case, namely, as benchmarks to measure the extent of discrimination and damage suffered by its dessert apples. The EEC proved unable to satisfy those benchmarks.

- **Facts**

Between April and August of 1988, the EEC imposed licenses for imports of dessert apples. In April, the EEC suspended issuance of import licenses for dessert apples originating in Chile for nearly two weeks – initially set for 15-22 April, but later switched to 18-29 April. The EEC contended import license applications from Chile exceeded the traditional quantity of apples imported by the EEC from Chile. That was a "critical circumstance," said the EEC, threatening "serious disturbance" to the dessert apples market in the EEC, and "serious injury" to European apple producers.[807]

Also in April 1988, the EEC set another quantitative limit. The EEC suspended, until 31 August 1988, issuance of import licenses for dessert apples from Chile or any other third country, if apples from Chile or another exporting country exceeded a prescribed quantity, technically called a "reference quantity." (For example, the reference quantity for South Africa was 166,000 tons, for New Zealand it was 115,000 tons, for Argentina it was 70,000 tons, for Australia it was 11,000 tons, and for various other countries it was 17,600 tons. The import quotas took effect from April through August.)

The EEC set a reference quantity for Chile of 142,131 tons, and determined – on 20 April – that Chile already had exceeded it. Thus, the EEC extended the suspension of import licenses for Chilean apples until 31 August. Not surprisingly, the gravamen of the Chilean complaint was the EEC violated Article XI:1.[808] The EEC did not even challenge the claim it violated this provision. The EEC responded its quota regime, while inconsistent with Article XI:1, could be justified under the exemptions provided in Article XI:2. Chile, of course, disagreed, and so did the GATT Panel.

- **MFN Principle in Article XIII:1**

What specific facts gave rise to violations of Article XIII, according to Chile? First, the suspension of import licenses violated Article XIII:1. This provision essentially embodies an MFN obligation for the administration of quantitative restrictions. Indeed, another way to summarize what Article XIII is all about is to say it is a reincarnation of the

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807 *Dessert Apples* GATT Panel Report, 97 at ¶ 2.12.

808 *See Dessert Apples* Report, B.I.S.D. (36th Supp.) 93, 99 at ¶ 3.2 (July 1990) (adopted 22 June 1989).

Chile also mounted a successful challenge on transparency grounds, namely, that back-dated quotas violate Article X and XIII:3(b)-(c). *See id.*, ¶¶ 6.1-6.6 at 115-17, ¶¶ 12.25-12.26 at 131-32, and ¶ 12.29 at 133. While the transparency matter is not discussed above, the issue of non-discriminatory administration of quantitative restrictions (*i.e.*, Article XIII:1-2) is treated.

The U.S. brought a parallel action, and prevailed in its claims the EEC dessert apple import regime was inconsistent with Article XI:1, not justified under XI:2, and inconsistent with the transparency requirements of Articles X and XIII:3(b)-(c). *See* Report of the GATT Panel, *European Economic Community – Restrictions on Imports of Apples*, B.I.S.D. (36th Supp.) 135, ¶ 5.26 at 167 (July 1990) (adopted 22 June 1989).

general MFN obligation in Article I:1. As Professor Jackson writes: "Article XIII is basically an attempt to apply a Most-Favored-Nation obligation to quotas."[809]

However, it is an overstatement to say Article XIII and Article I:1 are essentially the same, as that would render one of them would be superfluous. Article I:1 contains the clause "with respect to all rules and formalities in connection with importation and exportation." Does this clause cover quantitative restrictions, including quotas? Professor Jackson urges the word "formalities" would not cover quotas, because they "are certainly not mere formalities."[810] He further urges the word "rules" would not cover quotas, on the ground that "'rules' could be interpreted to apply to regulations related to tariffs or to the formalities of importing or exporting, such as those technical subjects covered in GATT Articles VII through X."[811] In both instances, the reasoning is tenuous, and as regards "rules," the logic is circular (because it returns to the word "formalities"). The simple but inescapable question is if a quota is not a "formality" or "rule," then what is it?

Evidently, the drafters desired to see the MFN rule reincarnated in the specific context of administration of quotas. That should not be surprising, as there are several incarnations of this and other obligations in GATT, nor should it cause legal scholars to torque the ordinary meanings of words like "rules" and "formalities." NTBs, including quotas, are especially pernicious, as the drafters understood. Reaffirming the MFN obligation in Article XIII, and elaborating on it in this context, was entirely sensible.

Applying the MFN obligation to quotas is not straightforward. Competition among foreign suppliers is based not on price, but on access to a share in a quota. So, how a quota is administered is central to determining whether the outcome is discriminatory. If, as Professor Jackson suggests, quota allotments are allocated on a "first come, first served" basis, then countries geographically closest to the importing country may be favored.[812] Or, that methodology might favor countries with access to the fastest shippers. The point is even if Article I:1 unambiguously covers quotas, without Article XIII (especially Paragraph 2), there would be yet more uncertainty as to how MFN treatment applies to them. Article XIII helps resolve doubts about whether and how to apply the obligation to this context, which might arise if only Article I:1 existed.

Thus, Article XIII:1 bars discrimination in the institution and maintenance of any NTB, be it a quota, import license, or other measure, or in the design and implementation of export licenses. If a WTO Member implements a quantitative measure on a particular imported (or exported) good, then it had better do so with respect to the like product imported from (or exported to) all other Members. Put succinctly, Chile focused on the suspension, which the EEC initially designated for 15-22 April 1988, and later changed to

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809 JACKSON 1969 §13.5 at 321.

810 JACKSON 1969 §13.5 at 322.

811 JACKSON 1969 §13.5 at 322. The reference to Article XIV seems not to buttress the argument that Article I:1 excludes quotas, because this Article contains exceptions to the rule of non-discrimination that, for the most part, are related to BOP exceptions in Article XII or Article XVIII, Section B. Indeed, Article XIV is a logical complement to Article XIII, which as explained in the text above, is a sensible reincarnation and elaboration of the MFN obligation.

812 *See* JACKSON 1969 §13.5 at 323.

18-29 April. The suspension applied only to Chilean dessert apples. Here, said Chile, was undisguised discrimination.

- **Publication and Duration**

Even after the EEC established its global quota regime for dessert apples, matters did not improve for Chilean apple exporters. The EEC did not publish its regime until 20 April 1988. Consequently, the EEC did not begin to apply its import restrictions to dessert apples from other countries until that date. From roughly 8 April to 20 April, the license suspension blocked Chilean apples from entry into the EEC. Even after the EEC published the global quota on 20 April, Chilean apples were victimized by discrimination. Other supplying countries could export to the EEC under the new quota. Chile could not do so, because of the continued suspension of licenses for its apples (given the EEC change of the suspension period to 29 April). So, during most of the season to export apples from the Southern hemisphere, Chilean apples could not enter the EEC market, yet apples from other countries could.

To make matters worse, argued Chile, the suspension applied for a longer period than was apparent from the EEC regulations. In practice, the EEC took about five days to issue an import license, once it received an application. The EEC decided to suspend licenses for Chilean apples on 12 April 1988. Therefore, the EEC did not grant any licenses for Chilean apples in connection with applications filed later than 8 April 1988.

The Panel agreed with Chile's Article XIII:1 claim.[813] The simple fact was the EEC had suspended the issuance of import licenses only with respect to dessert apples from Chile. It had not applied the suspension to like products from other supplying countries. The violation was so blatant, the Panel spent little time discussing it.

Second, argued Chile, the EEC violated Article XIII:3(b). This provision concerns public notice of QRs, and mandates that merchandise en route at the time of publication not be excluded from entry. In what manner was Article XIII:3(b) supposedly infringed? Chile said the EEC operated a secret quota against its dessert apples.

- **Article XIII:3 Principles**

By way of overview, Article XIII:3 contains notification requirements on how QRs are being administered, and anticipates three scenarios. First, Paragraph 3(a) says all contracting parties with an interest in merchandise subject to import licensing must receive, if they request it, "all relevant information" about the QRs being administered through licensing. (This requirement is not limited to contracting parties with a "substantial interest," as Professor Jackson states, but extends to all contracting parties "having an interest in the trade in the product concerned."[814]) The notice also must provide information about the licenses granted over a recent period and the distribution of these licenses among

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813 *See Dessert Apples* GATT Panel Report, 130 at ¶¶ 12.20-12.21 at 130.

814 *See* JACKSON 1969 §13.5 at 326 footnote 17 (item (1)).

supplying countries, though it need not disclose the identities of the exporters or importers getting a license.

Second, Paragraph 3(b) concerns notification of a quota regime. It demands public notice, whether or not requested to do so, of the total quantity or value of merchandise subject to the quota, the period of the quota, and any change in the quantity or value. It also deals with merchandise *en route* at the time notice is given, requiring it not be subject to exclusion from entry.

Third, Paragraph 3(c) deals with quota shares allocated among supplying countries. It calls upon the importing country administering this regime to give public notice, and to inform promptly all other contracting parties with an interest in supply the merchandise subject to the quota. (Here, too, this requirement is not limited to contracting parties with a "substantial interest," as Professor Jackson states, but extends to all contracting parties "having an interest in supplying the product concerned."[815]) The notice and information must indicate the quantity or value of the country-specific shares.

In the *Dessert Apples* Case, Chile alleged the EEC had acted inconsistently with the first and second sentences of Article XIII:3(b). As to the first sentence, the EEC suspended import licenses exclusively with respect to Chilean dessert apples, before giving "public notice" of any quota scheme.[816] The EEC took its decision to suspend import licenses for Chilean dessert apples on 12 April 1988, eight days before deciding upon a global quota regime. The EEC did not establish the global quota until 20 April, and did not publish the new regime on 21 April (as Regulation 1040/88). When the EEC finally published its global quota, it backdated the quota allotment for Chilean apples. That is, the EEC simultaneously told Chile of its quota share and that Chile already had filled it.

As to the second sentence, the EEC excluded from entry all of the apples that had been *en route* from Chile to Europe on or prior to 21 April. That exclusion was a blatant violation of the second sentence. This provision is designed to protect an importer from needing to apply for an import license before a ship sails, when quantitative restrictions are being contemplated or established by the importing country, but have not yet been publicly announced. In practice, Chile pointed out, a vessel carrying apples from Chile to Europe took about three weeks. For many ships, the voyage was not direct from the port of loading to the port of discharge, but rather involved multiple loading and off-loading stops. Given this fact, a vessel could not apply to the EEC for a license before setting out from Chile without incurring commercially unacceptable risks. In brief, Chilean exporters had no official advance notice from the EEC to help guide them in planning their shipments of apples to the EEC. The dearth of such notice meant Chile had no obligation to observe a restraint in applying for licenses in the first place.

- **Article XIII:2(d) Principle**

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815 *See* JACKSON 1969 §13.5 at 326 footnote 17 (item (3)).

816 *See Dessert Apples* GATT Panel Report, 108-109 at ¶¶ 4.7-4.11.

The EEC responded to Chile's points by arguing its measures were in full accordance with the requirements of Article XIII. First, Chile had unrealistically high expectations for exporting apples Europe.[817] Between 1-7 April 1988, the EEC received requests for licenses to import apples totaling 41,000 tons from all sources. The vast majority of these requests – 73% – represented Chilean apples. How could the EEC allow Chilean exporters to establish a dominant position, at the expense of exporters from other countries? Many of the exporters from other countries were less well informed, and less willing or able to engage in speculative operations, than the Chileans. If the EEC failed to act, not only would Chilean apples gain a dominant share of the European market, but also that share would exceed the traditional quantity supplied by Chile. In turn, there would be a violation of Article XIII:2(d).

The *chapeau* of Paragraph 2(d) demands administration of QRs that aim at a distribution of trade approximating as closely as possible the shares that exporting countries expectedly would have without the restrictions. Professor Jackson comments this requirement "is probably an unworkable and artificial aim … since the criteria by which one judges 'what would have been the case' are not precisely specified."[818] This comment is an overstatement.

To be sure, Article XIII:2(d) poses a counterfactual question. Such questions are inherently exercises in forecasting market conditions under a scenario that did not occur. But, Paragraph 2(d), plus subsequent adjudications (such as *Dessert Apples* and the 1997 *Bananas* case), provide insight into what not to do in order to comply with the standard. The Paragraph says allotments in a quota to countries with a principal supplying interest in the product in question, using data from a historical representative period.

- **Arguments**

The EEC said its measures against Chilean apples amounted to a precaution, done in order to meet the requirements of Article XIII:2(d). Moreover, the EEC claimed, the precautionary measures were not arbitrary or discriminatory fashion. Rather, they were based on a reasoned judgment (in effect, a forecast) from import license applications. It could be inferred from these applications that the Chileans were heading for precisely that result – a larger market share in Europe than they traditionally held, at the expense of other supplying countries. Consequently, said the EEC, it had no choice but to act the interests of exporters from third countries, even before it had the chance to establish a quota regime and allocate shares in that quota. Establishing that regime was a complex, time-consuming process, involving detailed legal and economic studies, including analyses of the export capacities of the exporting countries. But, time was of the essence. A precautionary action – namely, the suspension of import licenses for Chilean apples – was an indispensable interim measure to help suppliers from other countries, and thereby satisfy the EEC's obligations under Article XIII.

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817 *See Dessert Apples* GATT Panel Report, 107-108 at ¶ 4.4.

818 JACKSON 1969, §13.5 at 323.

The EEC urged suspending import licenses for dessert apples from other countries would make no sense, because apples from other countries were not the problem. Unlike Chilean apples, third country apples had not reached their fair share within a foreseeable quota. By suspending licenses for Chilean apples only, the EEC was defending, not violating, the non-discrimination the principle, because it was trying to ensure Chile would not gain a larger than traditional share of the European apple market at the expense of other overseas producers. This precautionary interim measure was even more necessary for third-country exporters with a later production and shipping season than the Chileans, because they might not be able to apply for a license they were unsure of being able to fill (should they be awarded it) within the time period prescribed by the license.

When it came to actual allotments in the global quota, the EEC put up a similar defense as it had for suspending licenses, namely, it was acting to protect the legitimate expectations of exporting countries other than Chile. The EEC said traditional suppliers of dessert apples were aware of the EEC's need to maintain an orderly market, hence they had been moderating their shipments to the EEC. Chile, however, refused to do so, behaving opportunistically by seeking to increase its market share in the EEC when other suppliers were moderating their exports. The self-interested behavior of Chile led other countries to inflate their forecasts of the amounts they would be exporting to the EEC. Consequently, in allotting Chilean dessert apples a share of 142,131 metric tons in the global quota, the EEC was neither discriminating against nor punishing Chile (even if this threshold was, by Chile's reckoning, slightly below its average of actual exports in recent years). The EEC simply was accounting for all relevant factors, in accordance with Article XIII:2(d), including the past export performance of Chile and its production and export capacity, overall trade patterns, and the policies of other exporting countries.

Not surprisingly, Chile hotly contested the EEC argument about defending the principle of non-discrimination in Article XII:2(d) by attacking the assumption underlying it, namely, that the 142,131 tons the EEC allocated for Chilean dessert apples was fair. That share reflected just 28% of the EEC market for dessert apples. In truth, responded Chile, that amount was not an underestimate of the share of trade Chilean exporters would be expected to have in the absence of the EEC's global quota. Why? There were four basic reasons,[819] all of which amounted to Chile saying the EEC was disingenuous in its defense of the principle.

First, the EEC distorted history. Chile had not behaved irresponsibly, while other countries acted in moderation. In 1979, the EEC had suspended imports of dessert apples from Chile because Chile refused to participate in a VRA. (Chile thought the VRA would be inconsistent with GATT.) In that year, all of the EEC other suppliers exported more than their voluntary quota limits. So much for their moderation.

Since then, all other exporting countries in the southern hemisphere exceeded (in one year or another) the amounts forecast for apple exports to the EEC. GATT contains no obligation to eschew exporting more than a forecasted amount. But, the EEC was wrong to suggest Chile's behavior caused other suppliers to inflate their estimated shipments.

819 *See Dessert Apples* GATT Panel Report, 110-112, 113-115 at ¶¶ 4.16-4.21, 4.25-4.27, 4.31-4.32.

Were that so, then why did the EEC give Australia a quota allotment in excess of the amount of dessert apples Australia forecast it would ship?

Second, the EEC did not base its allocation to Chile of a share in the global quota to Chile on data concerning export forecasts submitted by countries in the southern hemisphere. If the EEC had used those data, which it wrongly claimed were unreliable, then it would have come to a different, and correct, figure. That figure would have been a quota allotment of 200,000 tons of dessert apples, far more than the 142,131 tons the EEC gave Chile. An allotment of 200,000 would have meant Chilean apples would obtain a share of 32.6% in the EEC market.

Third, the EEC acted contrary to the requirement of Article XII:2(d) to use a "previous representative period" and to take account of "special factors." In its calculation, the EEC included data from 1985. But, in that year EEC imports of dessert apples from Chile were 86,969 tons, a sharp decline from the previous year, 1984, in which they were 97,820. Chile said 1985 was not a representative year, because of a severe earthquake, which struck it on 3 March and damaged its export infrastructure. The EEC ought to have taken into account this "special factor," and used a two-year representative period, *i.e.*, 1986 and 1987 (though the normal GATT practice was a three-year period). Had the EEC done so, then Chile's share in the EEC market would have been about 33%. Similarly, the EEC failed to take into account as a "special factor" the increase in productive efficiency achieved by Chilean apple producers. A supplying country whose productive and export capacity increased relative to other countries ought to be given a concomitantly larger share in any quota regime of an importing country.

Chile had a well-founded legal basis for its contention about "special factors." It observed that productive efficiency can be included as such a factor according to Article XIII:4 and the Interpretative Note to Article XIII:4, *Ad Article XIII, Paragraph 4*. Paragraph 4 of Article XIII states that "[w]ith regard to restrictions applied in accordance with paragraph 2(d) of this Article or under paragraph 2(c) of Article XI, the selection of a representative period for any product and the appraisal of any special factors affecting the trade in the product shall be made initially by the contracting party applying the restriction…." The Paragraph obligates that contracting party to consult about "the re-appraisal of the special factors involved" with all countries having a substantial interest in supplying the product. The relevant Interpretative Note defines the term "special factors:"

> The term "special factors" includes changes in relative productive efficiency as between domestic and foreign producers, or as between different foreign producers, but not changes artificially brought about by means not permitted under the Agreement. [820]

(Chile noted the decision of an earlier panel, in a 1980 case on the EEC's restrictions on Chilean apples, to consider productive efficiency as a "special factor.")

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[820] *Ad Article XI, Paragraph 2, last sub-paragraph*. The Interpretative Note to Article XIII:4 refers to the Interpretative Note to Article XII, *Ad Article XI:2*.

Chile had a well-founded basis in fact for its contention. Improvements in Chile's efficiency and ability to export were not theoretical, despite the EEC view there was no objective basis for contending Chile had become more productive than competitors in other countries. Chile said its gains were manifest by commercial contracts calling for the exportation of large volumes in excess of the EEC quota allotment to Chile, specifically, 180,000 tons. Thus, a fair quota allotment would be in line with this figure. But, when setting quota thresholds, the EEC demanded evidence of commercial contracts from Chile, whereas it did not do so from any other supplier in the southern hemisphere.

Fourth, the EEC was flatly wrong in saying Chile's applications for import licenses exceeded it "traditional quantity." In 1986 and 1987, respectively, Chile exported 155,000 and 158,000 tons of dessert apples to the EEC. Those amounts exceeded the 142,131 tons the EEC allocated Chile in the global quota. That is, the allocation was below the actual traditional shares for the previous 2 representative years. Even if data from 1985 were included, despite the earthquake that year, the Chilean quota allotment was just 7% higher than its three-year average (1985-1987) exports to the EEC.

To Chile, the discrimination against it was all the more obvious when it juxtaposed its share in the EEC global quota with the shares the EEC gave to some other southern hemisphere countries. The share in the 1988 global quota the EEC handed to Argentina, 70,000 tons of dessert apples, was 141% of Argentina's three-year (1985-1987) average export performance to the EEC. The EEC never had imported an amount even close to the allocation it gave Argentina, except for 7 years earlier (1981), when it imported 67,266 tons, and its imports from Argentina had fallen in each subsequent year. The EEC behaved the same way with respect to Australia and New Zealand. The EEC granted quota share allotments of 132% and 117%, respectively, to these countries, in comparison with their three-year average exports to the EEC. As with Argentina's quota threshold, the EEC had set thresholds for Australia and New Zealand, which they never came close to reaching. And, when the EEC began administering the quota, it ignored the threshold with respect to New Zealand. The EEC admitted 135,000 tons of dessert apples from New Zealand, even though the New Zealand quota was 115,000 tons.

- **Holdings**

Understandably, the Panel did not relish the prospect of deciding for the EEC what the tonnage allotments in the global quota ought to be. It took note of the normal GATT practice to use shipment data from the most recent three-year period available to establish thresholds. It also explained the existence of "special factors" with respect to one exporting country would not justify changing the reference period for all of the suppliers. Rather, such factors would affect only the quota allocation for the individual country in which they had occurred. There was nothing controversial in this explanation. Having offered it, the Panel simply concluded the EEC had acted consistently with its Article XIII obligations in selecting a reference period.

However, where the EEC fell short of its obligations under Paragraphs 2(d) and 4 of Article XIII was in taking into account "special factors." The Panel held the EEC, in setting quota thresholds, ought to have considered the:

(1) temporary reduction in the export capacity of Chile caused by the 1985 earthquake, and
(2) trend toward an increase in the productive efficiency of Chile and its export capacity relative to other countries supplying dessert apples.

The obligation to do so was clear from the Interpretative Note to Article XIII:4, and reinforced by an Interpretative Note in the *Havana Charter*, which the Panel quoted:

> The term "special factors" as used in Article 22 [of the *Havana Charter*, now GATT Article XIII] includes among other factors the following changes, as between the various foreign producers, which may have occurred since the representative period:
>
> (1) changes in relative productive efficiency;
> (2) the existence of new or additional ability to export; and
> (3) reduced ability to export.[821]

Conversely, the Panel found no basis for the EEC essentially taking into account as a "special factor" the supposedly restrained behavior of the other supplying countries.

As for the Chilean argument under Article XIII:3(b), the EEC disagreed it had acted inconsistently with this provision. The EEC focused on the language "product[s] … en route."[822] It said this referred to goods clearly destined for a particular importing country, with no possibility of being re-routed to another country. On this interpretation, the EEC indeed had admitted all Chilean apples "en route." The Panel would have none of this sophistry, saying that "en route" simply meant "on board and destined for the EEC."[823] The Panel saw the EEC had not taken into account any dessert apples in transit to Europe, save for those apples for which the EEC already had issued a license. That deliberate neglect was a clear violation of the requirement of sub-paragraph (b) to admit apples en route at the time the EEC published its suspension of import licenses.

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821 *Havana Charter*, Interpretative Note Ad *Article 22*, *quoted in Dessert Apples* Report, B.I.S.D. (36th Supp.) 93, 131 at ¶ 12.23 (July 1990) (adopted 22 June 1989).

The drafters at the 1946 London Preparatory Conference and 1948 Havana Conference gave considerable attention to the questions of defining a "representative period" and identifying "special factors." The result of their deliberations was the Interpretative Note, quoted above, designed for the *ITO Charter* and not carried into GATT. *See* JACKSON 1969 §13.5 at 324. For the drafting history, and the decision of the Working Party at the 1955 GATT Review Session not to make any changes to Article XIII and its Interpretative Notes, *see id*. § 13.5 at 324-325; *Reports Relating to the Review of the Agreement, Quantitative Restrictions*, B.I.S.D. (3rd Supp.) 170, 176 (1955) (adopted 5 March 1955).

822 *Dessert Apples* GATT Panel Report, 110 at ¶ 4.13.

823 *Dessert Apples* GATT Panel Report, 132 at ¶ 12.27.

The Panel was so incensed with the EEC's behavior that it mentioned Paragraph 3(c) as well. Whereas Article XIII:3(b) speaks about an overall quota regime and products in transit, Article XIII:3(c) focuses on shares in that quota:

> In the case of quotas allocated among supplying countries, the contracting party applying the restrictions shall *promptly inform* all other contracting parties having an interest in supplying the product concerned *of the shares in the quota currently allocated, by quantity or value*, to the various supplying countries and *shall give public notice* thereof.[824]

The Panel summarized the rule of Article XIII:3(b)-(c) as requiring prompt public notice of both a total quota (in terms of quantity or value of a product), and allotments of shares in the quota on a per country basis. It said the general transparency obligation contained in Article X:1, to publish trade regulations promptly in such a manner as governments and traders can become acquainted with them, reinforced this rule.

The Panel held the EEC to have acted completely at variance with this rule by back-dating Chile's share in the dessert apples quota. The EEC had published a quota share for Chile, simultaneously declared Chile already had filled it, and continued suspension of import licenses for Chilean apples that it had implemented eight days before publishing the quota. In a word, this behavior was inexcusable. It was wrong to apply new or intensified restrictions to goods *en route* at the time the change was announced, and a 1950 set of practices (albeit non-obligatory ones) approved by the CONTRACTING PARTIES said exactly that.[825] The EEC behavior was all the worse, because Chile was the only recipient of a back-dated quota. In other words, said the Panel, here was another violation of Article XIII:1 committed by the EEC. Not only had the EEC violated its transparency duties, but also in so doing it discriminated against Chile.

- **Lessons**

One inference from the GATT Panel Report in the 1989 *Dessert Apples* case is Article XIII must be taken seriously. The Panel did, by agreeing with essentially all of the Chilean Article XIII arguments concerning the non-discriminatory application, and publication, of the EEC QRs on dessert apples. The EEC could not use Article XIII as a shield against the sword of Article XI. That is, having violated Article XI, the EEC could not justify the violation by appealing to Article XIII. It could not do so, because Article XIII had substantively strict requirements. Had the Panel interpreted them otherwise, then Article XIII might become an exception that would "swallow" the rule of Article XI.

The EEC's failed effort to use Article XIII as a defensive shield gives rise to a second point. Sometimes some rich countries stop at nothing to protect their agricultural markets from like product competition from certain poor countries. Lest there be any doubt on this point, consider the facts of the 1997 *Bananas* case. Put briefly, Europe wove another

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824 Emphasis added.

825 *See Dessert Apples* GATT Panel Report, 132 at ¶ 12.27 (*quoting* 1950 *Standard Practices for the Administration of Import and Export Restrictions*).

tangled web against another fruit from a group of poor countries, and tried to defend it in part on Article XIII grounds. Its defense was a spectacular failure.

A third point concerns use of a global quota, as distinct from country-specific allocations of shares in a quota. Professor Jackson interprets Article XIII to state "where possible, use 'global quotas' (*i.e.*, no specific amounts allocated to specific countries or firms)."[826] But, that interpretation is not supported by the text of the Article.

Nothing in Article XIII expresses a "preference" for a global over country-specific quota.[827] Likewise, the case law hardly provides a resounding endorsement of this interpretation. To be sure, depending on a particular product and market environment, it may be easier to satisfy the non-discrimination obligation of Article XIII with a global quota than with country-specific shares in the chapeau of Article XIII:2. However, Paragraph 2(a) itself speaks of quotas "whether allocated among supplying countries or not," and continues on with mandates that they be fixed and notice about them given.

A fourth point about Article XIII and the *Dessert Apples* decision concerns use of a quota versus an import license to effect a QR. Professor Jackson interprets Article XIII to state "where possible, avoid the requirement of licenses."[828] Perhaps that interpretation is an overstatement.

Article XIII:2(b) says import licenses may be used "[I]n cases in which quotas are not practicable…." To allow licensing when quotas are impracticable is not equivalent to a mandate to avoid them unless a quota regime is impossible. Impossibility and impracticability are distinguishable concepts, as in Anglo-American contract law. What is true, and what links this with the third point, is Article XIII:2(c) does not permit a WTO Member to issue country-specific import licenses. If a Member resorts to licensing, then it cannot issue them for imports from a specific country. The licenses must be global.

III. European TRQs and Licensing for Banana Imports

● Origins of EC Banana Import Regime

On 1 July 1993, the EC introduced a common market organization for all banana imports, wherever sourced, through Council Regulation (EEC) 404/93 (Regulation 404/93). EC legislation, regulations, and administrative measures supplemented the Regulation. The common market organization replaced the EC's consolidated tariff of 20% *ad valorem* on banana imports, which had been in effect since 1963. It also replaced a hodgepodge of banana import regimes of individual member states.

Those regimes were bilateral arrangements each member state had with developing countries in the ACP. The individual regimes entailed a combination of quantitative restrictions and licensing requirements. Some regimes were very strict. In keeping with the

826 JACKSON 1969 §13.5 at 323.
827 JACKSON 1969 §13.5 at 327.
828 JACKSON 1969 §13.5 at 323.

common market, member states permitted duty-free entry from other member states. But, the particularities of the bilaterally-arranged regimes as regards imports differed significantly.

Spain, for example, maintained a *de facto* prohibition on imports of bananas, and met its consumption requirements almost exclusively with domestic production from the Canary Islands. France relied principally on bananas from its overseas departments, Guadeloupe and Martinique, and bestowed preferential access on its former colonies, the ACP countries of Côte d'Ivoire and Cameroon. The U.K. imported bananas on preferential terms from its former colonies in the Caribbean, particularly the ACP countries of Jamaica and the Windward Islands (Dominica, Grenada, St. Lucia, and St. Vincent and the Grenadines).

Interestingly, a few EC member states relied on banana imports not from ACP countries, but rather from Latin American countries – so-called "dollar bananas." These member states included Belgium, Denmark, Germany, Luxembourg, Ireland, and the Netherlands. Except for Germany, these states relied on the consolidated 20% tariff as the sole protective measure against banana imports. Germany permitted duty-free imports up to the level of estimated domestic consumption. The seeds of strain within the EC that emerged during the "Bananas War" thus were apparent. France and the U.K. proved far more committed to the defense of preferential arrangements for ACP bananas than the northern European or Benelux countries.

The banana import regimes of individual EC member states hardly went unnoticed by the banana exporting countries denied preferential access. The assorted bilateral preferential regimes were the subject of a complaint brought under the pre-Uruguay Round dispute resolution procedures by Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela. It resulted in a GATT Panel Report issued on 3 June 1993, *EEC – Members States' Import Regimes for Bananas* (DS32/R). It is the "first" *Banana* Panel Report, or *Bananas I*. While the Report recommended various changes to the bilateral import regimes, the Contracting Parties did not adopt it.

The new common market organization regime the EC commenced in 1993 implemented a PTA for *Lomé Convention* countries. The EC negotiated this *Convention* in 1975 with approximately 71 ACP developing countries – the so-called "ACP" or "Lomé" countries. The First *Convention*, signed in Yaoundé, Cameroon, in 1963, like the *Lomé Convention*, set forth a means for the EC to aid the ACP countries, partly through a system of trade preferences (*e.g.*, lower tariffs or duty-free treatment). Many of the Lomé countries were former European colonies. Of the Lomé countries, 39 were among the world's 48 poorest countries.

The Fourth *Lomé Convention* was signed on 15 December 1989 by the EC and the ACP countries, many of which are now WTO Members. This edition contained a protocol concerning bananas, implemented fully in 1993. Consuming about 4 million tons of bananas annually, the EC is the second largest importer of bananas in the world, after the U.S. Domestic EC producers supply only between 645,000 and 750,000 tons of the bananas

consumed in the EC. Their producing areas are in the Azores and Algarve, Canary Islands, Crete, Guadeloupe, Lakonia, Madeira, and Martinique.

Obviously, the EC needs imports to satisfy the balance of consumer demand. For example, the EC imports at least 2.1 million tons of bananas from Latin America, particularly Colombia, Costa Rica, Ecuador, Honduras, and Panama, and up to 727,000 tons from ACP countries. Among the ACP suppliers are Belize, Cameroon, Côte d'Ivoire, Colombia, Dominica, Dominican Republic, Jamaica, and St. Lucia.

The EC's PTA for bananas violated the GATT Article I:1 MFN clause, because it treats bananas from ACP countries (particularly from 12 traditional ACP supplying countries) more favorably than bananas from other countries of origin. As a general matter, the violation was excused by virtue of a Waiver from the EC's Article I:1 obligations. The Waiver, requested by the EC, was granted on 9 December 1994 by a decision of the GATT CONTRACTING PARTIES. It allowed the EC to deviate from the MFN clause "to the extent necessary … to provide preferential treatment for products originating in ACP states as required by … the Fourth *Lomé Convention*, without being required to extend the same preferential treatment to like products of any other contracting party." On 14 October 1996, the WTO General Council agreed to extend the Waiver until 29 February 2000.

Once again, European preferences for ACP bananas became the subject of controversy. Once again, the complaining parties were the same as those in the first *Bananas* case: Colombia, Costa Rica, Guatemala, Nicaragua, and Venezuela. Employing the pre-Uruguay Round dispute resolution procedures, they objected to the discriminatory nature of the EC's market organization for bananas. Once again, they essentially won on the merits. A GATT Panel issued its Report, *EEC – Import Regime for Bananas* (DS38/R), on 11 February 1994. However, the Contracting Parties did not adopt this Report in this second *Bananas* case, *Bananas II*. The non-adoption, coupled with EC resistance to make changes in the ACP preference scheme, may explain in part why Colombia, Costa Rica, Nicaragua, and Venezuela negotiated the *Banana Framework Agreement* (*BFA*) with the EC. But, once again, the complainants' effort to achieve what they regarded as fair market access – a more level playing field – was denied.

Bananas II, like *Bananas I*, thus was hardly akin to a smoldering ember. To use that metaphor would suggest a dying fire. These early cases were more akin to serious border exchanges in a war soon to break out.

- **Three Import Categories and Associated TRQs**

The Bananas War itself – a WTO action – was fought over the PTA set forth in Regulation 404/93. This Regulation established three categories of banana imports:

(1) "Traditional ACP bananas"
These were bananas the EC traditionally imported from 12 ACP countries. These countries of origin were known as the "12 Traditional ACP countries." They were Belize, Cameroon, Cape Verde, Côte d'Ivoire,

Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname.

(2) "Third Country bananas"
These were imports from any third country, *i.e.*, from any Non-ACP Country. The most prominent examples were imports from America's co-complainants, Ecuador, Guatemala, Honduras, and Mexico.

(3) "Non Traditional ACP bananas"
These bananas were defined to come from two sources: (a) quantities of bananas in excess of the quantities traditionally supplied by (*i.e.*, the country-specific quota allotments for) the 12 Traditional ACP Countries, and (b) quantities supplied by ACP countries that are not traditional suppliers to the EC (such as the Dominican Republic, Ghana, and Kenya).

Under its PTA, the EC provided a different tariff treatment for each category. Table 20-1 and the discussion after it explain these categories and related treatment.

For the first category, the EC calculated each year 857,700 tons of bananas traditionally were supplied by the 12 ACP countries listed in the Table. These "Traditional" Supplying Countries began exporting bananas to the EC before 1991. So, the EC granted duty-free entry to up to 857,700 tons annually from these countries. The EC divided the 857,700 limit among the 12 Traditional ACP Countries into country-specific quantitative limits. For example, the largest allocation went to Cameroon and Côte d'Ivoire (155,000 tons annually each), while the smallest allocations went to Madagascar (5,900 tons annually) and Cape Verde (4,800 tons annually). The EC did not bind country-specific quantities in its Schedule, and there was no provision in the EC regulations to increase the level of traditional ACP allocations.

The EC excluded bananas from Latin America from the PTA for Traditional ACP Countries. The category of "Third Country bananas" encompassed banana imports from all Non-ACP Countries. It included major Latin American banana producers (such as Ecuador, Guatemala, Honduras, and Mexico, the U.S. co-complainants). The EC set forth in its Schedule a bound TRQ, called the "basic tariff quota," for all Third Country bananas. It adjusted the basic tariff quota amount each year based on a "supply balance," a figure it calculated from production and consumption forecasts for the upcoming year.

Initially, in 1993, the EC set the basic tariff quota at 2 million tons (net weight) of Third Country bananas. The EC raised it to 2.1 million tons in 1994, and to 2.2 million tons in 1995. The EC bound its basic tariff quota in its GATT Article II Uruguay Round Schedule. Following the accession of Austria, Finland, and Sweden to the EC on 1 January 1995, the EC increased – but, did not bind – the in-quota threshold by 353,000 tons to account for the consumption and supply needs of these new member states.

Table 20-1
Three Import Categories and Associated TRQs

EC Treatment Pursuant to Council Regulation 404/93	**Traditional ACP Bananas**	**Third Country Bananas**	**Non-Traditional ACP Bananas**
Definition of Category	Bananas imported into the EC from the 12 Traditional ACP Supplying Countries, namely: Belize, Cameroon, Cape Verde, Côte d'Ivoire, Dominica, Grenada, Jamaica, Madagascar, Somalia, St. Lucia, St. Vincent and the Grenadines, and Suriname.	Bananas imported into the EC from any Non-ACP Country (*e.g.*, U.S. co-complainants, Ecuador, Guatemala, Honduras, and Mexico).	Bananas imported into the EC from any of the 12 Traditional ACP supplying countries in excess of the traditional quota allocation for these Countries of 857,700 tons annually. Also, all bananas imported into the EC from any Non-Traditional ACP supplying country (*e.g.*, Dominican Republic, Ghana, Kenya).
TRQ Amount ***(in terms of metric tons annually, net weight)***	In-quota amount of 857,700 (not bound).	In-quota amount was known as "basic tariff quota" (bound). The EC set it at 2 million in 1993, 2.1 million in 1994, and 2.2 million in 1995. The EC increased the basic tariff quota by 353,000 (unbound) to accommodate consumption and supply needs of three newly acceded EC members (Austria, Finland, and Sweden).	The EC set aside 90,000 (bound) of the basic tariff quota for Non-Traditional ACP bananas.

Table 20-1 (continued)

Country-Specific Allocations, and "Others" Category ***(in terms of tons annually, net weight, or percentage)***	The EC allocated the 857,700 in-quota amount among the 12 Traditional ACP Suppliers: Belize, 40,000; Cameroon, 155,000; Cape Verde, 4,800; Côte d'Ivoire, 155,000; Dominica, 71,000; Grenada, 14,000; Jamaica, 105,000; Madagascar, 5,900; Somalia, 60,000; St. Lucia, 127,000; St. Vincent and the Grenadines, 82,000; Suriname, 38,000.	The EC allocated percentage shares in the basic tariff quota (which it originally set at 2 million, as noted above, plus an increase of 353,000 for the 3 new EC members) to the 4 *BFA* countries (Colombia, Costa Rica, Nicaragua, and Venezuela). In addition, the EC put non-*BFA*, non-ACP countries into an all "others" category in which there were no country-specific allocations. Thus: Costa Rica, 23.4%; Colombia, 21%; Nicaragua, 3%; Venezuela, 2%; Others, 46.32% (in 1994), 46.51% (in 1995). The EC set aside the remaining share of the basic tariff quota, equaling 90,000, for Non-Traditional ACP bananas.	The EC allocated 30,000 of the 90,000 of the basic tariff quota to 3 of the 12 Traditional ACP Suppliers for quantities in excess of the traditional amounts they supply: Belize, 15,000; Cameroon, 7,500; Côte d'Ivoire, 7,500. The EC allocated the remaining 60,000 of the 90,000 to non-Traditional ACP Countries: Dominican Republic, 55,000; Other Non-Traditional ACP suppliers (*e.g.*, Ghana, Kenya), 5,000.

Table 20-1 (continued)

Tariff Applicable to In-Quota and Out-of-Quota Imports ***(ECU per ton)***	Duty-free for in-quota amount. ECU 693 for out-of-quota amount (in 1996-97).	ECU 75 up to basic tariff quota (applied on an MFN basis). ECU 822 for out-of-quota amount (in 1995), ECU 793 for out-of-quota amount (in 1996-97), and ECU 680 (in 2000) (bound and applied on an MFN basis).	Duty-free entry for Non-Traditional ACP bananas up to the country-specific allocations of the 90,000 set-aside. ECU 722 for out-of-quota amount (in 1995), and ECU 693 for out-of-quota amount (in 1996-97).

The EC established an MFN tariff of ECU 75 per ton for in-quota shipments, *i.e.*, imports of bananas from Third Countries within the basic tariff quota (*e.g.*, in 1995, 2.2 million tons plus 353,000 tons, or 2.535 million tons). To out-of-quota shipments, *i.e.*, banana imports in excess of the basic tariff quota (*e.g.*, in 1995, above 2.535 million tons), the EC applied an MFN tariff of ECU 822 per ton (as of 1 July 1995). Pursuant to its Uruguay Round commitments, the EC cut this amount to ECU 792 per ton (effective 1 July 1996), still about 10 times higher than for in-quota shipments. At the end of the six-year period to implement those commitments (*i.e.*, in 2000), the EC's final bound MFN rate was ECU 680 per ton. The reduction from ECU 822 to ECU 680 seemed impressive, but the final amount still was almost 10 times as high as the tariff for in-quota shipments. In other words, it was a major barrier to Third Country bananas.

Significantly, four banana-exporting countries in Latin America – Colombia, Costa Rica, Nicaragua, and Venezuela – realized they could not obtain free market access to the EC. The GATT Panel Report in the second *Bananas* case they (along with Guatemala) brought against the EC had neither been adopted by the Contracting Parties nor otherwise forced any meaningful changes to the EC's PTA. Consequently, these four dollar banana exporting countries negotiated with the EC for better treatment than other dollar banana supplying countries. In 1994, they and the EC entered into a *Framework Agreement on Bananas* (commonly referred to as the "*BFA*"). The *BFA* took effect on 1 January 1995, and expired on 31 December 2002. The *BFA* countries did not get better-than-average treatment for free: they surrendered a valuable right, namely, they agreed not to sue the EC in the WTO before 2002.

Under the *BFA*, the EC allocated in its GATT Article II Schedule to each of the four exporting countries specific shares of the bound basic tariff quota. That is, these privileged countries were guaranteed a slice of the TRQ for dollar bananas. Costa Rica, for instance, was given a 23.4% share, Colombia received a 21% share, Nicaragua a 3% share, and Venezuela a 2% share. In total, the EC reserved for *BFA* countries a whopping 49.4% of its basic tariff quota.

Non-ACP, non-*BFA* countries were not so fortunate. The EC put them in an "Others" category. In 1994, this catch all grouping equaled 46.32% of the overall in-quota amount of the basic tariff quota. In 1995, it was 46.51%. Moreover, whenever the EC raised its basic tariff quota (*e.g.*, from 2.1 million tons annually to 2.2 million tons annually between 1994 and 1995), it allocated the increase to *BFA* countries (including countries in the "others" category) in accord with these proportionate shares.

Plainly, because of the *BFA, i.e.*, because of the exclusion of all but four of the Latin American banana exporting countries, the EC did not treat all Third Country banana producers alike. Therein was the pattern. The EC gave country-specific shares in a TRQ to 12 of its former colonies, and country-specific shares in its basic tariff quota to the four dollar banana exporters. All other countries fought over the scraps of the basic tariff quota.

The third and final category of banana imports the EC created was an offspring of the second category. "Non-Traditional ACP Bananas" covered two sub-categories of banana imports: (1) bananas exported by the 12 Traditional ACP countries in excess of the 857,700 ton allotment already allocated to them; and (2) all bananas exported by Non-Traditional ACP Countries. So, this category embraced all ACP Countries, differentiating between historical ACP Suppliers, on the one hand, and countries not traditionally supplying the EC, on the other hand. Pursuant to the *BFA*, the EC carved out from the basic tariff quota 90,000 tons annually. It then divided the 90,000 ton carve-out between these two sub-categories of Non-Traditional ACP bananas, and bound this amount in its GATT Article II Schedule. All 90,000 tons were admitted duty-free.

Why would the *BFA* countries agree to the reservation of 90,000 tons of the basic tariff quota for Non-Traditional ACP Countries? After all, the *BFA* countries are not ACP Countries, thus any subtraction from the basic tariff quota for the ACP Countries would come at their expense (unless the EC took the 90,000 tons only from the "others" category of third-country bananas). One possibility is the EC bound the 90,000 ton figure in its schedule, the *BFA* countries felt assured there would be no more "leakage" of in-quota amounts from them to the ACP. The EC would not take away any more of the basic tariff quota for the ACP. To be sure, the fact the EC bound the 90,000-ton figure meant it agreed not to lower the amount. Conceivably, the EC might be more generous to the ACP, but apparently the *BFA* felt that scenario was unlikely. A second answer is the *BFA* countries had to accept the 90,000-ton reservation for non-traditional ACP countries as a *quid pro quo* for country-specific percentage share allocations of the basic tariff quota the *BFA* countries were guaranteed by the EC.

The EC divided the 90,000 ton limit into country-specific allocations: 15,000 tons to Belize, a Traditional ACP Supplier; 7,500 tons to Cameroon, a Traditional ACP Supplier; 7,500 tons to Côte d'Ivoire, a Traditional ACP Supplier; 55,000 tons to the Dominican Republic, a Non-Traditional ACP Supplier; and 5,000 tons to all "other" Non-Traditional ACP Supplying Countries (for example, Ghana and Kenya). The EC based the allocations to the three Traditional ACP suppliers, Belize, Cameroon, and Côte d'Ivoire, on the best-ever pre-1991 export volumes of these countries to the EC.

What about out-of-quota shipments? The EC subjected them to a per ton duty adjusted each year. In 1995, it was ECU 722, fully ECU 100 less than the ECU 822 the EC charged to out-of-quota shipments of bananas from third countries. In 1996-1997, the EC charged a tariff of ECU 693 per ton on over-quota amounts of bananas from Non-Traditional ACP Suppliers. This tariff was clearly more preferential than the ECU 793 per ton rate applicable to out-of-quota shipments from Third Countries that took effect on 1 July 1996. The margin of preference reflected the distinction between ACP and non-ACP countries. Here was one more part of the pattern: discrimination in favor of ACP Countries vis-à-vis Non-ACP Countries.

- **Operator Category Rules**

The facts of the Bananas War are difficult, but not excessively so, if they end here. They do not. Beyond the EC's tripartite categorization, what elevates the factual predicate from the level of "difficult" to "nearly incomprehensible" is the European licensing system. Yet, having a try at the licensing scheme helps to comprehend several battles of the War.

The EC subjected bananas from Traditional ACP, Third Country, and Non-Traditional Suppliers to licensing procedures. Only an importing company that held a license was permitted to import bananas into the EC. To get this cherished authorization, an importer filed an application with the competent authority in each EC member state into which the importer sought market access. That authority administered the EC's license allocation procedures in cooperation with the EC office in the member state.

The relevant licensing requirements were those applicable to banana imports from Third Countries and Non-Traditional ACP Suppliers at the preferential tariff rate for in-quota shipments. The EC applied three cumulatively applicable procedures: (1) Operator Category rules; (2) Activity Function rules; and (3) Export Certificate requirements for Colombia, Costa Rica, and Nicaragua.

First, the EC allocated licenses among "Operator Categories." There were three such Categories, A, B, and C, which Table 20-2 summarizes, and in which any company seeking to import bananas into the EC was placed. Category C licenses were not transferable to A or B Operators, but Category A or B licenses could be traded among Operators from any Category. Every applicant for a license to import bananas from a Third Country or Non-Traditional ACP Country was put in one of these three Categories. The Categories differed from one another according to the past import activities of the applicant, namely, the (1) countries (if any) from which it imported bananas, and (2) length of time it imported bananas.

Table 20-2
Operator Categories in EC TRQ for
Imported Bananas from Third or Non-Traditional ACP Countries

Operator Category	***Definition of Operator Category***	***Allocation of Licenses to Each Operator Category for Bananas to be Imported at In-Quota Tariff Rates from Third or Non-Traditional ACP Countries (Expressed as a Percentage of Total Import Licenses)***	***Basis for Determining the Percentage Allocation of Licenses Among Operators within Each Category***
Category A	"Old hands" Any Operator that had been marketing bananas since before 1992 from Third Countries and/or Non-Traditional ACP Countries.	66.5%	The EC divided the 66.5% license allocation among Category A operators based on the average quantities of Third Country and/or Non-Traditional ACP bananas that the operator has imported during the most recent 3-year period for which data exist. Essentially, operators that had been importing larger volumes received a more generous allocation than operators that had been handling smaller volumes.
Category B	"Diversifiers" Any Operator that had marketed bananas from the EC and/or Traditional ACP Countries during a preceding 3-year period.	30%	The EC divided the 30% license allocation among Category B operators based on the average quantities of EC and/or Traditional ACP bananas the operator has marketed in the most recent three-year period for which data exist. Essentially, operators that had been importing larger volumes receive more generous allocations than operators that had been handling smaller volumes.

Table 20-2 (continued)

Category C	"New comers." Any Operator that started marketing bananas from other than the EC and/or Traditional ACP Countries in 1992 or after.	3.5%	No data were available because Category C Operators were newcomers. The EC divided the 3.5% allocation among applicants on a *pro rata* basis.

Category C Operators were newcomers. They started marketing bananas from origins other than EC or Traditional ACP Countries in 1992 or after. So, an importer that began marketing Third Country or Non-Traditional ACP bananas in 1993 was put in Category C. The EC allocated 3.5% of the import licenses available for Third Country and Non-Traditional ACP bananas at in-quota rates to Category C Operators. Because they were newcomers, there were no data on the quantities of bananas each Category C Operator historically imported. Therefore, the EC divided licenses among these Operators on a *pro rata* basis. The EC derived the 3.5% figure by studying the volume of license applications for the newcomer portion of the in-quota amount of the TRQ.

Category B Operators had not marketed Third Country or Non-Traditional ACP bananas before, but they had been marketing EC and Traditional ACP bananas. They were trying to add Third Country or Non-Traditional ACP bananas to their portfolio of business interests (or perhaps to switch entirely to bananas from other sources). They could be dubbed the "diversifiers." The EC gave them 30% of the licenses to import Third Country and Non-ACP bananas at in-quota rates. Why 30%? The EC looked at the average quantity of bananas from the EC and Traditional ACP Supplying Countries that Category B operators marketed during the most recent three-year period for which data were available. In other words, the EC picked the 30% figure based on recent import trends.

Vitally, an importer with a license to import Traditional ACP bananas could obtain, in addition, a license to import Third Country and Non-Traditional ACP bananas. That importer was placed in Category B. Also, Category B operators were not as favored as Category A Operators, which got the largest percentage share of licenses.

Category A Operators had been marketing Third Country and/or Non-Traditional bananas since before 1992. They were (in contrast to the newcomers of Category C and the diversifiers of Category B) the "old hands." They received from the EC the lion's share of the allocation of all import licenses for Third Country and Non-Traditional bananas: 66.5%. How did the EC come upon this figure (which it considered generous)?

The EC used the same basis for determining entitlement to Category A licenses as for Category B licenses, namely, recent import data. The EC checked the average quantities of bananas from Third and/or Non-Traditional ACP Countries marketed in the three most

recent years for which data were available. It decided Category A Operators ought to be entitled to receive 66.5% of the licenses for importation of bananas from Third Countries and Non-Traditional ACP Countries at the in-quota rates.

In sum, conceptually, the EC did not immediately allocate import licenses directly to individual Operators. First, it gave them to import operator categories. Then, based on Activity Functions, it allocated them to individual operators within the Categories. Regarding its allocation to Categories, the EC granted the vast majority to Category, A, populated by companies that had been importing Third Country and Non Traditional ACP bananas since before 1992. The Category representing companies that had only just begun importing bananas from outside the EC and Traditional ACP Countries, *i.e.*, had done so only since 1992, get a tiny fraction – 3.5% – of the licenses. The Category representing companies that had focused their efforts on bananas from the EC and traditional ACP suppliers were better off, with a 30% allocation.

Is it fair to say the "old hands" at importing from Third Countries and Non-Traditional ACP Countries were the "chosen ones," because the EC license allocation scheme favored importers that had been in that market for a sustained period with a 66.5% allocation? Not necessarily. To be sure, the 66.5% figure suggests the scheme favored the *status quo* and made it tough for companies trying to break into the Third Country and Non-Traditional ACP banana import market to do so. But, Category B operators were more accurately dubbed the "chosen ones."

Consider exactly who they were. Critics of the EC preference scheme emphasized Category B operators tended to be European (especially British and French) companies. Consequently, these licensees got a sizeable chunk – 30% – of the licenses to import Non-Traditional ACP and Third Country bananas, even though that market niche has not been their forte. Consequently, Category B operators had a significant degree of control over the price paid to producers of dollar bananas, and the EC retail price. The spread between the two prices often was large – as much as $12 per box of bananas, reflecting a payment of $4 to the Latin producer and a re-sale price of $16. Thus, Category B importers had a significant vested interest in seeing the way the EC doled out licenses did not disrupt the *status quo*.

- **Activity Function Rules**

What did the term "marketing" bananas mean? How did the EC determine the amount of bananas an individual operator is licensed to import, *i.e.*, the "Individual Operator Reference Quantities"? So-called "Activity Function" rules resolved these areas of uncertainty created by the Operator Categories. Table 20-3 summarizes the rules, which are the second of the cumulatively applicable EC procedures to allocate licenses to import bananas from Third Countries and Non-Traditional ACP countries. Based on Activity Functions, the EC allocated fixed percentages of licenses required for the importation of bananas from these sources at in-quota tariff rates.

Activity Function rules pertained only to Category A and B Operators, not Category C. To qualify for Category A or B, an importer must have performed at least one of the "marketing" activities – (a), (b), or (c) – during the 3-year data period that determined the reference quantities of bananas. Activity (a) functions were associated with a "primary importer." An Operator performed Activity (a) if it purchased green bananas from producers in Third, Traditional ACP, or Non-Traditional ACP Countries, or if it produced bananas in these Countries, and subsequently sold the bananas in the EC. An Operator performed Activity (b) if it acted as a "secondary importer" or "customs clearer." It did so by, as an owner, supplying and releasing green bananas for free circulation, with a view to subsequent marketing of the bananas in the EC, and taking on the risk of spoilage or loss. Finally, an operator performed Activity (c) if it acted as a "ripener," *i.e.*, as an owner, it ripens and markets green bananas within the EC.

Associated with each Activity was a weighting coefficient. This coefficient was applied to the average quantity of bananas marketed by an operator in the three most recent data years. The result of the multiplication was the Individual Operator's Reference Quantity. The EC used that Quantity to set the individual Operator's annual entitlement to licenses. That is, an Operator's license claim was based on its Reference Quantity. This Quantity depended on the product of the operator's (1) historical banana import volumes, and (2) the weighting coefficient as determined by its type of Activity.

On what were the values of the weighting coefficients based? Risk. The weighting coefficients differed depending on the level of commercial risk borne by the Operators for the different activities. The idea was greater risk, greater reward. The EC as licensor was in the business of granting licenses to operators that undertook commercial risk at some point in the marketing chain. It rewards risk-taking, because the amount of bananas from Third and Non-Traditional ACP Countries that these licenses authorized an operator to import depended on the riskiness of the activities the Operator performed.

Logically, those firms engaging in riskier activities should have a larger entitlement to licenses. The EC designed its Activity Function rules to implement this logic. Primary importation was seen as the riskiest Activity, so it had the highest weighting coefficient, 57%. Secondary importation was viewed as the least risky of the three Activities, so its coefficient was 15%. In between these two Activities in terms of risk levels was ripening, which carried a 28% coefficient. If an Operator performed more than one Activity, then it got the benefit of the coefficients associated with those activities. The weighting coefficient for an operator performing all three Activities was 100%.

Table 20-3
Activity Functions under EC TRQ for
Imported Bananas from Third and Non-Traditional ACP Countries

Activity Function	***Type of Activity***	***Definition of Activity***	***Weighting Coefficient*** ***(Reflects the Level of Commercial Risk Borne by Operator in Connection with the Activity, and is Used to Determine Each Operator's Individual Reference Quantity)***
(a)	Primary Importer	Purchasing green bananas from producers in Third, Traditional ACP, or Non-Traditional ACP Countries, or producing such bananas in these Countries, and subsequently selling them in the EC.	57%
(b)	Secondary Importer (*i.e.*, Customs Clearer)	As an owner, supplying and selling green bananas with a view to their subsequent marketing in the EC, while bearing the risk of spoilage or loss.	15%
(c)	Ripener	As an owner, ripening green bananas and marketing them in the EC.	28%

- **Computation of Individual Reference Quantity**

The preceding paragraphs imply an Operator's Individual Reference Quantity was not necessarily identical in amount with the amount of Third Country and ACP bananas the Operator was licensed to import. Rather, the Individual Reference Quantity was a key figure the EC used to decide (1) the operator's claim for a license, and (2) the amount of bananas the license represents. Conceptually, calculation of the Individual Reference Quantities was the penultimate step. The final step was translation of these Quantities into actual license grants for specific amounts to individual operators. How the EC performed the final step was not apparent from either the Panel or Appellate Body Report, from which it is difficult to fathoming the precise details. (It was said, half-jokingly, perhaps three or four people at the EC in Brussels could explain what was going on, though not necessarily in a satisfactory manner. Fortunately, following them does not seem to be essential to understanding the legalities of the Bananas War.)

Another way to comprehend weighting coefficients is to realize they represented the percentage of Category A and B licenses to which an importer engaged in a certain Activity has access for the importation of bananas from Third Countries and Non-

Traditional ACP Countries. Primary importers could obtain access to "A" and "B" licenses equivalent to 57% of their past import volumes (assuming they did not also perform customs clearance and ripening activities). Customs clearers got 15% of the "A" and "B" licenses, and ripeners are eligible for 28% (again, assuming no further activities).

A greatly simplified hypothetical example helps clarify how the Operator Category and Activity Function rules worked in practice. Assume the EC set the in-quota amount – the basic tariff quota – for bananas from Third Countries and Non-Traditional ACP Supplying Countries at 2 million tons (net weight). Thus, the total in-quota amount of bananas from Third and Non-Traditional ACP Countries for which the EC will distribute licenses is 2 million tons.

Based on average quantities of Third Country and/or Non-Traditional ACP bananas marketed in the 3 most recent years for which data are available, the EC decides to allocate 66.5% of these licenses to Category A operators. Based on the average quantities of EC and/or Traditional ACP bananas marketed in the three most recent years for which data are available, the EC allocates 30% of the licenses to Category B operators. Accordingly, the licenses the EC grants to Category A importers to import bananas from Third Countries and Non-Traditional ACP suppliers at the in-quota tariff will represent 66.5% of the 2 million-ton quota, or 1,300,000 tons. Of all licenses, 30%, representing 600,000 tons, will go to Category B. Operators in Category C will be authorized to import 100,000 tons in total at the in-quota tariff rate.

But, how does the EC determine the volume of bananas permitted to be imported by an individual operator, *i.e.*, the Individual Reference Quantity, of that operator? The EC has to look to the Activity Category of that importer. Therefore, consider 3 license applicants, Zabars, HyVee, and Freshfields. Suppose Zabars has never marketed Third Country or Non-Traditional ACP bananas in the EC. Therefore, it falls in Category C. The EC allocates Zabars a portion of the 3.5% of the licenses available for Category C operators. How big is the allocation, and thus how many tons of bananas is Zabars entitled to import from Third Countries and Non-Traditional ACP Countries? The answer depends on a *pro rata* license allocation among Category C applicants.

Suppose HyVee has marketed Traditional ACP bananas. Specifically, it has ripened and sold these bananas within the EC. So, it is a Category B Operator, and has been engaging in Activity (c). The EC allocates to HyVee a portion of the 30% of import licenses for in-quota Third Country and Non-Traditional ACP bananas. Suppose HyVee has imported on average 200,000 tons of Traditional ACP bananas during the most recent three-year data period. (Obviously, not all of these imports have been at the in-quota amount. This figure represents both in-quota and out-of-quota amounts.) What is HyVee's Individual Reference Quantity?

The answer is 56,000 tons. This answer results from the application of the weighting coefficient for Activity (c), in which HyVee is engaged, to the 200,000-ton average quantity of bananas HyVee has marketed. The coefficient is 28%, and the product of it and 200,000 tons is 56,000 tons. Given this Individual Reference Quantity, the EC

would not grant HyVee a Category B operator license to import any more than 56,000 tons of bananas from Third Countries and Non-Traditional ACP countries at the in-quota amount. In other words, the 56,000-ton figure sets an upper boundary.

Precisely what amount of such bananas does the EC authorize HyVee to import? The answer depends on HyVee's Individual Reference Quantity. That Quantity determines entitlement to import a specified amount of Third Country and ACP bananas. But, it is not necessarily the licensed amount itself. The license, of course, entitles HyVee to receive the benefit of the lower tariff rate on bananas up to the licensed amount. Bananas from these Countries of origin in excess of this Individual Reference Quantity are subject to the higher tariff for out-of-quota shipments.

Suppose HyVee was engaged in Activity (a), primary importing. The EC deems that riskier than ripening, as is evident from the 57% weighting coefficient. Therefore, HyVee's Individual Reference Quantity would be higher: 114,000 (*i.e.*, the product of the 200,000 ton average quantity of Traditional ACP bananas Well Spring had been marketing and the coefficient.) In turn, HyVee is entitled to a Category B license authorizing it to import more third-country and non-traditional ACP bananas than would be the case if HyVee were engaged only in ripening. Here, too, the Individual Reference Quantity to serve as an upper limit on the precise tonnage entitlement, *i.e.*, the entitlement will not exceed 114,000 tons. What is the logic behind the larger entitlement HyVee gets as a primary importer as opposed to a ripener? Again, greater risk assumed in the past entitles an importer to greater return, in the form of a more generous import license, for the future. Because HyVee has been engaged in the riskier business of primary importation of Traditional ACP bananas, the EC rewards HyVee with a license to import a larger quantity of Third Country and Non-Traditional ACP bananas than would be the case if HyVee had been a mere ripener of Traditional ACP bananas.

Finally, consider the position of Freshfields. Suppose it has marketed Third-Country and (or) Non-Traditional ACP bananas for many years (in particular, since before 1992), and thus fits into Category A. Assume Freshfields has acted as a primary importer, *i.e.*, engaged in Activity (a), so the applicable weighting coefficient is 57%. Suppose further the average quantity of bananas, both in- and out-of-quota, that Freshfields imported from Third Countries and (or) Non-Traditional ACP Countries in the most recent 3 years is 400,000 tons. Therefore, its Individual Reference Quantity for these imports is 228,000 tons (*i.e.*, the product of this amount and the coefficient). Given this Quantity, Freshfields is entitled to a Category A import license authorizing it to bring into the EC a set amount of bananas, not to exceed 228,000 tons, at the in-quota tariff rate from Third and Non-Traditional ACP Countries. Any amount in excess of what the EC authorizes is subject to the out-of-quota rate.

Here again, the "greater risk, greater reward" logic is apparent. If Freshfields had engaged in only secondary market activities, *i.e.*, if it had acted only as a customs clearer, then its Individual Reference Quantity would be far lower – the product of 15% and 400,000 tons, or 60,000 tons. In turn, the EC would set an in-quota amount for Freshfields

as regards the importation of Third Country and ACP bananas commensurate with this lower Quantity.

- ***BFA* Export Certificates**

Allocating licenses to import bananas from Third Countries and Non Traditional ACP Supplying Countries involved multiple steps that the EC undertakes *in seriatim*. Step 1 involved placing importers into Operator Categories A, B, and C, and assigning percentage shares of licenses to those Categories. Step 2 resulted in calculation of Individual Reference Quantities, and on the basis thereof, allocation of licenses for importation at the in-quota tariff rate to each company in Category A and B. Step 3 concerned an additional requirement that must be satisfied to receive an import license for bananas from any one of the *BFA* countries.

The EC reserved for *BFA* countries specific shares in the basic tariff quota for duty-free imports of bananas from Non Traditional ACP and Third Country Suppliers. Among the *BFA* countries, the EC granted Colombia a 21% share in the tariff-rate quota, Costa Rica a 23.4% share in the tariff-rate quota, Nicaragua a 3% share, and Venezuela a 2% share. These country-specific reservations were not the only special treatment the *BFA* provided to these exporting countries. The *BFA* also authorized these four countries to issue special "Export Certificates" for up to 70% of their country-specific allocations.

Export Certificates were a device for a *BFA* country to decide which companies could take advantage of the country-specific shares, and export bananas to the EC. Without a Certificate, exportation was forbidden. Of the 4 *BFA* countries, Colombia, Costa Rica, and Nicaragua (but not Venezuela) issued Certificates. In turn, the EC required a Category A or C (but not B) operator to obtain a Certificate to be eligible to receive from the EC a license to import bananas from Colombia, Costa Rica, or Nicaragua.

IV. 1997 *Bananas* War Outcomes

WTO APPELLATE BODY REPORT, *EUROPEAN COMMUNITIES – REGIME FOR THE IMPORTATION, SALE AND DISTRIBUTION OF BANANAS*, WT/DS27/AB/R (ADOPTED 25 SEPTEMBER 1997)

I. Introduction

1. The European Communities and Ecuador, Guatemala, Honduras, Mexico and the United States (the "Complaining Parties") appeal from certain issues of law and legal interpretations in the Panel Reports, *European Communities - Regime for the Importation, Sale and Distribution of Bananas* (the "Panel Reports"). …

2. The Panel issued four Panel Reports [one for the U.S., Ecuador, and Mexico, and one for Guatemala and Honduras combined] …

[The Panel's findings with respect to the complaints of Ecuador and Mexico were identical. It also made the same findings, except for the *GATS* claims, which were not in issue, with respect to the complaints of Guatemala and Honduras. Omitted are the portions of the Appellate Body Report dealing with the *GATS*. In brief, the U.S. prevailed in its claim the EC's banana import regime ran afoul of the MFN and national treatment principles in *GATS* Articles II and XVII, respectively. Observe, as the Appellate Body stated in ¶ 255(p), that there is no legal basis for an *a priori* exclusion of a trade measure from the scope of the GATT *and GATS*. Depending on the measure in question, both regimes may overlap simultaneously.]

...

IV. Issues Raised in this Appeal

129. The appellant, the European Communities, raises the following issues in this appeal:

...

(d) Whether the EC's allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities, is consistent with Article XIII:1 of the GATT 1994; and whether the tariff quota reallocation rules of the *BFA* are consistent with the requirements of Article XIII:1 of the GATT 1994;

...

(f) Whether the existence of two separate EC regimes for the importation of bananas is legally relevant to the application of the non-discrimination provisions of the GATT 1994 and the other Annex 1A agreements of the *WTO Agreement*;

...

(i) Whether the application of the EC activity function rules to imports of third-country and non-traditional ACP bananas, in the absence of the application of such rules to imports of traditional ACP bananas, is consistent with Article I:1 of the GATT 1994; and whether the EC export certificate requirement for the importation of *BFA* bananas is consistent with the requirements of Article I:1 of the GATT 1994;

(j) Whether the EC import licensing procedures are within the scope of Article III:4 of the GATT 1994; and, if so, whether the EC practice with respect to hurricane licenses is consistent with the requirements of Article III:4 of the GATT 1994...

[Omitted is the Appellate Body's discussion of issues (i) and (j). In respect of licensing requirements, what ought the outcome to be on these issues? Check ¶ 255(n)-(o) below. Also excludes is the Appellate Body's treatment of the following issues the EC raised. Whether: (1) the U.S. had standing to bring GATT claims; (2) the requirements of *DSU* Article 6:2 for establishment of a panel were met; (3) Articles 4:1 and 21:1 of the WTO *Agreement on Agriculture* prevailed over the EC's GATT Article XIII obligations; (4) the EC was required under the *Lomé Convention* to allocate shares in its tariff-rate quota to traditional ACP countries, and to maintain licensing procedures for bananas from third countries and non-traditional ACP countries; (5) the WTO *Agreement on Import Licensing Procedures* are relevant to tariff-rate quotas; and (6) the EC's licensing system ran afoul of GATT Article X:3(a). These five issues are not central to the case, in contrast to the

GATT Article XIII claim. As noted earlier, the discussion of all *GATS* issues also is excluded. Finally, omitted is the discussion of the complainants' argument as to whether the *Lomé Convention* waiver for the EC that covers GATT Article I also covers Article XIII. In brief, the Appellate Body found the waiver did not embrace breaches of Article XIII.]

B. Multilateral Agreements on Trade in Goods

...

2. *Article XIII of the GATT 1994*

159. The European Communities raises two legal issues relating to the interpretation of Article XIII of the GATT 1994. The first is whether the allocation by the European Communities of tariff quota shares, by agreement and by assignment, to some Members not having a substantial interest in supplying bananas to the European Communities (including Nicaragua, Venezuela, and certain ACP countries in respect of traditional and non-traditional exports), but not to other such Members (including Guatemala), is consistent with Article XIII:1. The second is whether the tariff quota reallocation rules of the *BFA* are consistent with the requirements of Article XIII:1 of the GATT 1994.

…

161. In administering quantitative import restrictions or tariff quotas, Members must also observe the rules in ArticleXIII:2. … Article XIII:2(d) provides specific rules for the allocation of tariff quotas among supplying countries, but these rules pertain only to the allocation of tariff quota shares to Members "having a substantial interest in supplying the product concerned." Article XIII:2(d) does not provide any specific rules for the allocation of tariff quota shares to Members not having a substantial interest. Nevertheless, allocation to Members not having a substantial interest must be subject to the basic principle of non-discrimination. When this principle of non-discrimination is applied to the allocation of tariff quota shares to Members not having a substantial interest, it is clear that a Member cannot, whether by agreement or by assignment, allocate tariff quota shares to some Members not having a substantial interest while not allocating shares to other Members who likewise do not have a substantial interest. To do so is clearly inconsistent with the requirement in Article XIII:1 that a Member cannot restrict the importation of any product from another Member unless the importation of the like product from all third countries is "similarly" restricted.

162. Therefore, on the first issue raised by the European Communities, we conclude that the Panel found correctly that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities is inconsistent with the requirements of Article XIII:1 of the GATT 1994.

163. The second issue relates to the consistency of the tariff quota reallocation rules of the *BFA* with Article XIII:1 of the GATT 1994. Pursuant to these reallocation rules, a portion of a tariff quota share not used by the *BFA* country to which that share is allocated may, at the joint request of the *BFA* countries, be reallocated to the other *BFA* countries. These reallocation rules allow the exclusion of banana-supplying countries, other than *BFA*

countries, from sharing in the unused portions of a tariff quota share. Thus, imports from *BFA* countries and imports from other Members are not "similarly" restricted. We conclude, therefore, that the Panel found correctly that the tariff quota reallocation rules of the *BFA* are inconsistent with the requirements of Article XIII:1 of the GATT 1994. Moreover, the reallocation of unused portions of a tariff quota share exclusively to other *BFA* countries, and not to other non-*BFA* banana-supplying Members, does not result in an allocation of tariff quota shares which approaches "as closely as possible the shares which the various Members might be expected to obtain in the absence of the restrictions." Therefore, the tariff quota reallocation rules of the *BFA* are also inconsistent with the *chapeau* of Article XIII:2 of the GATT 1994.

...

4. *The "Separate Regimes" Argument*

189. It has been argued by the European Communities that there are two separate EC import regimes for bananas, the preferential regime for traditional ACP bananas and the *erga omnes* regime for all other imports of bananas. … The European Communities argues … the non-discrimination obligations of Articles I:1, X:3(a) and XIII of the GATT 1994 ... apply only *within* each of these separate regimes. The Panel found that the European Communities has only one import regime….

190. The issue here is not whether the European Communities is correct in stating that two separate import regimes exist for bananas, but whether the existence of two, or more, separate EC import regimes is of any relevance for the application of the non-discrimination provisions of the GATT 1994.... The essence of the non-discrimination obligations is that like products should be treated equally, irrespective of their origin. As no participant disputes that all bananas are like products, the non-discrimination provisions apply to *all* imports of bananas, irrespective of whether and how a Member categorizes or subdivides these imports for administrative or other reasons. If, by choosing a different legal basis for imposing import restrictions, or by applying different tariff rates, a Member could avoid the application of the non-discrimination provisions to the imports of like products from different Members, the object and purpose of the non-discrimination provisions would be defeated. It would be very easy for a Member to circumvent the non-discrimination provisions of the GATT 1994, ... if these provisions apply only *within* regulatory regimes established by that Member.

191. Non-discrimination obligations apply to all imports of like products, except when these obligations are specifically waived or are otherwise not applicable as a result of the operation of specific provisions of the GATT 1994, such as Article XXIV. In the present case, the non-discrimination obligations of the GATT 1994, specifically Articles I:1 and XIII, apply fully to all imported bananas irrespective of their origin, except to the extent that these obligations are waived by the *Lomé* [*Convention*] Waiver. We, therefore, uphold the findings of the Panel that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective if there is one or more "separate regimes" for the importation of bananas.

…

V. Findings and Conclusions

255. ... [T]he Appellate Body:

...

(e) upholds the Panel's finding that the allocation of tariff quota shares, whether by agreement or by assignment, to some, but not to other, Members not having a substantial interest in supplying bananas to the European Communities is inconsistent with Article XIII:1 of the GATT 1994;

(f) upholds the Panel's finding that the tariff quota reallocation rules of the *BFA* are inconsistent with Article XIII:1 of the GATT 1994, and modifies the Panel's finding by concluding that the *BFA* tariff quota reallocation rules are also inconsistent with the *chapeau* of Article XIII:2 of the GATT 1994;

...

(k) upholds the Panel's findings that the non-discrimination provisions of the GATT 1994, specifically, Articles I:1 and XIII, apply to the relevant EC regulations, irrespective of whether there are one or more "separate regimes" for the importation of bananas;

...

(n) upholds the Panel's conclusions that the EC activity function rules and the *BFA* export certificate requirement are inconsistent with Article I:1 of the GATT 1994;

(o) upholds the Panel's findings that Article III:4 of the GATT 1994 applies to the EC import licensing procedures, and that the EC practice with respect to hurricane licenses is inconsistent with Article III:4 of the GATT 1994;

…

V. Helping and/or Hurting Poor Countries?

● Rhetoric versus Three Facts

One of the most regrettable aspects of the *Bananas* War was the rhetoric about helping developing countries. The EC was vocal in asserting it had their interests at heart. Anything less than a vigorous defense of the preferential trading scheme for bananas would be a betrayal of the poor farmers in ACP countries, to whom Europeans owed a special obligation given their Colonial past. What about, for example, Belize, where bananas accounted for one in every 10 jobs?

The U.S. fired back with its own high-minded contention: in addition to the 4,000 Americans who lost their jobs with Chiquita as a result of the illegal EC preference regime, what about the poor banana growers in Latin America? In other words, the EC's PTA hurt other developing countries. For example, 10% of the population of Ecuador, which was the leading Latin banana supplier to the EC and produced 30% of the world's bananas, is engaged in growing bananas.

Both sides hid the real driving forces behind their cases: their own banana companies. After all, since when do hegemonic powers fight a trade war solely over developing country interests? The preferential trading system for bananas benefited – in effect if not design – European producers. Chiquita and Dole calculated accurately that its destruction would benefit them. Was dividing banana producing-countries into ACP and Non-ACP camps, and causing them to do battle through their hegemonic MNC benefactors, a Neo-Colonialist manifestation of the old "divide and conquer" strategy? Did a veil hiding each side's true motivations extend to the underlying economics of the world banana market and thereby inhibit a dialog about how to help banana producers?

Three essential facts about the world banana market were lost amidst the rhetoric. First, ACP bananas were more expensive than dollar bananas. Differences in production costs were the reason for the price differential. ACP bananas from the Caribbean were grown on small farms set amidst hilly terrain. Dollar bananas were grown on large plantation farms with economies of scale and low wages. Production costs were on average about one-third lower than in the Caribbean. The differential could be even greater: whereas ACP production costs were as high as $515 per ton, Ecuador, for example, produced bananas at $162 per ton.

Second, given the production cost gap, representatives of the Caribbean banana industry freely admitted they could not survive without the EC's PTA for bananas. Preferential access played a significant role in many Caribbean economies. About 60% of the foreign exchange revenue of the four Windward Islands came from banana exports to the EC. (In St. Vincent, 70% of the population was dependent on the banana industry.) In some Caribbean economies, banana exports accounted for 60% of all exports. Caribbean farmers lacked the technology to grow other crops, and in any event a banana crop blown down from a hurricane (a not infrequent occurrence) recovered in just nine months. Caribbean banana producers warned that if the EC preference scheme were dismantled, trade in associated products (*e.g.*, avocados and citrus fruits) would be damaged, because banana boats would no longer visit their ports. The island farmers then would have no choice but to shift to lucrative crops such as cocaine.

Third, the EC's PTA was rotten for European consumers, and provided far less succor to ACP countries than was commonly realized. The World Bank put it more delicately, calling the arrangement highly inefficient. The point is Europeans paid far more than they needed to for bananas, and banana plantation workers in poor countries got far less. The microeconomic distribution effects of the EC scheme were entirely incongruous with its noble rhetoric. The *Financial Times* rightly observed EC consumers pay at least 10 times more for bananas, through prices made artificially high by the preference scheme, than the benefit that redounds to banana producers. Likewise, *The Economist* incisively pointed out:

> [T]he European banana regime is a rich man's racket, not a boon for the poor. It costs European consumers around $2 billion a year – 50 cents per kilo of bananas. Of that, around $1 billion goes to the distributors. Banana

> growers in the poor countries that the Europeans claim to care about gain only $150 m[illion] a year.

If French carpenters and Belgian dentists were paying so much for bananas, and Caribbean growers getting so little, who captured all the rent? As *The Economist* suggested, none other than European fruit companies. The "insider" European companies – particularly those Category B operators – awarded import licenses collect monopoly rents at the expense of the ostensible beneficiaries of the arrangement, the ACP countries. In sum, the scheme hardly served as a ladder out of poverty for ACP countries, yet such a ladder was the altruistic metaphor used to justify its existence.

- **Gaining New Comparative Advantages, and Adjustment Assistance**

What is to be made of these facts? If the U.S. and EC are not disingenuous in their concern for developing countries, and if they care at all about consumers, then they would have worked collaboratively not only to dismantle entirely the PTA for bananas, but also to devise an adjustment assistance mechanism for banana producing countries. To retain the arrangement in virtually any conceivable form was to sell short consumer interests in favor of those of a cabal of MNCs. To liberalize trade in the world's banana market without a compensatory mechanism for countries damaged by that liberalization would be heartless. To fail to take both steps would reveal a lack of commitment to, and understanding of, free trade theory.

Even the most staunch advocates of free trade must admit that trade liberalization results in *net* gains to an economy. There are "winners" *and* "losers" from free trade, as Adam Smith and David Ricardo, the avatars of free trade, pointed out. Yes, the benefits accruing to the winners more than offset the injury felt by the losers. But, this net gain is little comfort to a worker who experiences real wage declines, or unemployment, as a result of fair foreign competition. Nor is it much comfort to a firm, or an industry, forced to downsize or go bust. And, what of the communities in which these workers and firms are located? They suffer economic and social dislocations.

The central challenge for trade officials on both sides of the Atlantic was, therefore, not to convince themselves and the public that liberalizing the world banana market was a "good" thing. That was axiomatic. Rather, the central challenge was to persuade producer interests likely to be injured by free trade that a creative solution existed to deal with the damage. To be sure, nothing in the GATT-WTO agreements compels a country to develop a program for helping workers. Still, if American and European trade officials were to avoid the unsavory epithet of "uncompassionate," then they needed an answer to ACP countries at risk of being left behind by a new trade deal that was, on balance, in the global interest.

The most obvious, efficient, and fair possibility was to transfer some of the net gain from free trade to injured workers. In other words, direct aid whereby the "winners" compensate the "losers" by sharing a bit of their gain. It is an old idea stemming from an understanding of what Adam Smith and David Ricardo themselves knew: that free trade

based on the Law of Comparative Advantage is, on balance, beneficial for society, and some of this benefit can be channeled to those who need help to face the challenges posed by free trade. If ACP, particularly Caribbean countries, lacked a comparative advantage in banana production, then there was no point in perpetuating their dependence on this industry through a PTA that wreaked havoc on consumer interests and channeled rents to special corporate interests. The wise long-term strategy was to provide financial and technical assistance to these countries to transfer their productive resources into endeavors where they had, or could get, a comparative advantage.

Exactly what endeavors these might be is for economic, business, agricultural, and industry experts to determine. Perhaps the Caribbean countries of the ACP ought to focus on different crops, on light industry, or on certain service sectors. Perhaps the answer differs from one country to the next. Exactly how to finance the new endeavors is also a matter for the experts. It may be crippling for some countries to service debt; for them, outright grants are needed. Other countries may be good candidates for "soft" (*i.e.*, long-term, low interest rate) loans. The U.S. and EC can provide answers through an *ad hoc* bilateral working party. Or, they can pool their expertise with that of the WTO and World Bank, IOs that have pledged to work together to assist developing countries. In the end, if a successful transition adjustment assistance program is devised, it might serve as a model for future cases in which trade liberalization adversely affects certain developing country producers. It may embolden trade officials in benefactor and beneficiary countries to dismantle protectionist preferential schemes and face up to free trade.

Critics of a TAA scheme for developing countries doubtless make two arguments. First, the scheme smacks of a 1970s-style "NIEO" in which massive resources are transferred from First to Third World countries. The scheme may be aimed at smoothing the transition to free trade. But, this end cannot justify by the means, namely, a socialist re-distributive mechanism. A resource transfer would be nothing short of a bail out for countries plagued by mismanagement and corruption. In turn, at best it would encourage the adoption of industrial policies by developing country governments. At worst, it would create a moral hazard problem, encouraging bad behavior by other developing country governments. Only the hard discipline imposed by global economic forces will strengthen these countries.

Second, TAA for workers, firms, industries, and communities has been largely unsuccessful in developed countries. If a single rich country like the U.S. cannot make it work within its own borders for literate, well-fed, but out-of-luck recipients, then how can it possibly be made to work on a much larger scale – the principal export industry of an entire country? Certainly, two international bureaucracies, the WTO and World Bank, are no more efficient, and have no more market sense, than the American government.

The criticisms cannot be ignored, but equally, they must not be over stated, for that would lead to paralysis. On the first point, whether TAA amounts to a bail out and spawns a moral hazard problem depends on how it is structured. If the assistance is simply a wire transfer of funds to a country's treasury, then the critics' worst fears may be realized. But, if funds are disbursed only after careful conditions have been agreed upon, and then only

to a special administrator acting independently of the government, they stand a better chance of being put to good use. The conditions ought not to be a template imposed by a WTO-World Bank team on every country. Rather, they ought to be based on an adjustment plan initially drafted by the recipient country's government in consultation with overseas and domestic experts.

The heart of that plan should be a specific strategy to transfer factors of production – labor, land, human capital, physical capital, and technology – from one sector (*e.g.*, bananas) to another. It must identify barriers to factor mobility within the country, and explain how to reduce them. In respect of labor and human capital, it ought to explain what sort of worker re-training will be necessary. For land, physical capital, and technology, the plan ought to set forth tax and other financial incentives needed to make the necessary shifts. Overall, the plan must be realistic in its time frame. Perhaps most importantly, the plan ought to make clear that no assistance is to be provided to reluctant factors of production. Assistance must reward entrepreneurship.

The second criticism, the poor record of adjustment assistance in the U.S., is not unfair. But, the reasons for that record need to be examined. As covered in a separate Chapter, politicians have not given the various TAA programs a fair chance. In many FYs, the programs have been under-funded, and some have been cut back or eliminated. Eligibility for assistance depends on a complex web of criteria that are difficult to administer. The cause of injury must be identified, as only if import competition is the cause is a petition sustainable. If, for instance, a worker is displaced because of technological change, then her only recourse is regular UI.

In both of these critical respects, assistance for a developing country trying to wean itself off of bananas or some other industry in which it lacks a comparative advantage need not be like domestic TAA. If the U.S. and EC are serious about helping ACP countries reduce their dependence on a single, uncompetitive crop, and more generally if the WTO and World Bank are serious about smoothing the transition for developing countries undergoing trade liberalization, then the assistance program for countries ought to be adequately funded. Perhaps the "gain" accruing to the "winners" could be taxed in a non-discriminatory way to provide funds for the program (*e.g.*, a small, temporary surcharge on the income of multinational fruit companies).

The point is the cause of free trade is damaged rather considerably if developed countries and IOs promise a compassionate brand of free trade yet deliver far less than their promise. That may be incentive enough to "get it right." Likewise, the mistake of nightmarish eligibility criteria need not be repeated at the international level. For countries, the cause of injury is already clear – trade liberalization as a result of, for example, the dismantling of a preferential arrangement. Thus, establishing and navigating a myriad of rules about injury causation are unnecessary. The focus ought to be on a plausible adjustment plan.

In sum, one lesson from the *Bananas* War is important underlying economic facts on which sound policy should rest tend to be forgotten or hidden in nasty trade disputes.

The losers are not the workers predicted by the Law of Comparative Advantage. Rather, they are the people one or both sides in the dispute claim to help. The winners are, again, not who Ricardo's Law forecasts, but rather insiders.

A trade policy stance that matches rhetoric would have two uncompromising principles. First, developing countries ought not to be pitted against one another in trade battles between hegemons. The days of using them as pawns in some greater crusade should have ended with the Cold War. Second, developing countries should not be encouraged through PTAs to remain dependent on an uncompetitive industry. Rather, through meaningful, incentive-oriented, assistance, they ought to be encouraged to meet the challenges of free trade. Fidelity to these principles might reduce trade friction and help create healthy trading partners.

VI. Domestic Politics and Public Choice Theory

Does the Bananas War illustration Public Choice Theory? Why did the U.S. bring the case, and why the EC defended its PTA so vigorously? The consistent answer from practitioners was corporate lobbying influence: Chiquita and Dole in the U.S., and large fruit companies in the EC, such as the Irish banana distributor Fyffes Plc.

For instance, *The Economist* was hardly the only influential publication covering the Bananas War to observe Carl Lindner Jr. (1919-2011), Chairman of Chiquita, was politically well-connected, had actively lobbied the Clinton Administration, and was a major donor to both the Democratic and Republican Parties. Not surprisingly, EC officials voiced their concern Mr. Lindner had undue influence over American trade policy as regards bananas. This brutally realistic – indeed, rather cynical – answer suggests public choice theory may be powerful in explaining how the War started, and once it started, why it dragged on for so long. The answer also suggests a sinister irony: if American fruit companies are so influential in the White House and Capitol Hill, is the U.S., which used to "buy" Central American "banana" republics, the new "banana" republic?

In brief, Public Choice theory is microeconomic logic applied to politics. Politicians are viewed as suppliers of a product, namely, policy initiatives. Voters are viewed as consumers of that product. Votes are the currency they use to "pay" political officials for new policies. Accordingly, there is an upward-sloping supply curve for policy initiatives – more votes, more policies. There is a downward-sloping demand curve for these initiatives – the cheaper the cost, in terms of votes, the greater the demand. Where the two curves intersect, equilibrium is reached.

But, voters do not all weigh in with equal force. Some voters – well-organized, well-financed groups that work through sophisticated lobbyists – are more influential in pressing their case to political officials. Those groups provide a large number of votes in exchange for favorable policy initiatives. Thus, they have a particularly strong influence on policy. To the "inside-the-beltway" crowd in Washington, D.C., these points are hardly surprising. Public Choice Theory merely dresses up the obvious in sophisticated, if antiseptic, jargon.

The point is simply America has no trade policy; rather, it has clients. Nevertheless, the Theory is used to explain the rationale for certain international trade statutes. Jargon notwithstanding, the application of the theory to trade is entirely reasonable. If the Law of Comparative Advantage were translated without adulteration into multilateral trade agreements and domestic trade statutes, those agreements and statutes would be far shorter than they are now. The essential language would be, simply, that "all tariff and NTBs are hereby abolished," and thereafter would follow a broad definition of "tariffs" and "NTBs." In reality, of course, agreements and statutes contain trade-liberalizing commitments, followed by pages and pages of exceptions thereto, plus a host of remedies to combat unfair, and sometimes fair, import competition. How can the exceptions and remedies be explained? Public Choice Theory provides an answer: they are the product of interest-group pressure on trade officials.

This explanation is a plausible one for the *Bananas* War. Consider how the War started? The U.S. is not a banana exporter. Two prominent American MNCs – Dole and Chiquita Brands – produce bananas in Latin America for export to third countries like EC member states, as well as to the U.S. Dole and Chiquita, along with Del Monte, owned by Jordanian interests, are the largest banana companies in the world. They account for roughly two-thirds of world trade in bananas, and have 42% of the EC market. In contrast, bananas produced in the ACP account for just 19% of total EC banana imports. (Caribbean bananas, in particular, account for only 7% of the EC market, and only 3% of the world banana exports.)

ACP countries seized on these statistics to support their view dollar bananas hardly were prejudiced by the EC's PTA. More importantly for Public Choice Theory is that defenders of the arrangement highlighted that powerful executives of some of the American-based multinational fruit companies contributed handsome sums to influential political organizations. The allegation was these executives successfully persuaded the U.S. officials to champion the corporate cause of making war on the EC's scheme. It is exactly the allegation Public Choice Theory would suggest.

Given that the U.S. does not export a single banana, ACP countries, especially in the Caribbean, were incensed when it brought a WTO complaint that jeopardized their economies. Consistent with Public Choice Theory, they claimed pressure from politically important firms, not U.S. economic self-interest, concern for developing countries, or legal principle, motivated the suit. So influential were corporate interests that they persuaded U.S. trade officials to use (abuse?) the country's economic largesse to beat up on struggling Caribbean democracies. In 1992, the combined GDP of three of the four Windward Islands (Dominica, St. Lucia, and St. Vincent and the Grenadines) was less than $1 billion, just one-quarter of Chiquita's gross revenue that year. The combined GDP of the seven principal Caribbean nations (the four Windward Islands plus Belize, Jamaica, and Surinam) is less than 0.4% of U.S. GDP.

Does corporate lobbying influence explain the tenacity with which the EC defended its PTA? British and French firms were said to have particular clout. They were the most

vocal advocates of a no-compromise position after the Appellate Body issued its Report. Other EC states in which there are no such corporate interests (*e.g.*, Germany) took a softer line, advocating full-scale reform, or even dissolution, of the arrangement.

Chapter 21

FOURTH PILLAR (CONTINUED): TBTs AS NTBs[829]

I. Another Kind of NTB

By no means are conventional QRs, like quotas and import licenses, the only kind of NTB to trade. TBTs can be, and indeed are, NTBs to trade. Consider the *Vehicle Services Licensing Bill*, 5077-2013, proposed in April 2014 in the Israeli Knesset.[830] This *Bill* mandated that any importer of a foreign automobile obtain the direct, exclusive commitment of the overseas manufacturer (*e.g.*, BMW, Jaguar Land Rover, Mercedes, Peugeot, Renault, or Volvo from Europe, Honda or Toyota from Japan, Hyundai or Kia from Korea, or Chrysler, Ford, or GM from the U.S.) to give the importer spare parts, warranty protection, and recall support for the foreign-made vehicles. Indeed, an overseas producer had to do so for any model, even a model it did not intend to export to Israel. Simply put, the *Bill* required foreign car companies to give importers in Israel the technical ability, equipment, and data to handle repairs and warranty matters for vehicles they did, and did not, import. Otherwise, the importers would not be able to bring the vehicles into Israel. Representatives of foreign car companies objected to the Knesset.

Sometimes, a country replaces a conventional QR with a TBT that is an NTB. In December 2016, the USTR credited Russia with "eliminate[ing] the general requirement for an activity license to import and export, and shifted to an automatic import licensing regime for alcoholic beverages."[831] But, it faulted Russia for "retain[ing] the requirement that an importer have an activity license to produce, warehouse, or distribute alcohol … to obtain a license to import alcoholic products and to purchase the required excise stamps."[832] In other words, Russia dropped its license requirement to import alcoholic beverages, yet it kept its licensing regime for making, storing, and selling alcohol, and its differential temperature and pallet rules that importers found unnecessarily burdensome.

Some SPS measures also constitute NTBs to trade. SPS measures concern risks to human, animal, or plant life or health from disease or disease-bearing agents. TBT measures do not address threats from these causes, but rather concern matters like product safety and quality standards, and the prevention of consumer fraud. *Kimchi* is an example:

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829 Documents References:
(1) GATT Articles I, III:4, III:8
(2) WTO *TBT Agreement*

830 *See* Jenny David, *U.S., European Car Exporters Object To Israeli Vehicle Licensing Legislation*, 31 International Trade Reporter (BNA) 920 (15 May 2014).

831 UNITED STATES TRADE REPRESENTATIVE, 2016 REPORT ON THE IMPLEMENTATION AND ENFORCEMENT OF RUSSIA'S WTO COMMITMENTS 15 (December 2016), https://ustr.gov/sites/default/files/2016-WTO-Report-Russia.pdf.

832 UNITED STATES TRADE REPRESENTATIVE, 2016 REPORT ON THE IMPLEMENTATION AND ENFORCEMENT OF RUSSIA'S WTO COMMITMENTS 15 (December 2016), https://ustr.gov/sites/default/files/2016-WTO-Report-Russia.pdf.

> South Korea has rebuffed China after false reports that it had won global certification for its production of *kimchi* – a hallowed dish for Koreans.
>
> Last week global industry standards body ISO posted new regulations for the making of *pao cai,* a type of Chinese salted fermented vegetables.
>
> Some Chinese media crowed that it affected *kimchi,* prompting a clarification from South Korea.
>
> …
>
> There are many types of *kimchi*, a spicy pickle dish normally made using cabbage. *Kimchi* is often served in China under the name pao cai, but China has its own variant of the dish which it also calls *pao cai*.
>
> Earlier this month the ISO published new rules for the development, transportation and storage of *pao cai*. Authorities in Sichuan province, where the majority of pao cai is produced in China, had lobbied for the certification.
>
> Although the ISO listing clearly says "this document does not apply to kimchi," some Chinese media suggested otherwise.
>
> The nationalist, state-run *Global Times* called it "an international standard for the kimchi industry led by China."
>
> …
>
> South Korea's agricultural ministry then released a statement saying international standards for kimchi were agreed by the United Nations in 2001.
>
> "It is inappropriate to report [the *pao cai* certification] without differentiating *kimchi* from *pao cai* of China's Sichuan," it said.
>
> Traditionally, *kimchi* is made by washing and salting vegetables before adding seasoning and fermented seafood and placing the product into breathable clay jars underground. The annual ritual of making it, known as Kimjang, has been listed as an Intangible Cultural Heritage by the U.N. cultural organisation UNESCO.
>
> Due to high demand in the country, South Korea imports large amounts of *kimchi* from producers in China. Meanwhile, Korean *kimchi* exports to China are virtually non-existent due to strict Chinese regulations on pickled goods.[833]

Note, then, Korea's concerns about Chinese branding of *kimchi* did not involve SPS issues

[833] *Kimchi Ferments Cultural Feud between South Korea and China*, BBC NEWS, 30 November 2020, www.bbc.com/news/world-asia-55129805.

– no disease or disease-bearing pest was alleged to be associated with the Chinese product. Rather, Korea viewed the Chinese characterization of the ISO rules as deceptive. In that respect, query why Korea did not attempt IP protection, such as a trademark or GI, for *kimchi*?

The central tension created by any actual or contemplated TBT or SPS measure is whether it is a reasonable effort to advance legitimate safety concerns, or whether it is a device to protect producers of like products from import competition. Consider LEGO Systems, Inc., which makes the popular children's construction toy, LEGO. The company seeks to sell one version of LEGO sets and pieces globally, not hamstrung with different, country-specific TBT standards. Such variations would compel the company to have multiple production lines, each making a non-standardized product. That not only would drive up its manufacturing costs, but also undermine its ability to shift exports from one market to another adroitly in response to local demand and supply conditions. If, for example, the EU imposes higher TBT standards on the size of LEGO pieces to protect small children from choking on them than does Indonesia, namely, demanding larger dimensions, then LEGO might rightly query whether the EU measure is motivated to protect local toy companies that regularly a competitive product with big pieces.

Lead in paint provides another illustration. The U.S. accepts paint with up to 100 parts PPM. The Canadian threshold is 90 PPM. Both countries sovereignly assert that their limit is "right" for their population. Paint producer-exporters must comply with each standard if they want access to both markets, or simply assume the burden of adopting the toughest standard – 90 PPM – for all their products.

Note that even if TBT measures are identical, testing procedures to verify compliance may differ. The U.S. and Canada have the same rules on phthalates, but they use different testing methodologies. Also called "plasticizers," phthalates are industrial chemicals added to plastics used to make products like PVC and toys, and even certain coatings for pharmaceutical pills more flexible, durable, resilient, and transparent. Their effects on the human endocrine, *i.e.*, hormone, system may be adverse, and they may cause birth defects. Companies thus have to submit their product to duplicate testing if they want to sell it in both the U.S. and Canada. They may rightly query argue that a MRA between the countries, whereby each one recognizes the conformity assessment procedures of the other, would facilitate trade, cut costs, and thereby lower prices.

Not until the Uruguay Round, however, did the multilateral trading community agree upon credible disciplines to TBT and SPS measures. The *TBT* and *SPS Agreements* establish criteria to delineate legitimate from protectionist TBT and SPS measures, respectively. The *TBT Agreement* encourages piggybacking on internationally accepted industry standards, while the *SPS Agreement* calls for reliance on scientific evidence.

II. 2014 *Fur Seals* Case and Defining "Technical Regulation" under *TBT Agreement* Annex 1:1[834]

[834] This case is cited, and its facts summarized, in an earlier Chapter.

The EU Seal Regime could not possibly violate the *TBT Agreement* if it were not subject to that *Agreement*. So, Canada and Norway had to prove the Regime was a "technical regulation" governed by the *Agreement*. In its first Paragraph, Annex 1:1 of the *Agreement* defines "technical regulation" as a:

> [d]ocument 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 labeling requirements as they apply to a product, process or production method.[835]

Thrice before, the Appellate Body opined on this term. In the 2012 *Tuna-Dolphin* and 2002 *Sardines* cases, it said whether a measure is a "technical regulation" depends on its "characteristics," and on the "circumstances" of the case.[836] That was unhelpfully broad. But, in the 2001 *Asbestos* case, it said the key "characteristics" and "circumstances" are the "design and operation," and "integral and essential aspects," of a measure.[837]

In the *Seals* case, the Panel said the Annex 1:1 definition intimates a "Three Tier Test," namely, does the disputed measure:

(1) apply to an "identifiable group of products"?
(2) "lay down[] characteristics" for all products in the group?
(3) demand "mandatory compliance"?

Agreeing with Canada and Norway, the Panel answered "yes" in respect of each Tier, meaning the Seal Regime was a "technical regulation" subject to the *TBT Agreement*.

The EU did not contest its Seal Regime applied to an "identifiable group of products," namely, seal items, or that "compliance" was "mandatory." But, the EU appealed, the Regime does not "lay down product characteristics, including the applicable administrative provisions." Thus began a 70 paragraph, 17-paged single spaced discussion on the Second Tier of the Test. Some of it was wasted on unnecessary, unenlightening matters, such as what nouns like "document," "process," "production," and "method," and the verb "lay down," mean (sometimes with customary citations to the trusty *Shorter Oxford English Dictionary*), the effect of the disjunctive "or" on understanding a sentence, and repeating quotes from the Basic Regulation.

So, for instance, the Appellate Body writes:

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835 *Quoted in Fur Seals* Appellate Body Report, ¶ 5.8. (Emphasis added.)

836 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing, and Sale of Tuna and Tuna Products*, WT/DS381/AB/R, ¶ 188 (adopted 13 June 2012); Appellate Body Report, *European Communities – Trade Description of Sardines*, WT/DS231/AB/R, ¶¶ 192-193 (adopted 23 October 2002). The *WTO Case Review 2012* and *WTO Case Review 2002*, respectively, discuss and analyze these Reports.

837 *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶ 72 (adopted 5 April 2001).

> Continuing with our review of the first sentence of Annex 1.1, we note the reference to "applicable administrative provisions," which is linked to the words "product characteristics or their related processes and production methods" by the conjunctive "including." The word "provision" is relevantly defined as "a legal or formal statement providing for some particular matter." The adjective "administrative," in turn, is defined as "[p]ertaining to management of affairs." The term "applicable" in this context indicates that the relevant "administrative provisions" must "refer" to or be "relevant" to the product characteristics or their related PPMs as prescribed in the relevant document. The word "including" suggests that, where a mandatory document laying down product characteristics or their related processes and production methods also contains "administrative provisions" that refer to those "product characteristics" or "related processes and production methods," those administrative provisions are to be considered as an integral part of the technical regulation and are thus subject to the substantive provisions of the *TBT Agreement*. In the context of Annex 1:1, we understand the appositive clause "including the applicable administrative provisions" to refer to provisions to be applied by virtue of a governmental mandate in relation to either product characteristics or their related processes and production methods.[838]

The Appellate Body Report reader may be forgiven for asking about the value added of such paragraphs to the outcome of the case. But, at least she can be thankful for the grammatical nudge to recall hat an "appositive clause" is a noun, noun phrase, or noun clause, usually set off by commas. The experienced lawyer-grammarian will note with annoyance that the Appellate Body neglected to decide whether the appositive clause is restrictive (providing information essential to the preceding phrase in apposition that begins with the word "document") or non-restrictive.

In any event, the Panel reasoned the Seal Regime did "lay down product characteristics" in the negative: a product could be placed on the EU market only if it did not contain seal materials. The "administrative provisions" in the Regime were in the exceptions, such as the IC, MRM, and Travellers Exceptions, which concerned seal products with "certain characteristics." In other words, the Panel reduced the Regime and its Exceptions to a simplistic negative that a product may not contain seal, and thereby decided the entire Regime was a "technical regulation."

To state the Panel reasoning is to appreciate its lack of common sense: if that reasoning is correct, then virtually any feature in a measure that bears any relation to a product can be dubbed a "product characteristic," and, in turn, that measure can be put within the *TBT Agreement*. The *Agreement* would govern not only a measure addressing *bona fide* "product characteristics," and a measure covering "related processes and production methods," but also a measure dealing with non-product PPMs. What would the *Agreement* not cover? Surely the Uruguay Round drafters did not intend the over-inclusive outcome that nearly every measure qualifies as a "technical regulation."

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838 *Fur Seals* Appellate Body Report, ¶ 5.13.

Overturning the Panel, the Appellate Body agreed with the EU appellate arguments that the Seal Regime is not a "technical regulation" subject to the *TBT Agreement*.[839] Consequently, the Appellate Body declared to be moot and of no legal effect all of the Panel holdings under the *Agreement,* namely, Articles 2:1-2 5:1(2) and 5:2(a). The gist of the Appellate Body rationale was that the Seal Regime contained procedural requirements that had nothing to do with negative characteristics of a "product." Instead, the Regime and its Exceptions concerned the type and purpose of a seal hunt, and the identity of the hunter.

That is, the Appellate Body in *Fur Seals* applied its precedents. Citing its 2001 *Asbestos* Report (in which it found the EU prohibition on imports containing raw asbestos fibers did make that ban a "technical regulation"), the Appellate Body said when deciding whether a measure is a "technical regulation" – specifically, whether under Annex 1:1 to the *TBT Agreement* the measure lays down binding product "characteristics" – it does not matter whether the measure is affirmative (*i.e.*, mandates a product must possess a feature) or negative (*i.e.*, requires it must not possess an attribute). The legal result is the same.

The argument (made by Norway) that seal products are mixed, meaning there are few pure seal products, as most contain non-seal derived features, so the Regime regulates all products containing seal inputs, was unpersuasive. Relying on its 2001 *Asbestos* Report, the Appellate Body thought the Panel did not assess the extent to which the distinction between pure versus mixed seal products was an "integral and essential" part of the Regime, and, in turn, whether that distinction mattered in deciding if the Regime lays down product "characteristics" as a "technical regulation must do.

Using the 2002 *Sardines* and 2012 *Tuna-Dolphin II* precedents, along with the 2001 *Asbestos* Report, the Appellate Body found the "integral and essential aspect" of the Seals Regime was regulation of the placement on the market of seal products. To say this regulation prescribed attributes for those products, without more, was incomplete. True, in the words of the *Asbestos* Report, the Seal Regime did set "certain 'objective features, qualities or characteristics" on all products, namely, that they not contain seal.[840] But, that bar was just one component of the Regime, and the entire Regime had to be checked before deciding if it is a "technical regulation." There were Exceptions based on the type or purpose of the hunt, and identity of the hunter. So, the prohibition, *i.e.*, the barring of placement on the EU market of seal products, could not be vaulted to the status of being the main feature of the measure:

> the EU Seal Regime "consists of both prohibitive and permissive components and should be examined as such." As we see it, when the

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839 *See Fur Seals* Appellate Body Report, ¶¶ 5.58-5.59, 5.70.

The Appellate Body decided it was inappropriate to complete the legal analysis as to whether the Seals Regime might be a "technical regulation" because it lays down "related processed and production methods" under Annex 1:1 of the *TBT Agreement*. *See id*., ¶¶ 5.61-5.69. Arguably, the Regime does so, because it intervenes on how and under what circumstances seals may be hunted, and by whom. So, had the case been argued differently by Canada and Norway, they might well have succeeded in bringing the Regime within the *Agreement.*

840 *Fur Seals* Appellate Body Report, ¶ 5.39.

> prohibitive aspects of the EU Seal Regime are considered in the light of the IC and MRM exceptions, it becomes apparent that the measure is not concerned with banning the placing on the EU market of seal products as such. Instead, it establishes the 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. We view this as the main feature of the measure. That being so, we do not consider that the measure as a whole lays down product characteristics.[841]

Moreover, to the degree the Panel thought the type or purpose of the hunt, or identity of the hunter, were product characteristics, the Panel was wrong. Likewise, the Panel erred in finding that "applicable administrative provisions" of the Seal Regime apply to product "characteristics," and thereby somehow reinforced the notion the Regime laid down such "characteristics." The "essential and integral" aspects of the Regime did not establish product "characteristics," hence those provisions did not apply to any "characteristics."[842]

A simpler way to make the point is the EU accepted seal products as they are, pure or mixed. The EU did not define what constitutes a "seal product," the way it did with respect to "sardines" in the 2002 *Sardines* case. That threshold matter was up to the market, *i.e.*, hunters, producers, and exporters. What the EU did do was create exceptions to allow their importation, whatever "they" might be.

Could the Appellate Body be faulted for results-oriented jurisprudence on the Annex 1:1 definitional issue? The Appellate Body knew it had to leave the Seals Regime out of the ambit of the *TBT Agreement*. To include the Regime in that ambit would be to start down the slippery slope of over-inclusion. So, the Appellate Body had to exalt the importance of the IC, MRM, and Travellers Exemptions. They were not just exceptions to the basic rule, namely, the import ban. Rather, they were part of that rule, on par with the ban. The Appellate Body turned to its own precedents. With words and phrases like "circumstances" and "integral and essential," they gave the Appellate Body flexibility to reach the desired result. They also allowed the Appellate Body to stay within the narrow confines of the plain meaning of the text of Annex 1:1 and its immediate context, and avoid straying for further contextual guidance, supplementary means of interpretation (*e.g.*, the negotiating history to the *Agreement*). Notably, though, in *obiter dicta* the Appellate Body marked for a future case the possibility that it would stray.[843]

III. 2002 *Peru Sardines* Case and Use of International Standards for Legitimate Objectives under *TBT Agreement* Article 2:4

- **Facts**

In March 2001, Peru brought a complaint against the EC. Peru alleged Regulation (EEC) 2136/89 prevented its exporters from using the trade description "sardines" for their

841 *Fur Seals* Appellate Body Report, ¶ 5.58.
842 *Fur Seals* Appellate Body Report, ¶¶ 5.52, 5.57-5.58.
843 *Fur Seals* Appellate Body Report, ¶ 5.60.

products shipped to the EC. The relevant *Codex Alimentarius* standards (specifically, STAN 94-181, revised 1995, abbreviated as "Codex Stan 94") lists the species "*sardinops sagax sagax*" as among the species that can be traded as "sardines." Thus, argued Peru, the EC Regulation was an unjustifiable barrier to trade in breach of GATT Article XI:1 and Article 2 of the *TBT Agreement*. In its May 2002 Report, the Panel agreed with Peru. The European Regulation breached Article 2:4 of this *Agreement*.

The EC appealed. The Appellate Body upheld the finding of the Panel that the Regulation is properly characterized as a "technical regulation" under the *TBT Agreement*. It also upheld the Panel conclusion about the temporal application of Article 2:4 of the *Agreement*. The provision applies to measures adopted before 1 January 1995 (when the *Agreement*, like other Uruguay Round texts, entered into force), but which have not lapsed, as well as to extant technical regulations. That is, the Appellate Body agreed the *Agreement* applied retroactively as well as prospectively to the EC Regulation.

The Appellate Body then turned to two issues, also arising under Article 2:4 of the *TBT Agreement*, namely:

(1) Whether to uphold the finding of the Panel that Codex Stan 94 is a "relevant international standard"?
(2) Whether to uphold the Panel finding that the EC failed to use Codex Stan 94 "as a basis for" the EC regulation?[844]

As below, the Appellate Body upheld both findings.

Additionally, the Appellate Body upheld the Panel determination under Article 2:4 that "Peru has adduced sufficient evidence and legal arguments to demonstrate that Codex Stan 94 is not "ineffective or inappropriate" to fulfill the "legitimate objectives" of the EC Regulation."[845] Without this conclusion, the Peruvian arguments in favor of Codex Stan 94 would have been pointless – the Standard, even if relevant and used by the

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[844] The Appellate Body also had to decide whether it should uphold the Panel finding that the respondent EC had the burden of proof to show Codex Stan 94 is an "ineffective or inappropriate means for the fulfillment of the legitimate objectives pursued." Here, in contrast to the first two issues, Peru lost. The Appellate Body held the Panel should have allocated to Peru the burden to show Codex Stan 94 is an "effective and appropriate" way to fulfill "legitimate objectives." Fortunately for Peru, the Appellate Body held it adduced sufficient evidence and legal arguments to prove Codex Stan 94 is not "ineffective or inappropriate" to fulfill the "legitimate objectives" of the EC Regulation.

[845] *Sardines* Appellate Body Report, ¶ 291. The Appellate Body agreed with the Panel's reasoning on this issue:

> … [T]he Panel made the factual finding that "it has not been established that consumers in most member States of the European Communities have always associated the common name 'sardines' exclusively with *Sardina pilchardus*.' … [T]he Panel gave consideration to the contentions of Peru that, under Codex Stan 94, fish from the species *Sardinops sagax* bear a denomination that is distinct from that of '*Sardina pilchardus*,' and that the very purpose of the labeling regulations set out in Codex Stan 94 for sardines of species other than *Sardina pilchardus* is to ensure market transparency."

Id., ¶ 290.

Europeans as a basis for their regulation, would not have achieved their three legitimate policy goals: market transparency, consumer protection, and fair competition.

WTO APPELLATE BODY REPORT, *EUROPEAN COMMUNITIES – TRADE DESCRIPTION OF SARDINES*, WT/DS231/AB/R (ADOPTED 23 OCTOBER 2002)[846]

I. Introduction

...

2. This dispute concerns the name under which certain species of fish may be marketed in the European Communities. The measure at issue is Council Regulation (EEC) 2136/89 (the "EC Regulation"), which was adopted by the Council of the European Communities on 21 June 1989 and became applicable on 1 January 1990. The EC Regulation sets forth common marketing standards for preserved sardines.

3. Article 2 of the EC Regulation provides that:

> Only products meeting the following requirements may be marketed as preserved sardines and under the trade description referred to in Article 7:
> – they must be covered by CN codes 1604 13 10 and ex 1604 20 50;
> – they must be prepared exclusively from fish of the species *"Sardina pilchardus Walbaum*;*"*
> – they must be pre-packaged with any appropriate covering medium in a hermetically sealed container;
> – they must be sterilized by appropriate treatment. (Emphasis added.)

4. *Sardina pilchardus Walbaum ("Sardina pilchardus")*, the fish species referred to in the EC Regulation, is found mainly around the coasts of the Eastern North Atlantic Ocean, in the Mediterranean Sea, and in the Black Sea.

5. In 1978, the *Codex Alimentariu*s Commission (the "*Codex* Commission"), of the United Nations Food and Agriculture Organization and the World Health Organization, adopted a world-wide standard for preserved sardines and sardine-type products, which regulates matters such as presentation, essential composition and quality factors, food additives, hygiene and handling, labelling, sampling, examination and analyses, defects, and lot acceptance. This standard, *CODEX* STAN 94-1981, Rev.1-1995 ("*Codex* Stan 94"), covers preserved sardines or sardine-type products prepared from the following 21 fish species:

> – *Sardina pilchardus*
> – *Sardinops melanostictus, S. neopilchardus, S. ocellatus, S. sagax*[,] *S. caeruleus*
> – *Sardinella aurita, S. brasiliensis, S. maderensis, S. longiceps, S. gibbosa*

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846 Complaint by Peru, footnotes omitted.

– *Clupea harengus*
– *Sprattus sprattus*
– *Hyperlophus vittatus*
– *Nematalosa vlaminghi*
– *Etrumeus teres*
– *Ethmidium maculatum*
– *Engraulis anchoita, E. mordax, E. ringens*
– *Opisthonema oglinum*.

6. Section 6 of *Codex* Stan 94 provides as follows:

> 6. LABELLING
>
> In addition to the provisions of the Codex General Standard for the Labelling of Prepackaged Foods (*CODEX* STAN 1-1985, Rev. 3-1999) the following special provisions apply:
>
> 6.1 NAME OF THE FOOD
>
> The name of the product shall be:
>
> 6.1.1 (i) "Sardines" (to be reserved exclusively for *Sardina pilchardus (Walbaum)); or*
>
> (ii) "X sardines" of a country, a geographic area, the species, or the common name of the species in accordance with the law and custom of the country in which the product is sold, and in a manner not to mislead the consumer.
>
> 6.1.2 The name of the packing medium shall form part of the name of the food.
>
> 6.1.3 If the fish has been smoked or smoke flavored, this information shall appear on the label in close proximity to the name.
>
> 6.1.4 In addition, the label shall include other descriptive terms that will avoid misleading or confusing the consumer. (Emphasis added.)

7. Peru exports preserved products prepared from *Sardinops sagax sagax* ("*Sardinops sagax*"), one of the species of fish covered by *Codex* Stan 94. This species is found mainly in the Eastern Pacific Ocean, along the coasts of Peru and Chile. *Sardina pilchardus* and *Sardinops sagax* both belong to the *Clupeidae* family and the *Clupeinae* subfamily. As their scientific name suggests, however, they belong to different genus. *Sardina pilchardus* belongs to the genus *Sardina*, while *Sardinops sagax* belongs to the genus *Sardinops*. …

…

VII. The Characterization of *Codex* Stan 94 as a "Relevant International Standard"

A. The European Communities' Argument that Consensus is Required

219. The European Communities argues that only standards that have been adopted by an international body by consensus can be relevant for purposes of Article 2:4 [of the *TBT Agreement*]. The European Communities contends that the Panel did not verify that

Codex Stan 94 was not adopted by consensus, and that, therefore, it cannot be a "relevant international standard."

220. However, in our view, the European Communities' contention is essentially related to whether Codex Stan 94 meets the definition of a "standard" in Annex 1:2 of the *TBT Agreement*. The term "standard," is defined in Annex 1:2 as follows:

> 2. Standard
>
> Document approved by a recognized body, that provides, for common and repeated use, rules, guidelines or characteristics for products or related processes and production methods, with which compliance is not 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.
>
> *Explanatory note*
>
> The terms as defined in ISO/IEC Guide 2 cover products, processes and services. This *Agreement* deals only with technical regulations, standards and conformity assessment procedures related to products or processes and production methods. Standards as defined by ISO/IEC Guide 2 may be mandatory or voluntary. For the purpose of this Agreement standards are defined as voluntary and technical regulations as mandatory documents. *Standards prepared by the international standardization community are based on consensus. This Agreement covers also documents that are not based on consensus*. (Emphasis added.)

221. The European Communities does not contest that the *Codex* Commission is an international standardization body, and that it is a "recognized body" for purposes of the definition of a "standard" in Annex 1:2. The issue before us, rather, is one of *approval*. The definition of a "standard" refers to documents *approved* by a recognized body. Whether approval takes place by consensus, or by other methods, is not addressed in the definition, but it is addressed in the last two sentences of the Explanatory note.

222. The Panel interpreted the last two sentences of the Explanatory note as follows:

> The first sentence reiterates the norm of the international standardization community that standards are prepared on the basis of consensus. The following sentence, however, acknowledges that consensus may not always be achieved and that international standards that were not adopted by consensus are within the scope of the *TBT Agreement*.[86] This provision therefore confirms that even if not adopted by consensus, an international standard can constitute a relevant international standard.

[86] The record does not demonstrate that *Codex* Stan 94 was not adopted by consensus. In any event, we consider that this issue would have no bearing on our determination in light of the explanatory note of Paragraph 2 of Annex 1 of the *TBT Agreement*

> which states that the *TBT Agreement* covers "documents that are not based on consensus."

We agree with the Panel's interpretation. In our view, the text of the *Explanatory Note* supports the conclusion that consensus is not required for standards adopted by the international standardizing community. The last sentence of the Explanatory note refers to "documents." The term "document" is also used in the singular in the first sentence of the definition of a "standard." We believe that "document(s)" must be interpreted as having the same meaning in both the definition and the *Explanatory Note*. The European Communities agrees. Interpreted in this way, the term "documents" in the last sentence of the Explanatory note must refer to standards *in general*, and not only to those adopted by entities *other than* international bodies, as the European Communities claims.

223. Moreover, the text of the last sentence of the Explanatory note, referring to documents not based on consensus, gives no indication whatsoever that it is departing from the subject of the immediately preceding sentence, which deals with standards adopted by international bodies. Indeed, the use of the word "also" in the last sentence suggests that the same subject is being addressed – namely standards prepared by the international standardization community. Hence, the logical assumption is that the last phrase is simply continuing in the same vein, and refers to standards adopted by international bodies, including those not adopted by consensus.

224. The Panel's interpretation, moreover, gives effect to the chapeau of Annex 1 to the *TBT Agreement*, which provides:

> The terms presented in the sixth edition of the ISO/IEC Guide 2:1991, General Terms and Their Definitions Concerning Standardization and Related Activities, shall, when used in this *Agreement*, have the same meaning as given in the definitions in the said Guide …
>
> For the purpose of this *Agreement*, *however*, the following definitions shall apply … (Emphasis added.)

Thus, according to the *chapeau*, the terms defined in Annex 1 apply for the purposes of the *TBT Agreement* only if their definitions *depart* from those in the ISO/IEC Guide 2:1991 (the "ISO/IEC Guide"). This is underscored by the word "however." The definition of a "standard" in Annex 1 to the *TBT Agreement* departs from that provided in the ISO/IEC Guide precisely in respect of whether consensus is expressly required.

225. The term "standard" is defined in the ISO/IEC Guide as follows:

> Document, established by *consensus* and approved by a recognized *body*, that provides, for common and repeated use, rules, guidelines or characteristics for activities or their results, aimed at the achievement of the optimum degree of order in a given context. (Original emphasis.)

Thus, the definition of a "standard" in the ISO/IEC Guide expressly includes a consensus requirement. Therefore, the logical conclusion, in our view, is that the *omission* of a consensus requirement in the definition of a "standard" in Annex 1:2 of the *TBT Agreement* was a deliberate choice on the part of the drafters of the *TBT Agreement*, and that the last two phrases of the *Explanatory Note* were included to give effect to this choice. Had the negotiators considered consensus to be necessary to satisfy the definition of "standard," we believe they would have said so explicitly in the definition itself, as is the case in the ISO/IEC Guide. Indeed, there would, in our view, have been no point in the negotiators adding the last sentence of the Explanatory note.

226. Furthermore, we observe that the Panel found that, in any event, the European Communities did not prove that *Codex* Stan 94 was not adopted by consensus. Instead, the Panel found that, "[t]he record does not demonstrate that *Codex* Stan 94 was not adopted by consensus."

227. Therefore, we uphold the Panel's conclusion … that the definition of a "standard" in Annex 1:2 to the *TBT Agreement* does not require approval by consensus for standards adopted by a "recognized body" of the international standardization community. We emphasize, however, that this conclusion is relevant only for purposes of the *TBT Agreement*. It is not intended to affect, in any way, the internal requirements that international standard-setting bodies may establish for themselves for the adoption of standards within their respective operations. In other words, the fact that we find that the TBT Agreement does not require approval by consensus for standards adopted by the international standardization community should not be interpreted to mean that we believe an international standardization body should not require consensus for the adoption of its standards. That is not for us to decide.

B. The European Communities' Argument on the Product Coverage of *Codex* Stan 94

228. We turn now to examine the European Communities' argument that *Codex* Stan 94 is not a "relevant international standard" because its product coverage is different from that of the EC Regulation.

229. In analyzing the merits of this argument, the Panel first noted that the ordinary meaning of the term "relevant" is "bearing upon or relating to the matter in hand; pertinent." The Panel reasoned that, to be a "relevant international standard," *Codex* Stan 94 would have to bear upon, relate to, or be pertinent to the EC Regulation. The Panel then conducted the following analysis:

> The title of *Codex* Stan 94 is "*Codex* Standard for Canned Sardines and Sardine-type Products," and the EC Regulation lays down common marketing standards for preserved sardines. The European Communities indicated in its response that the term "canned sardines" and "preserved sardines" are essentially identical. *Therefore, it is apparent that both the EC Regulation and Codex Stan 94 deal with the same product, namely preserved sardines*. The scope of Codex Stan 94 covers various species of fish, including *Sardina pilchardus* which the EC Regulation covers, and includes, *inter alia*, provisions on presentation (Article 2:3), packing medium (Article 3:2), labelling, including a requirement that the packing medium is to form part of the name of the food (Article 6), determination of net weight (Article 7:3), foreign matter (Article 8:1) and odour and flavour (Article 8:2). The EC Regulation contains these corresponding provisions set out in *Codex* Stan 94, including the section on labelling requirement. (Emphasis added; footnote omitted.)

230. We do not disagree with the Panel's interpretation of the ordinary meaning of the term "relevant." Nor does the European Communities. Instead, the European Communities argues that, although the EC Regulation deals only with preserved sardines – understood to mean exclusively preserved *Sardina pilchardus* – *Codex* Stan 94 also covers other preserved fish that are "sardine-type."

231. We are not persuaded by this argument. First, even if we accepted that the EC Regulation relates only to preserved Sardina pilchardus, which we do not, the fact remains that Section 6.1.1(i) of *Codex* Stan 94 also relates to preserved Sardina pilchardus. Therefore, Codex Stan 94 can be said to bear upon, relate to, or be pertinent to the EC Regulation because both refer to preserved Sardina pilchardus.

232. Second, … although the EC Regulation expressly mentions only *Sardina pilchardus*, it has legal consequences for other fish species that could be sold as preserved sardines, including preserved *Sardinops sagax*. *Codex* Stan 94 covers 20 fish species in addition to *Sardina pilchardus*. These other species also are legally affected by the exclusion in the EC Regulation. Therefore, we conclude that Codex Stan 94 bears upon, relates to, or is pertinent to the EC Regulation.

233. For all these reasons, we uphold the Panel's finding … that Codex Stan 94 is a "relevant international standard" for purposes of Article 2:4 of the *TBT Agreement*.

VIII. Whether *Codex* Stan 94 Was Used "As a Basis For" the EC Regulation

234. We turn now to whether *Codex* Stan 94 has been used "as a basis for" the EC Regulation. … Article 2:4 of the *TBT Agreement* requires Members to use relevant international standards "as a basis for" their technical regulations under certain circumstances. The Panel found that "the relevant international standard, *i.e.*, *Codex* Stan 94, was not used as a basis for the EC Regulation." The European Communities appeals this finding.

…

240. … [R]elevant international standards must be used "as a basis for" technical regulations. … [T]he Panel interpreted the word "basis" to mean "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge." In applying this interpretation of "basis" to the measure in this dispute, the Panel contrasted its interpretation of Section 6.1.1(ii) of *Codex* Stan 94 as setting forth "four alternatives for labeling species other than *Sardina pilchardus*" that all "require the use of the term 'sardines' with a qualification," with the fact that, under the EC Regulation, "species such as *Sardinops sagax* cannot be called 'sardines' even when … combined with the name of a country, name of a geographic area, name of the species or the common name in accordance with the law and custom of the country in which the product is sold." In the light of this contrast, the Panel concluded that *Codex* Stan 94 was not used "as a basis for" the EC Regulation.

[In respect of the "four alternatives," the Appellate Body is speaking of the Peruvian argument, accepted by the Panel, that Section 6.1.1(ii) is properly interpreted as follows: a species other than *Sardina pilchardus* may be marketed as "X sardines," where "X" is one of the following four alternatives – (1) a country, (2) a geographic area, (3) the species, or (4) the common name of the species.]

…

242. The question before us, therefore, is the proper meaning to be attributed to the words "as a basis for" in Article 2:4 of the *TBT Agreement*. In *EC – Hormones* [*i.e.*, *EC Measures Concerning Meat and Meat Products (Hormones)*, WT/DS26/AB/R, WT/DS48/AB/R (adopted 13 February 1998)], we addressed a similar issue, namely, the meaning of "based on" as used in Article 3:1 of the *SPS Agreement*, which provides:

> Harmonization
>
> 1. To harmonize sanitary and phytosanitary measures on as wide a basis as possible, Members shall *base their sanitary or phytosanitary measures on international standards*, guidelines or recommendations, where they exist, except as otherwise provided for in this *Agreement*, and in particular in Paragraph 3. (Emphasis added.)

In *EC – Hormones*, we stated that "based on" does not mean the same thing as "conform to." In that appeal, we articulated the ordinary meaning of the term "based on," as used in Article 3:1 of the *SPS Agreement* in the following terms:

> A thing is commonly said to be "based on" another thing when the former "stands" or is "founded" or "built" upon or "is supported by" the latter.[150]
>
> [150] L. Brown (ed.), *The New Shorter Oxford English Dictionary on Historical Principles* (Clarendon Press), Vol. I, p. 187.

The Panel here referred to this conclusion in its analysis of Article 2:4 of the *TBT Agreement*. … [T]he Panel did so correctly, because our approach in *EC – Hormones* is also relevant for the interpretation of Article 2:4….

243. In addition, … the Panel here used the following definition to establish the ordinary meaning of the term "basis:"

> The word "basis" means "the principal constituent of anything, the fundamental principle or theory, as of a system of knowledge."[90]

[90] [*Webster's New World Dictionary*, (William Collins & World Publishing Co., Inc., 1976)], p. 117.

Informed by our ruling in *EC – Hormones*, and relying on this meaning of the term "basis," the Panel concluded that an international standard is used "as a basis for" a technical regulation when it is used as the principal constituent or fundamental principle for the purpose of enacting the technical regulation.

244. We agree with the Panel's approach. In relying on the ordinary meaning of the term "basis," the Panel rightly followed an approach similar to ours in determining the ordinary meaning of "based on" in *EC – Hormones*. In addition to the definition of "basis" in *Webster's New World Dictionary* that was used by the Panel, we note, as well, the similar definitions for "basis" that are set out in the *The New Shorter Oxford English Dictionary* [1993 ed., vol. I, p. 188], and also provide guidance as to the ordinary meaning of the term:

> **3** [t]he main constituent. … **5** [a] thing on which anything is constructed and by which its constitution or operation is determined; a determining principle; a set of underlying or agreed principles.

245. From these various definitions, we would highlight the similar terms "principal constituent," "fundamental principle," "main constituent," and "determining principle" – all of which lend credence to the conclusion that there must be a very strong and very close relationship between two things in order to be able to say that one is "the basis for" the other.

246. The European Communities, however, seems to suggest the need for something different. The European Communities maintains that a "rational relationship" between an international standard and a technical regulation is sufficient to conclude that the former is used "as a basis for" the latter. According to the European Communities, an examination based on the criterion of the existence of a "rational relationship" focuses on "the qualitative aspect of the substantive relationship that should exist between the relevant international standard and the technical regulation." In response to questioning at the oral hearing, the European Communities added that a "rational relationship" exists when the technical regulation is informed in its overall scope by the international standard.

247. Yet, we see nothing in the text of Article 2:4 to support the European Communities' view, nor has the European Communities pointed to any such support. Moreover, the European Communities does not offer any arguments relating to the context or the object and purpose of that provision that would support its argument that the existence of a

"rational relationship" is the appropriate criterion for determining whether something has been used "as a basis for" something else.

248. We see no need here to define in general the nature of the relationship that must exist for an international standard to serve "as a basis for" a technical regulation. Here we need only examine this measure to determine if it fulfills this obligation. In our view, it can certainly be said – at a minimum – that something cannot be considered a "basis" for something else if the two are contradictory. Therefore, under Article 2:4, if the technical regulation and the international standard contradict each other, it cannot properly be concluded that the international standard has been used "as a basis for" the technical regulation.

245. Thus, we need only determine here whether there is a *contradiction* between *Codex* Stan 94 and the EC Regulation. If there is, we are justified in concluding our analysis with that determination, as the only appropriate conclusion from such a determination would be that the *Codex* Stan 94 has not been used "as a basis for" the EC Regulation.

…

256. We accept the European Communities' contention that the EC Regulation contains the prescription set out in Section 6.1.1(i) of Codex Stan 94. However, … the analysis must go beyond Section 6.1.1(i); it must extend also to Sections 6.1.1(ii) and 2.1.1 of *Codex* Stan 94. And, a comparison between, on the one hand, Sections 6.1.1(ii) and 2.1.1 of *Codex* Stan 94 and, on the other hand, Article 2 of the EC Regulation, leads to the inevitable conclusion that a contradiction exists between these provisions.

257. The effect of Article 2 of the EC Regulation is to prohibit preserved fish products prepared from the 20 species of fish other than *Sardina pilchardus* to which *Codex* Stan 94 refers – including *Sardinops sagax* – from being identified and marketed under the appellation "sardines," even with one of the four qualifiers set out in the standard. *Codex* Stan 94, by contrast, permits the use of the term "sardines" with any one of four qualifiers for the identification and marketing of preserved fish products prepared from 20 species of fish other than *Sardina pilchardus*. Thus, the EC Regulation and *Codex* Stan 94 are manifestly contradictory. To us, the existence of this contradiction confirms that Codex Stan 94 was not used "as a basis for" the EC Regulation.

258. We, therefore, uphold the finding of the Panel … that *Codex* Stan 94 was not used "as a basis for" the EC Regulation within the meaning of Article 2:4 of the *TBT Agreement*.

IV. 2012 *COOL* Case and National Treatment under *TBT Agreement* Article 2:1

● Facts

The Report in *United States – Certain Country of Origin Labeling (COOL) Requirements* was the third one decided by the Appellate Body in quick succession in 2012

concerning the *TBT Agreement*.[847] As a temporal fact, the previous two Appellate Body Reports analyzing the *TBT Agreement* were unavailable to the participants until just before their oral arguments on appeal in this third case. In all three disputes, the Appellate Body struck down American technical regulations concerning consumer safety and environmental protection, because they violated the national treatment principle in Article 2:1 of the *Agreement*.

In the previous two 2012 cases, *Clove Cigarettes* and *Tuna Dolphin II*, the Appellate Body also found the American technical regulations violated Article 2:2 of the *Agreement*, because those measures were "more trade restrictive than necessary to fulfill a legitimate objective."[848] In this third case, being unable to complete analysis because of factual insufficiencies, the Appellate Body made no Article 2:2 ruling.

The genesis of the third TBT case in 2012 were separate consultations sought be Canada and Mexico with the U.S. concerning Country of Origin Labeling rules for meat products sold in America. The COOL Measure also concerned livestock from which meat products are derived. The controversial "COOL Measure" itself consists of both law and implementing regulation, that is:

(1) The COOL Statute –
Section 1638 of the *Agricultural Marketing Act of 1946* (the COOL Statute), and

(2) The COOL Regulation –
The 2009 Final Rule (AMS), where "AMS" refers to the Agriculture Marketing Services of the USDA.[849]

At issue in the WTO Appellate Body action were requirements in the COOL Measure introduced through the 2002 *Farm Bill*, amended in the 2008 *Farm Bill*, and thereafter promulgated by regulation. The primary issues on appeal concerned whether the COOL Measure violated Article 2:1 and 2:2 of the *TBT Agreement*.

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847 *See* WT/DS384/AB/R, WT/DS386/AB/R (adopted 23 July 2012). The Panel Report was *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/R, WT/DS386/R, (adopted as modified by the Appellate Body, 23 July 2012). [Hereinafter, *COOL* Panel Report.] Although Mexico and Canada approached the WTO separately, the DSB set up a single panel to hear the complaints by Mexico and Canada. The Panel meetings with the parties were broadcast on televisions in a separate room open to the public. At the U.S. request, the Panel issued a single Panel Report.

848 *See* Appellate Body Report, *United States – Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406/AB/R (adopted 24 April 2012), Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381/AB/R (adopted 13 June 2012). [Hereinafter, *Clove Cigarettes* and *Tuna Dolphin II* Appellate Body Report, respectively.]

849 *See COOL* Panel Report, ¶¶ 7.75, 7.77, 7.85. The COOL measure was the primary measure on appeal. The Panel also looked extensively at the 2009 Final Rule (AMS) and the Vilsack letter. *See id.*, ¶ 7.44.

The COOL Measure was not a customs or border measure.[850] American customs officials (namely, CBP) use the traditional Substantial Transformation Test to determine country of origin for pork and beef products. Under this Test, the country of origin is the place where the livestock was slaughtered. (After all, how could it be doubted that life to death is not a "substantial transformation"?) Therefore (notwithstanding the possibility of livestock reincarnation), for customs purposes, only one country of origin is attributed to imported meat products.

The Appellate Body offered the following illustration:

> If, for example, an animal is born and raised in Brazil, and then slaughtered in Argentina, according to the substantial transformation rules, the country of origin of the meat derived from that animal is exclusively Argentina.[851]

Conversely, the COOL Measure allows more than one country to be attributed on a country of origin label. So in this example, the country of origin label under the COOL Measure may list both Brazil and Argentina.

In other words, CBP would use the Substantial Transformation Test, and deem Argentina to be the country of origin under the customs law regime. But, the COOL Measure would permit the USDA, in the American TBT regime, to allow retailers to label Brazil or Argentina as the country of origin. Manifestly, two different results could result under the two different regimes. And, they did, hence the dispute. Notably, the Canadians and Mexicans were reasonably tolerant of the idea that different origin determinations could occur in connection with different legal regimes. What incensed them was the discriminatory way in which the Americans operationalized the COOL Measure to protect domestic industries.

The COOL Measure mandated American retailers to mark certain products destined for domestic consumption with a country of origin label. However, a number of exceptions existed for certain types of meat products, and thus "a considerable proportion of beef and pork … [was] exempted."[852] The label could take a variety of forms, such as a sticker or placard. But, the label had to be placed conspicuously so its consumer could "read and understand" the origin of the labeled product.[853] The COOL Measure also "require[d] upstream suppliers to provide retailers with information on the origin of the meat supplied. (These data were necessary for the retailers to affix an accurate label.) Consequently, the COOL Measure "impose[d] recordkeeping requirements on producers along the livestock and meat production chain as part of its 'audit verification system.'"[854]

The COOL Measure uniquely defined origin as:

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850 *See* Appellate Body Report, *United States – Certain Country of Origin Labeling (COOL) Requirements*, WT/DS384/AB/R, WT/DS386/AB/R ¶ 239 (adopted 23 July 2012). [Hereinafter, *COOL* Appellate Body Report.]

851 *COOL* Appellate Body Report, footnote 379.

852 *COOL* Appellate Body Report, ¶ 474.

853 *COOL* Appellate Body Report, footnote 381.

854 *COOL* Appellate Body Report, ¶ 242.

> a function of the country(ies) [*i.e.*, country or countries] in which the production steps involving the animals from which that meat is derived took place.[855]

Therefore, to label a meat product correctly, the retailer must have information on where the livestock used to produce a given meat product was born, raised, and slaughtered. That is because the three "production steps" are birth, raising, and slaughtering. Information on these steps comes "from the upstream livestock and meat supply chain."[856] Hypothetically, a meat product from an animal born in Bangladesh, raised in India, and killed in Pakistan could originate from any one of those three countries, and different retailers in the U.S. could render different decisions, reflected on their different labels. The point is that because origin is determined according to different stages in the production process, the COOL Measure allowed for more than one country of origin to be included on the label for beef and pork products.

The COOL Measure had recordkeeping and verification requirements by which upstream livestock and meat supply chains had to abide. The Appellate Body noted livestock and meat producers needed accurate origin information for "every stage of the supply and distribution chain," and pass along that information to the next stage in the processing chain.[857] Recordkeeping requirements ensured producers complied with the COOL Measure, and the relevant implementing regulation granted the Secretary of Agriculture audit rights to ascertain compliance at each stage in the chain.

The COOL Statute defined "four categories of origin for muscle cuts of meat," which Table 21-1 sets out. The aforementioned categories were important, because they determined the nature of the label to be applied to the meat product. As Table 21-2 shows, labels were a function of the meat category contained in the product.

Regrettably, the Appellate Body did not clarify the confusing overlap between Labels B and C. To do so, consider Table 21-3. It reveals the only instance in which a meat retailer in the U.S. did not have discretion as to choosing between a B or C label is where the meat is Category C. In all other instances, the retailer could choose either a B or C Label, which meant it could decide whether to put "United States" first or last.

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855 *COOL* Appellate Body Report, ¶ 240.

856 *COOL* Appellate Body Report, ¶ 249.

857 *COOL* Appellate Body Report, ¶ 249 (*quoting* the Panel Report, ¶¶ 7.116, 7.117).

Table 21-1
Four COOL Statute Origin Categories

Category A ***Meat exclusively of American Origin***	Meat derived from animals "exclusively born, raised and slaughtered in the United States."[858]
Category B ***Meat of Mixed Origin: Foreign Born but Raised and Slaughtered in U.S.***	Meat derived from animals "born in Country X and raised and slaughtered in the United States. (These animals were not exclusively born, raised and slaughtered in the United States or imported for immediate slaughter.)"[859]
Category C ***Meat of Mixed Origin: Foreign Born and Foreign Raised, but Slaughtered in U.S.***	Meat derived from animals "imported into the United States for immediate slaughter."[860]
Category D ***Meat of Foreign Origin: All Production Steps are Foreign***	"Foreign meat imported into the United States."[861]

- **Appellate Issues**

The primary issues on appeal concerned *TBT Agreement* Articles 2:1 and 2:2. First, the U.S. appealed the Panel holding that the COOL Measure violated Article 2:1.[862] The U.S. argued the COOL Measure did not treat imported livestock less favorably than like domestic livestock. The U.S. lost.

858 *COOL* Panel Report, ¶ 7.89.
859 *COOL* Panel Report, ¶ 7.99.
860 *COOL* Panel Report, ¶ 7.99.
861 *COOL* Panel Report, ¶ 7.99.
862 *See COOL* Appellate Body Report, ¶ 233.

Regarding the Article 2:1 appeal, the U.S. also argued the Panel "erred in its determination of the United States' 'level of fulfillment' of its objective." The American argument included an assertion the Panel violated its obligations under *DSU* Article 11. The Appellate Body quickly dismissed the argument. *See id*. at ¶¶ 425-429, 432. Canada also argued the "Panel erred by failing to define the objective of the COOL measure at a 'sufficiently detailed level.'" *Id*. at ¶ 432, *see also id*. at ¶¶ 430-431. The Appellate Body "reject[ed] this ground of appeal." *Id*. at ¶ 431.

Table 21-2
Label Rules

Label A: American Product Only	Use this label "when 100% of the meat is derived from Category A animals."[863] Essentially, label reads: **"Product of the U.S."**[864]
Label B: Product of Mixed Origin (U.S. and Foreign)	Use this label when: (1) 100% of the meat is derived from Category B animals; (2) Categories A and B meat are commingled on a single production day; (3) Categories A and C meat are commingled on a single production day; (4) Categories B and C meat are commingled on a single production day; or (5) Categories A, B, and C meat are commingled on a single production day.[865] Essentially, label reads: **"Product of the U.S., Country X,"** with "U.S." appearing **first** on the label.[866]
Label C: Product of Mixed Origin (Foreign and U.S.)	Use this label when: (1) 100% of the meat is derived from Category C animals; (2) Categories A and B meat are commingled on a single production day, meat may be labeled as Label C (or as Label B); (3) Categories A and C meat are commingled on a single production day; (4) 100% of the meat is derived from Category B animals, meat may be labeled as Label C (or as Label B); (5) Categories B and C meat are commingled on a single production day; or (6) Categories A, B, and C meat are commingled on a single production day.[867] Essentially, label reads: **"Product of Country X, Product of the U.S.,"** with "U.S." appearing **last** on label.[868]

863 *COOL* Panel Report, ¶ 7.100.
864 *COOL* Panel Report, ¶ 7.100.
865 *COOL* Panel Report, ¶ 7.100.
866 *COOL* Panel Report, ¶ 7.100.
867 *COOL* Panel Report, ¶ 7.100.
868 *COOL* Panel Report, ¶ 7.100.

Table 21-2 (continued)
Label Rules

Label D: Foreign Product Only	Use this label "when it is 100% imported foreign meat."[869] Essentially, label reads: "**Product of Country X**."[870]

Table 21-3
Discretion as to Labels B and C

Label B May Be Used If…	**Or Label C May Be Used If…**
Category B Product only	Category B Product only
No (*i.e.*, cannot use Label B if Category C Product only)	Category C Product only
Categories A and B Product	Categories A and B Product
Categories A and C Product	Categories A and C Product
Categories B and C Product	Categories B and C Product
Categories A, B, and C Product	Categories A, B, and C Product
… in which case "United States" appears first on Label B	**… in which case "United States" appears last on Label C**

Second, the Appellate Body addressed several questions, all of which concerned Article 2:2, namely, whether the COOL Measure fulfilled a legitimate objective. The Appellate Body began by considering the Canadian and Mexican argument that the objective of the COOL measure was protectionist, which was illegitimate under Article 2:2. Canada and Mexico lost.

Then, the Appellate Body addressed the American appeal that the Panel incorrectly found the COOL Measure did not fulfill its objective, and thus violated Article 2:2. The U.S. also appealed "the legal framework adopted [and applied] by the Panel to determine whether a measure is more trade restrictive than necessary 'to fulfill' a legitimate objective."[871] The Appellate Body reversed the Panel finding that "the COOL Measure was inconsistent with Article 2:2, because it did not fulfill the objective of providing consumer information on origin."[872] That was an American victory.

But, it was a modest victory. The Appellate Body attempted to determine whether the COOL Measure is "more trade restrictive than necessary to fulfill a legitimate

869 *COOL* Panel Report, ¶ 7.100.
870 *COOL* Panel Report, ¶ 7.100.
871 *COOL* Appellate Body Report, ¶ 353.
872 *COOL* Appellate Body Report, ¶ 470.

objective," as requested by Canada and Mexico.[873] The Appellate Body was unable to complete the analysis due to insufficient availability of facts. So, overall, the Appellate Body handed the U.S. a partial victory, which in practical effect was a loss. The COOL Measure was inconsistent with Article 2:1. Whether the COOL Measure violated Article 2:2 could not be determined. Still, because the Measure violated the *TBT Agreement* national treatment rule, it could not stand.

- **Questions Concerning *TBT Agreement* Article 2:1 and Panel Finding**

  Article 2:1 of the *TBT Agreement* says:

  > Members shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded *treatment no less favorable* than that accorded to like products of national origin and to like products originating in any other country. (Emphasis added.)

The starting point in any dispute involving an alleged violation of the *TBT Agreement* is to establish the measure at issue is a "technical regulation." Here, none of the participants appealed the Panel finding that the COOL Measure was a "technical regulation." Also left untouched was the Panel finding that Canadian and American hogs and cattle are like products, and Mexican and American cattle are like products.

The Panel held the COOL Measure violated Article 2:1, because it accorded less favorable treatment to imported livestock than to like domestic livestock. In doing so, the Panel studied 3 questions.

First, the Panel determined the categories of labels, *i.e.*, Labels A through D, accorded different treatment to imported livestock. Second, the Panel found the COOL Measure implicitly involved segregation, through the various meat categories and label types. It determined, unsurprisingly, the costs associated with segregation were higher when "more origins and … labels [are] involved."[874] Third, the Panel found the COOL Measure created a competitive advantage to process domestic livestock over imported livestock due to the compliance costs.[875]

The Appellate Body examined the same questions, *in seriatim*. Its key finding was on the first one. It held the COOL Measure violated Article 2:1, essentially because it discriminatorily imposed higher record-keeping and attendant administrative burdens on foreign meat producers than on their American competitors. Notably, the Appellate Body relied heavily on its recent 2012 TBT precedents, which (to be fair to the Panel) were unavailable to the Panel.

- **Interpretation of "Treatment No Less Favorable"**

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873 *See COOL* Appellate Body Report, ¶ 470.
874 *COOL* Appellate Body Report, ¶¶ 260-261.
875 *COOL* Appellate Body Report, ¶¶ 262-263.

Unsurprisingly, the Appellate Body applied to the COOL Measure its recent interpretations of Article 2:1 in its 2012 Reports, *Clove Cigarettes* and *Tuna Dolphin II*. The Appellate Body said:

> an analysis of less favorable treatment [with regard to the national treatment obligation] involves an assessment of whether the technical regulation at issue modifies the *conditions of competition* in the relevant market to the detriment of the group of imported products vis-à-vis the group of like domestic products.[876]

However, given the context of Article 2:1, the Appellate Body cautioned:

> Article 2:1 should not be read to mean that *any* distinctions, in particular ones that are based exclusively on such particular product characteristics or on particular processes and production methods, would *per se* constitute less favorable treatment within the meaning of Article 2:1.[877]

This interpretation was consistent with the reading of GATT Article III:4 by the Appellate Body in its 2001 *Asbestos* Report.[878] Here, as in *Clove Cigarettes* and *Tuna Dolphin II*, the Appellate Body reiterated Article III:4 may serve as a guide for interpreting the "treatment no less favorable" element of national treatment under the *TBT Agreement*. Consequently, the Appellate Body depended not only on its 2012 *TBT Agreement* jurisprudence, but also its precedent concerning GATT Article III.

As in GATT, a technical regulation may be found to violate, *de facto* or *de jure*, the "treatment no less favorable" element of the TBT national treatment principle. In determining a *de facto* violation, both texts require a Panel to:

> take into consideration "the totality of facts and circumstances before it," and assess any "implications" for competitive conditions "discernible from the design, structure, and expected operation of the measure."[879]

This examination must take into account the market and industry characteristics, "relative market shares," "consumer preferences, and historical trade patterns."[880] In other words, a

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876 *COOL* Appellate Body Report, ¶ 268. (Emphasis added.) *See also Clove Cigarettes* Appellate Body Report ¶ 180; *Tuna Dolphin II* Appellate Body Report, ¶ 215.

877 *COOL* Appellate Body Report, ¶ 268. (Emphasis added.)

878 *See COOL* Appellate Body Report, footnote 479 (referring to Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R, ¶100 (adopted 5 April 2001)).

879 *COOL* Appellate Body Report, ¶ 269 (*quoting*, respectively, *Clove Cigarettes* Appellate Body Report, ¶ 206 and Appellate Body Report, *Thailand – Customs and Fiscal Measures on Cigarettes from the Philippines*, WT/DS371/AB/R, ¶ 130 (adopted 15 July 2011) [hereinafter, 2011 *Thai Cigarettes* Appellate Body Report]).

880 *COOL* Appellate Body Report, ¶ 269 (referring to *Tuna Dolphin II*, ¶¶ 233-234 (concerning the analysis of market and industry characteristics and consumer preferences, respectively), Panel Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/R, ¶ 8.119 (adopted as modified 24 March 2006) (concerning market shares), Appellate Body Report, *Korea – Measures Affecting Imports of*

panel must analyze "the operation of the particular technical regulation at issue in the particular market in which it is applied."[881]

Regarding causal effects of a disputed measure or technical regulation, under both GATT and the *TBT Agreement*, the Appellate Body stated:

> [i]n every case, it is *the effect of the measure on the competitive opportunities in the market* that is relevant to an assessment of whether a challenged measure has a detrimental impact on imported products. (Original emphasis.)[882]

But, the words "relevant to," which (regrettably) the Appellate Body did not italicize for emphasis, are critical. The Appellate Body did not equate the national treatment tests under GATT and the *TBT Agreement*.

Yes, an un-level competitive playing field is relevant evidence in both instances. And, for GATT cases, it is the key, *i.e.*, tilting competition against imports is illegal, regardless of the purpose behind the measure that causes the tilt. But, for TBT cases, there can be more: a tilt of the playing field against imports is not automatically a violation of the *TBT Agreement*, precisely because the technical regulation that causes the tilt is a technical regulation. Such a regulation creates categories and distinctions that may have a legitimate regulatory purpose. As the Appellate Body indicated, when a "*de facto* detrimental impact … stems exclusively from a legitimate regulatory distinction," the measure does not necessarily violate Article 2:1 of the *TBT Agreement*.[883]

So, finding a relationship between the measure at issue and a detrimental impact on the competitive position of imports vis-à-vis a like domestic product is not dispositive. The key is the measure must not be administered in a discriminatory manner.[884] The Appellate Body restated the increasingly common phrase in disputes concerning Article 2 of the *TBT Agreement*.

The Appellate Body had set the precedent recently, in the April 2012 *Clove Cigarettes* case, relied on the same language in the June 2012 *Tuna II case*, and applied the same language in the *COOL* case:

Fresh, Chilled and Frozen Beef, WT/DS161/AB/R, WT/DS169/AB/R, ¶ 145 (adopted 10 January 2001) (concerning historical trade patterns) [hereinafter 2001 *Korea Beef* Appellate Body Report]).

881 *COOL* Appellate Body Report, ¶ 269.

882 *COOL* Appellate Body Report, ¶ 270.

883 *COOL* Appellate Body Report, ¶ 271.

884 *See COOL* Appellate Body Report, ¶ 271.

Confusingly, the Appellate Body said the presence of a "genuine relationship" is key. *See id*., ¶ 269 (*quoting Tuna Dolphin II* Appellate Body Report, footnote 457 (referring to *Thai Cigarettes* Appellate Body Report, ¶ 134)). *See also* 2001 *Korea Beef* Appellate Body Report, ¶ 137. In fact, the key is not the relationship between a technical regulation, on the one hand, and its impact in the marketplace, on the other hand. That much is relevant, but the key is whether a technical administration is administered in a discriminatory manner.

> [i]n assessing *even-handedness*, a panel must "carefully scrutinize the particular circumstances of the case, that is, the *design, architecture, revealing structure, operation and application* of the technical regulation at issue."[885]

Simply put, "treatment no less favorable" under Article 2:1 of the *TBT Agreement* means even-handedness in the way a governmental authority applies a TBT measure to foreign and like domestic products. That the impact of the treatment may be disparate is not, itself, conclusive evidence of unfavorable treatment. In turn, with respect to proof, once a complainant makes an initial *prima facie* case, the burden shifts to the respondent, who must show the measure is applied in practice in an even-handed manner.

- **Application of "Treatment No Less Favorable"**

The Appellate Body looked at whether the labeling requirement treated imports differently from a domestic like product. America argued its COOL Measure does not result in differential treatment to imported products, because all meat requires "the same recordkeeping," and all meat must be labeled with "the same relevant information."[886] Even when meat is commingled, "the same label, that is a B or C Label, is affixed to all meat derived from commingled animals."[887] The U.S. lost this argument, as the Appellate Body upheld the Panel finding.

The Panel found the COOL Measure caused market participants to choose domestic livestock or meat derived from domestic livestock over the imported like product. In the absence of the COOL Measure, market participants would not have exercised this preference. The Appellate Body declared:

> where private actors are induced or encouraged to take certain decisions *because of the incentives created by a measure*, those decisions are not "independent" of that measure.[888]

Therefore, the Appellate Body agreed with the Panel that:

> the COOL measure modifies the *conditions of competition* in the U.S. market to the detriment of imported livestock by creating an incentive in favor of processing exclusively domestic livestock and a disincentive against handling imported livestock.[889]

However, the Appellate Body determined the Panel failed to complete its analysis as to whether the COOL Measure violated Article 2:1.

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885 *COOL* Appellate Body Report, ¶ 271 (drawing from *Clove Cigarettes*, ¶ 182 and *Tuna Dolphin II*, ¶ 225).
886 *COOL* Appellate Body Report, ¶ 275.
887 *COOL* Appellate Body Report, ¶ 275.
888 *COOL* Appellate Body Report, ¶ 291. (Emphasis original.)
889 *COOL* Appellate Body Report, ¶ 293. (Emphasis added.)

Merely finding a detrimental impact to foreign producers or goods is not enough. The Panel failed to determine whether the "detrimental impact stems exclusively from a legitimate regulatory distinction, or whether the COOL measure lacks even-handedness."[890] Instead, the Panel viewed the detrimental impact as dispositive, and ended its analysis prematurely. So, the Appellate Body completed the analysis by examining the "design, architecture, revealing structure, operation, and application of the COOL measure."[891]

The U.S. argued the COOL measure would not violate Article 2:1 if the Appellate Body found it was administered even-handedly. The Americans noted there is a difference between a regulatory distinction (*i.e.*, categories of products, or categories within a product class, created by a technical regulation) and the objective of the regulation (*i.e.*, the goal of the regulation). According to the U.S., "the mere fact that the [COOL] measure identifies the origins of products in order to label them accordingly at retail does not mean that there is a regulatory distinction made between domestic and imported products."[892]

The Appellate Body said the "relevant regulatory distinction" under the COOL Measure is segregation of the livestock production steps (birth, raising and slaughter) and the categories of meat labels.[893] The task for the Appellate Body was to determine whether these distinctions were "designed and applied in an even-handed manner."[894] The Appellate Body said the recordkeeping and verification requirements:

> [r]equire livestock and meat producers to track and transmit to their downstream buyers information regarding the countries in which each production step took place for the animals and/or meat that they process. Thus, for example, a livestock producer must maintain and transmit information sufficient to enable its customers to differentiate between cattle born and raised in the United States, and cattle born in Mexico and raised in the United States.[895]

The Appellate Body noted the COOL Measure demanded detailed data from upstream producers, but the label conferring origin information to consumers "is less detailed and will often be less accurate." The label merely stated country of origin, without reference to the production steps. The label actually might contain misinformation, because:

> a retail label may indicate that meat is of mixed origin when in fact it is of exclusively U.S. origin, or that it has three countries of origin when in fact it has only one or two.[896]

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890 *COOL* Appellate Body Report, ¶ 293.
891 *COOL* Appellate Body Report, ¶ 293.
892 *COOL* Appellate Body Report, ¶ 329. (Emphasis removed.)
893 *COOL* Appellate Body Report, ¶ 341.
894 *COOL* Appellate Body Report, ¶ 341.
895 *COOL* Appellate Body Report, ¶ 342.
896 *COOL* Appellate Body Report, ¶ 343.

In addition, an upstream producer had no knowledge of where its product ultimately ends up, nor whether the product is exempt from the labeling requirements. Therefore, according to the Appellate Body:

> information regarding the origin of *all* livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping and verification requirements of the COOL measure, even though a "considerable proportion" of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all.[897]

The Appellate Body said the cost of the recordkeeping and verification is, naturally, "lower when a given producer processes single origin livestock only."[898] Therefore, Label A, meat products derived wholly from American livestock, incurred the lowest costs (because the birth, growth, and slaughtering of the livestock were entirely in the U.S.).

According to the Appellate Body, the "overall architecture of the COOL measure and the way in which it operates and is applied" showed the compliance requirements for upstream producers "are disproportionate as compared to the level of information communicated to consumers through the mandatory retail labels."[899] Thus, the regulatory distinction was "arbitrary" and "reflect[ed] discrimination."[900] The Appellate Body upheld the finding of the Panel that the COOL Measure violated Article 2:1 of the *TBT Agreement*, albeit for different reasons.

- **Synopsis**

The Appellate Body held against the U.S. on the national treatment issue. It did so not solely because the COOL Measure disfavored foreign meat (that is, meat from livestock born, raised, and/or slaughtered outside the U.S.) in competition with American meat. Rather, the Appellate Body found America could not justify this un-level playing field with its purported regulatory purpose: to convey information to consumers via a retail label.

That purpose was justifiable, but the labels did not convey much information at all. They did not tell consumers where livestock from which meat was derived was born, raised, or slaughtered. The labels gave only a summation of country of origin.

The Appellate Body weighed this paucity of information in the COOL labels against the significant burden on foreign meat producers to keep records to comply with the COOL Measure. The mismatch was too great. Foreign producers were forced to collect an enormity of data. But, much of that information never was conveyed in the label on the product they produce, thus undermining the stated (and legitimate) purpose of the

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897 *COOL* Appellate Body Report, ¶ 344. (Emphasis original.)
898 *COOL* Appellate Body Report, ¶ 345.
899 *COOL* Appellate Body Report, ¶ 347.
900 *COOL* Appellate Body Report, ¶¶ 347, 349.

regulation, and hurting foreign producers by raising the cost of their product compared to American meat.

V. Plain Packaging

In June 2018 a WTO Panel upheld Australia's 2010 "plain packaging" tobacco law, which enhanced public health by cutting smoking, against claims under Article 2:2 of the *TBT Agreement* by Cuba, Dominican Republic, Honduras, and Indonesia that there were equally effective, less restrictive measures reasonably available to achieve a legitimate objective.[901] The Panel also rejected claims under the *TRIPs Agreement* that the law was an obstacle to trademark registration (Article 15:4) unjustifiable infringed on the trademarks of tobacco companies (Articles 16:1, 16:4, 20, and 22:2(b)). The law "bans logos and distinctively-colored cigarette packaging in favor of drab olive packets that look more like military or prison issue, with brand names printed in small standardized fonts."

At the time the Panel issued its report, Britain, France, Hungary, Ireland, New Zealand, and Norway had similar laws, and Burkina Faso, Canada, Georgia, Romania, Slovenia and Thailand had passed and were set to implement such laws.[902] The case, then, was a test case of the use of the *TBT Agreement* Article 2 (or GATT XX) and the *TRIPs Agreement* in defense of tobacco control measures that banned branding, raising the fundamental balancing question of public health measures against trademark integrity.

VI. 2014 *Fur Seals* Case and Legal Test for Non-Discrimination under GATT versus *TBT Agreement*

Is the legal test for non-discrimination under *TBT Agreement* Article 2:1 the same as that under GATT Articles I:1 and III:4? The language in the two texts, and the overall purpose – ensuring a level competitive playing field – is similar. The 2002 *Sardines* and 2012 *COOL* case do not answer this question. The 2014 *Fur Seals* case does.

It does so thanks to the interesting, but parlous, losing appellate argument of the EU. The EU contended the Panel misinterpreted both Article I:1 and III:4. The Panel was wrong to conclude that the legal standard for the non-discrimination obligations in Article 2:1 of the *TBT Agreement* does not "equally apply" to GATT Article I:1 and III:4 claims. The topic of how the non-discrimination obligations in the *TBT Agreement* and GATT relate to one another (if at all) arose because Canada and Norway made claims of non-discrimination under both accords. The Panel cited the 2012 *Tuna Dolphin II* and *U.S. Clove Cigarettes* Appellate Body Reports in support of the following legal points:[903]

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901 *See* WTO Panel Reports, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WT/DS435/R, WT/DS441/R, WT/DS458/R, WT/DS467/R (issued 28 June 2018).

902 *See* Tom Miles, *Australia Wins Landmark WTO Ruling on Plain Tobacco Packaging*, Reuters, 28 June 2018, www.reuters.com/article/us-wto-tobacco-ruling/australia-wins-landmark-wto-ruling-on-plain-tobacco-packaging-idUSKBN1JO2BF.

903 *See Fur Seals* Appellate Body Report, ¶ 5.76-5.77; *Tuna Dolphin II* Appellate Body Report, ¶¶ 215; *Clove Cigarettes*, ¶¶ 180-182, 215.

(1) The test for "treatment no less favorable" under GATT Articles I:1 and II:4 is whether a measure "modif[ies] the conditions of competition in the marketplace" in favor of domestic like products to the detriment of imports.

(2) Under GATT Article XX, each Member has a right to derogate from these GATT non-discrimination obligations.

(3) The meaning of "treatment no less favorable" in Article 2:1 of the *TBT Agreement* is different from that in GATT in one respect: the *TBT Agreement* allows for a detrimental impact on imports that "stems exclusively from a legitimate regulatory distinction," as opposed to discrimination. After all, this *Agreement* contains the rules for legitimate technical regulations, and products from certain countries might not meet such regulations. Moreover, the *Agreement* does not have a general list of exceptions like GATT Article XX, which at least implicitly suggests it allows for disparate treatment of goods caused by application of a lawful technical regulation.

To these points, the Appellate Body added 4 further ones:

(4) The text of GATT Article III:4 expressly uses the "treatment no less favorable" test. The wording of Article I:1 is different. It expresses an obligation to extend any "advantage" a Member grants to any product originating in or destined to any other country "immediately and unconditionally" to the like product originating in or destined for all other Members.

(5) Notwithstanding the textual distinction, both GATT Articles are fundamental non-discrimination obligations. The national treatment rule of Article III:4 "proscribes … discriminatory treatment of *imported* products vis-à-vis like *domestic* products."[904] The MFN rule of Article I:1 "proscribes … discriminatory treatment *between and among* like products of different origins."[905] The obligations aim to forbid "discriminatory measures by requiring … *equality of competitive opportunities* for like imported products from all Members [the MFN rule] and equality of competitive opportunities for imported products and like domestic products [the national treatment rule]."[906] Given their goal, neither "require[s] a demonstration of the *actual* trade effects of a specific measure."[907]

(6) That the 2 GATT non-discrimination obligations "overlap in … scope" is clear from the MFN rule. It incorporates all matters refereed to in

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904 *Fur Seals* Appellate Body Report, ¶ 5.79. (Emphasis original.)
905 *Fur Seals* Appellate Body Report, ¶ 5.79. (Emphasis original.)
906 *Fur Seals* Appellate Body Report, ¶ 5.82. (Emphasis added.)
907 *Fur Seals* Appellate Body Report, ¶ 5.82. (Emphasis original.)

Paragraphs 2 and 4 of Article III. So, an internal matter within the scope of Article III:4 also may be in the purview of the MFN obligation.

(7) The MFN proscription against grating an "advantage" to imports from certain origins has two explicit on time and manner.[908] As to time, a Member must extent any "advantage" "immediately" to all other like products. As to manner, the Member must extend any "advantage" "unconditionally," *i.e.*, "without conditions." The discipline does not forbid a Member from attaching conditions to the "advantage." It simply means the Member must attach the same conditions to all like products, regardless of origin and thus now skew the marketplace, *i.e.*, the conditions must not have a "detrimental impact on the competitive opportunities for any Member."

Despite these points, the EU insisted on appeal the non-discrimination obligations in the *TBT Agreement* apply equally to claims under GATT. The logic of the EU position was that if its Seal Regime was a legitimate technical regulation, then under the *Agreement*, that Regime could have a detrimental impact on foreign seal products. In turn, if the same allowance under the *Agreement* for detrimental impact applied to GATT, then the Seal Regime was excused from such an impact under GATT, too.

If there was going to be any force in an argument about disparate impact, then it might have been in a different context: GATT Article XI:1. Suppose Canada and Norway had sued the EU claiming its Seal Regime was a forbidden quantitative restriction. The EU might have defended its measure under Article XI:2(b) as an "[i]mport … prohibition[] or restriction[] necessary to the application of standards or regulations for the classification, grading or marketing of commodities in international trade." Canada and Norway did not make that claim, probably anticipating the defense.

So, on appeal, the EU was left arguing that a proper Article I:1 analysis of detrimental impact on competitive opportunities requires an investigation into the "rationale for such impact … specifically, whether it stems exclusively form a legitimate regulatory distinction." In other words, the EU tried to shoe-horn into the MFN rule the standard in Article 2:1 of the *TBT Agreement*.

The EU had no Article I:1 jurisprudence to support its arguments. Hence, the Appellate quickly, easily rejected the attempt, repeating that "where a measure modifies the conditions to competition between like imported products to the detriment of the third-country imported products at issue, it is inconsistent with Article I:1."[909] No more study was needed. Under the MFN rule, a Panel does not need to see if a differential competitive impact from a measure stems from a legitimate regulatory distinction.

VII. 2020 *Russia Railway Equipment* Case and "Comparable Situations" under *TBT Agreement* Article 5:1:1

908 *Fur Seals* Appellate Body Report, ¶ 5.88. (Emphasis original.)
909 *Fur Seals* Appellate Body Report, ¶ 5.90.

- **Facts**

The *Russia Railway Equipment* dispute occurred amidst an ongoing conflict between Ukraine and the Russian Federation that began in early 2014.[910] The conflict displaced millions of Ukrainians, resulted in Russia's annexation of Crimea, and incurred thousands of deaths.[911] While these events are of indefinite consequence, they also set the stage for a specific, novel Appellate Body decision concerning Article 5:1:1 of the *TBT Agreement*.

The roots of the dispute grow from less dramatic circumstances, beginning in July 2011. Then, the Commission of the Customs Union covering Russia, the Republic of Belarus and the Republic of Kazakhstan adopted Decision No. 710.[912] This Decision reformed the technical safety standards applicable to rail cars and other railway products used in the Custom Union market. The decision was to take effect on August 2, 2014 – after which the affected railway products would require a certificate of conformity registered with the region's Federal Budgetary Organization. A later amendment extended the transition period to end on August 1, 2016.

Despite the transition period, Ukraine argued Russia began suspending certificates (that were previously registered with the Federal Budgetary Organization) in late 2013. Russia allegedly justified these suspensions as "technical issues," which were necessary because it could not send inspectors to visit Ukraine's production facilities. Russia's stance was at odds with that of Belarus and Kazakhstan, which each continued to provide certificates for Ukrainian railway products under the new technical regulations. Russia considered these Belarusian and Kazakh certificates invalid as well, arguing the regulations were only applicable to products manufactured within the CU. Russia continued to deny new certificate applications through 2015, up until the dispute was brought.

Ukraine pointed to three offending measures Russia took regarding certificates for railway products constituted three challengeable measures (collectively, "Measures"):

(1) "Systematic Import Prevention Measure" or "First Measure" –
Systematic prevention of Ukrainian railway product imports caused by Russia's suspension of valid certificates issued for railway products, refusal to issue new certificates for railway products, and non-recognition of certificates issued by the competent authorities of Belarus and Kazakhstan as established in accordance with the Custom Union's underlying treaty.

(2) "Suspension and Rejections Measure, or Second Measure" –

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910 *See* WTO Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/AB/R, (issued 4 February 2020, adopted 5 March 2020). [Hereinafter, *Russia Railway Equipment* Appellate Body Report.] The Panel Report is *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WT/DS499/R (issued 30 July 2018, adopted 5 March 2020). (Hereinafter, *Russia Railway Equipment* Panel Report.)

911 *See* Gwendolyn Sasse, *War and Displacement: The Case of Ukraine*, 72 EUROPE-ASIA STUDIES issue 3, 347-353 (2020).

912 *See Russia Railway Equipment* Panel Report at 60.

The suspensions of valid certificates, the rejections of applications for new certificates, and the refusal to recognize certificates of other CU-member countries for Ukrainian producers of railway products.

(3) "Non-Recognition of Certificates Measure," or "Third Measure" – Russia's non-recognition of certificates issued under the new technical regulations by Belarus and Kazakhstan to Ukrainian suppliers of railway products.[913]

Ukraine alleged that, because of these Russian measures, Ukraine's exports of rail products to Russia decreased from $1.7 billion in 2013 to just $600 million in 2014 – bottoming at $110 million in 2015. This steep decline occurred even though the technical regulations had not entered into full force.

- **Issue Synopsis**

On appeal, Ukraine challenged several of the Panel's findings regarding the Russian Measures, arguing the Panel erred:[914]

(1) In its analysis relating to the existence of a "comparable situation" under Article 5:1:1 of the *TBT Agreement* and in finding Ukraine failed to establish that Russia acted inconsistently with its obligations under that Article.

(2) In concluding Ukraine failed to establish that (a) Ukraine's proposed less-restrictive alternatives were reasonably available to Russia, and (b) Russia acted inconsistently with its obligations under Article 5:1:2 of the *TBT Agreement*.

(3) In its assessment of the existence of systematic import prevention with respect to Ukraine's claims under GATT Articles I:1, XI:1, and XIII:1 of the GATT 1994.

Issue (1) presented the first opportunity ever for the Appellate Body to opine on the meaning of what constitutes a "comparable situation" under Article 5:1:1.[915]

- **Issue (1): "Comparable Situation" Under *TBT Agreement* Article 5:1:1**

Did, as Ukraine contended, the Panel err in its analysis relating to the existence of a "comparable situation" under Article 5:1:1 of the *TBT Agreement* and in finding that Ukraine failed to establish Russia acted inconsistently with its obligations under that

913 *Russia Railway Equipment* Appellate Body Report, ¶ 1.2.
914 *Russia Railway Equipment* Appellate Body Report, ¶ 4.1.
915 Russia's arguments concerning the Panel's opinion are not discussed herein. For an analysis of them, see Raj Bhala, David Gantz, Dukgi Goh, Eric Witmer & Cody Wood, *WTO Case Review 2020*, 39 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2021).

provision? Here was the first time the Appellate Body analyzed what constituted a "comparable situation" for purposes of suppliers denied rights under Article 5:1:1. In general, the Article "establishes obligations to provide national treatment and most-favored nation treatment with regard to access for suppliers from other Members to covered conformity assessment procedures of importing Members."[916]

Specifically, Article 5:1:1 states that Members apply the following when certifying the technical compliance of products imported from another Member:

> …conformity assessment procedures are prepared, adopted and applied so as to grant access for suppliers of like products originating in the territories of other Members under conditions no less favorable than those accorded to suppliers of like products of national origin or originating in any other country, in a comparable situation; access entails suppliers' right to an assessment of conformity under the rules of the procedure, including, when foreseen by this procedure, the possibility to have conformity assessment activities undertaken at the site of facilities and to receive the mark of the system[.][917]

The first clause of Article 5:1:1 sets forth the obligation that a Member's governing authority must provide conformity assessment procedures on a national treatment and most-favored nation basis to Member suppliers of "like products" "in a comparable situation."[918] The second clause states suppliers should have "access" to these procedures so that their products may be found to conform with the importing Member's regulations. This access includes the possibility of having any requisite inspections undertaken at the Member-supplier's facility.

The language used in the two clauses is important. "In contrast to other non-discrimination obligations, such as Article III:4 of the GATT 1994 and Article 2:1 of the *TBT Agreement*, the obligations under Article 5:1:1 of the *TBT Agreement* attach to the suppliers of products as opposed to the product itself."[919] The separation in Article 5:1:1 between suppliers and their products thus means suppliers should receive access to conformity assessment procedures, while the products themselves are to receive the "positive assurance of conformity" that results from said procedures.

In this scenario, a like-products assessment is still required. But, determining whether a Member is in violation of Article 5:1:1 also "requires an assessment of whether the conditions for access to conformity assessment granted by the regulating Member to suppliers of domestic or third-country products modify the conditions of competition to the detriment of suppliers of like imported products.[920] Article 5:1:1 focuses on whether the Member supplier is discriminated against in terms of the procedures used to conduct

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916 *Russia Railway Equipment* Appellate Body Report, ¶ 5.108.
917 *Russia Railway Equipment* Appellate Body Report, ¶ 5.119.
918 *Russia Railway Equipment* Appellate Body Report, ¶ 5.121.
919 *Russia Railway Equipment* Appellate Body Report, ¶ 5.122.
920 *Russia Railway Equipment* Appellate Body Report, ¶ 5.123.

assessments (*e.g.*, whether onsite product inspections are available) relative to the importing country or other Members.

The Appellate Body determined that "the factors relevant for purposes of establishing the existence of a 'comparable situation' [are] those with a bearing on the conditions for granting access to conformity assessment in a particular case."[921] This comparison must "be assessed in relation to the measure at issue granting access to conformity assessment to suppliers of like products and in light of the particular circumstances of each case."[922] Because the comparison is focused on the situations of the suppliers, the factors to consider may vary by industry.[923] Other factors, such as the nature of the rules of conformity, the product at issue, or the internal situation of a country, may be considered.[924] All of these factors are weighed alongside the importing country's need to obtain "positive assurance[s]" that the imported products will conform with its technical standards.[925]

Ukraine challenged the Panel's explanation of what constituted a "comparable situation," arguing the Panel failed to properly describe what factors needed to be compared.[926] The Appellate Body disagreed, finding the Panel did make a sufficient consideration and application of potential factors, even if it did not prescribe a positive rule for what factors were necessary.[927]

The main concern underlying the Panel's application of the "comparable situation" finding related to the ongoing conflict in Ukraine. The Panel found this conflict made Ukrainian railway suppliers look *incomparable* relative to other suppliers who were not located in similarly dangerous regions.[928] Ukraine took issue with the Panel's finding that threats to Russian inspectors' safety was a valid basis to find such situations differed. The gravamen of Ukraine's argument was the Panel focused on the circumstances of the *inspectors'* situation relative to the conflict as a whole. Ukraine said the Panel should have taken into account the specific situations and locations of the suppliers, rather than the upheaval that existed in the country in general.

The Appellate Body agreed with Ukraine.[929] Security and life safety concerns within a country certainly may bear on a supplier's situation. But, in this instance, the Panel failed to consider whether security concerns for Russian inspectors actually existed at the suppliers' locations.[930]

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921 *Russia Railway Equipment* Appellate Body Report, ¶ 5.123.
922 *Russia Railway Equipment* Appellate Body Report, ¶ 5.125.
923 *Russia Railway Equipment* Appellate Body Report, ¶ 5.126.
924 *Russia Railway Equipment* Appellate Body Report, ¶ 5.128.
925 *Russia Railway Equipment* Appellate Body Report, ¶ 5.128.
926 *Russia Railway Equipment* Appellate Body Report, ¶ 5.129.
927 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.136.
928 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.137.
929 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.149.
930 *See Russia Railway Equipment* Appellate Body Report ¶¶ 5.140-5.141.

The Appellate Body also concluded the Panel was wrong to weigh and balance Russia's interests with those of Ukraine when comparing the situations of suppliers.[931] Such a balancing test may be appropriate for assessing whether a trade-restrictive remedy violates Article 2:2 of the *TBT Agreement*, but it is not appropriate for Article 5:1:1 claims. The Appellate Body also noted the Panel gave undue deference to Russia's discretion in where to send its inspectors, rather than consider the specific facts relevant to the suppliers.[932] The Panel's interpretive problems were compounded by its consideration of evidence the Appellate Body deemed to be "general," applicable to irrelevant regions, or else lacking in sufficient analysis and comparison to determine its probative value.[933]

In the end, the Appellate Body determined that although the Panel interpreted the phrase "in a comparable situation" correctly, it failed to make the correct factual findings that were specific to the Ukrainian suppliers at issue.[934] Consequently, the Appellate Body sided with Ukraine, reversed the Panel's holding, and concluded Russia's Measures were inconsistent with its Article 5:1:1 obligations.[935]

- **Issue (2): Less Restrictive Alternatives and *TBT Agreement* Article 5:1:2**

Did, as Ukraine urged, the Panel err in finding Ukraine failed to establish (1) less-restrictive alternatives Ukraine proposed for Russia in lieu of Russia's Measures were reasonably available to Russia, and (2) Russia acted inconsistently with its obligations under Article 5:1:2 of the *TBT Agreement*? Ukraine claimed the Panel failed to act objectively in accord with *DSU* Article 11 when the Panel found that Russia's instructions not to approve (*i.e.*, to deny) certificates did not violate *TBT Agreement* Article 5:1:2.[936] As Ukraine saw it, this failure was the result of the Panel inadequate consideration of Ukraine's proposed less-restrictive trade measures that were available to Russia.[937]

How these alternatives were viewed is important, because the Panel's examination of less restrictive alternatives is necessary to determine if Russia was acting in conformity with the second sentence of Article 5:1:2.[938] This sentence states that conformity assessment procedures cannot be more strict than necessary "to give the importing Member adequate confidence that products conform with the applicable technical regulations or standards, taking account of the risks non-conformity would create."[939]

The language of Article 5:1:2 indicates that these conformity assessment procedures should not be designed to create unnecessary obstacles to international trade.[940]So, the obstacles created by the procedure must be weighed against the risks of

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931 *See Russia Railway Equipment* Appellate Body Report ¶ 5.145.
932 *See Russia Railway Equipment* Appellate Body Report ¶ 5.147.
933 *Russia Railway Equipment* Appellate Body Report ¶ 5.148.
934 *Russia Railway Equipment* Appellate Body Report ¶ 5.154.
935 *Russia Railway Equipment* Appellate Body Report ¶¶ 5.155-5.156.
936 *Russia Railway Equipment* Appellate Body Report ¶ 5.157.
937 *Russia Railway Equipment* Appellate Body Report ¶ 5.1580.
938 *Russia Railway Equipment* Appellate Body Report ¶ 5.161.
939 *Russia Railway Equipment* Appellate Body Report ¶ 5.182.
940 *Russia Railway Equipment* Appellate Body Report ¶ 5.183.

non-conformity and the legitimacy of the technical regulation.[941] As a result, the existence of unnecessary obstacles to trade under Article 5:1:2 can be determined by analyzing three factors:

> (1) Whether the conformity assessment procedure provides adequate confidence of conformity with the underlying technical regulation or standard;
> (2) the strictness of the conformity assessment procedure or of the way in which it is applied; and
> (3) the nature of the risks and the gravity of the consequences that would arise from non-conformity with the technical regulation or standard.[942]

Ukraine's proposed alternative trade restrictions were relevant for analyzing factor (2). That is, whether the conformity procedure proposed by Russia is too restrictive can be determined by examining whether Russia could achieve the same risk-reducing objectives through means that have less of an impact on trade.[943]

Ukraine suggested four alternatives it argued were less restrictive, but would still meet Russia's risk-reducing objectives: (1) providing "additional communications with the relevant Ukrainian producers;" (2) "entrusting inspections in Ukraine to the competent authorities of Kazakhstan or Belarus;" (3) "accrediting non-Russian experts or organizations to conduct inspections in Ukraine;" and (4) "conducting off-site inspections."[944] The Panel held Ukraine had not met its burden of proof to show each one of these options was less-restrictive than the measures Russia adopted.[945]

The Appellate Body first considered Ukraine's argument that offsite inspections were available to Russia and could provide confidence that Ukraine's railway products would meet Russian standards.[946] The Panel's analysis of this issue was complicated by the fact Russia's laws contemplated the use of offsite inspections in certain situations.[947] Even though Ukraine's proposition only considered offsite inspections in the abstract, irrespective of Russia's prior procedures, the Panel used this pre-existing law as a benchmark for Ukraine's evidentiary burden. The Panel found Ukraine could have, but did not, introduce evidence regarding how the law effects Russia's ability to weed-out non-conforming merchandise.[948]

However, this was not the evidentiary burden Ukraine was required to meet. Instead, the Appellate Body held Ukraine's *prima facie* burden mandated only that the

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941 *Russia Railway Equipment* Appellate Body Report ¶¶ 5.185-5.186.
942 *Russia Railway Equipment* Appellate Body Report ¶ 5.186.
943 *See Russia Railway Equipment* Appellate Body Report ¶ 5.186.
944 *Russia Railway Equipment* Appellate Body Report, ¶¶ 5.176-5.179.
945 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.180.
946 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.199.
947 *See Russia Railway Equipment* Appellate Body Report, ¶¶ 5.200-5.201.
948 See *Russia Railway Equipment* Appellate Body Report, ¶¶ 5.200-5.201, 5.210.

proposed restriction be "hypothetically" feasible.[949] This meant Ukraine needed only to show that, in concept, its more general alternative was "reasonably available" to Russia, such that detailed information as to the alternative's operation was unnecessary.[950] Holding Ukraine to the real-world technical requirements of Russia's legislation (which was not the alternative Ukraine proposed) went beyond this conceptual hurdle.

The Panel did more than apply the wrong evidentiary burden. The Panel also failed to determine whether Ukraine's proposed offsite inspection measure was "less strict and makes an equivalent contribution to the objective of providing Russia with adequate confidence of conformity."[951] Because of these two failures, the Appellate Body determined that the record was insufficient for it to assess whether Russia applied its conformity assessment procedure more strictly than Article 5:1:2 allowed.[952] To be sure, there are limits to the conceptual ease of this evidentiary burden. Namely, a complainant still must provide "sufficient indications that the proposed alternative does not *a priori* impose an undue burden on the respondent, such as prohibitive costs or substantial technical difficulties, and is not merely theoretical in nature."[953]

Applying these principles, the Appellate Body agreed with the Panel's treatment of Ukraine's three other proposed alternatives. First, as to Ukraine's suggestion Russia could credential and appoint non-Russian inspectors to conduct the assessments, the Appellate Body ruled the Panel was correct to find Ukraine did not describe the alternative with enough precision to establish the measure was reasonably available to Russia.[954] Second, the Appellate Body said the Panel was correct to reject Ukraine's alternative proposal that Belarusian or Kazakh authorities could carry out inspections, because it was not self-evident Russia had the power to trust the decisions of foreign authorities.[955] Third, the Appellate Body agreed with the Panel that Russia's recognition of Belarusian and Kazakh conformance certificates under their shared Customs Union was not the same as Russia recognizing the specific inspection procedures of those countries.[956] As to the remaining alternative, that Russia could ensure conformity through increased communication with Ukrainian suppliers, the Appellate Body dismissed it as having an uncertain outcome.[957]

- **Issue (3): First Measure and GATT Obligations**

Did, as Ukraine claimed, the Panel err in assessing whether Russia's First Measure resulted in systemic import prevention of Ukrainian railway products, thereby violating GATT Articles I:1, XI:1, and XIII:1? Ukraine argued the Panel applied the wrong evidentiary burden and the wrong standard of proof when it addressed this question.[958]

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949 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.210.
950 *Russia Railway Equipment* Appellate Body Report, ¶ 5.206.
951 *Russia Railway Equipment* Appellate Body Report, ¶ 5.205.
952 *Russia Railway Equipment* Appellate Body Report, ¶ 5.205.
953 *Russia Railway Equipment* Appellate Body Report ¶ 5.206.
954 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.207.
955 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.208.
956 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.208.
957 *Russia Railway Equipment* Appellate Body Report, ¶ 5.209.
958 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.219.

Ukraine believed the First Measure, which concerned Russia's suspension of conformity certificates, rejection of application for new certificates, and non-recognition of existing certificates, systematically prevented the importation of Ukrainian railway products. The Panel found each of these Measures were "individual decisions" that did not, in the aggregate, form a single unwritten Measure.[959]

Ukraine agreed with the Panel that the existence of any international trade measure must be demonstrated by evidence showing "(i) that the measure is attributable to the respondent; (ii) the precise content of the measure; and (iii) other elements arising from the manner in which the complainant described the measure, such as the nature or operation of the measure."[960] However, Ukraine believed the Panel applied these elements incorrectly by considering them out-of-order. Had the correct order been followed, Ukraine argued, the Panel would have viewed each individual decision as evidence of a single, unwritten measure.[961]

The Appellate Body reiterated that the existence of an unwritten often is determined through circumstantial evidence.[962] The evidence required, and elements that evidence must establish, may vary depending on the measure at issue and manner in which it is described by a complainant. Panels are afforded discretion in how to organize their assessment, depending on the measure at issue and arguments made.[963] Ukraine thus was required to show the Panel's order of analysis resulted in an error in the specific circumstances of the case.

The Appellate Body ultimately agreed with the Panel's manner of analyzing the existence of the First Measure.[964] A key point supporting the Panel's decision was the fact Ukraine described the First Measure by challenging its components on an individual basis.[965] The Panel was thus correct in analyzing each decision separately, and was justified in going on to see if the rationales for these decisions shared uniformity such that the existence of a single measure could be identified.[966] Based on the differences in the individual components, a single unifying rationale for the proposed measure could not be determined.

- **Significance**

The *Russia Railway Equipment* case matters because it is the first instance in which the Appellate Body analyzed "comparable situation," and offered a test for it, under *TBT Agreement* Article 5:1:1. The focus of the Appellate Body on whether conditions are comparable at a facility-level raises an interesting dilemma. This focus, or test, implies an importing Member cannot refrain from inspecting the facility of another Member if the

959 *Russia Railway Equipment* Appellate Body Report, ¶ 5.229.
960 *Russia Railway Equipment* Appellate Body Report, ¶ 5.220.
961 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.229.
962 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.234.
963 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.235.
964 *See Russia Railway Equipment* Appellate Body Report, ¶¶ 5.250-5.251.
965 *See Russia Railway Equipment* Appellate Body Report, ¶ 5.243.
966 *See Russia Railway Equipment* Appellate Body Report, ¶¶ 5.243-5.25.

conditions (be they logistical, safety, access, burden, etc.) are relatively the same at both locations. Similarly, the importing Member may not deny one Member inspections of its exporting facility, but continue inspections at the facility of a different Member, if the conditions under which those two facilities operate are similar.

These requirements make sense where, for example, war cuts off access to the infrastructure needed to conduct an onsite inspection, or make it too dangerous for an inspector to travel across battle lines to that facility. If Russia had made such an argument relative to the locations of specific Ukrainian facilities, then perhaps the decision of the Appellate Body would have been different (provided similar battles were not occurring near all railway product manufacturing facilities worldwide).

Alas, modern events highlight how specific these differences in situatedness need to be to justify restriction of conformity assessments at some locations, but not others. For example, if a global pandemic makes it dangerous to visit all facilities, no matter the location, would an importing country be able to argue it cannot visit a particular exporting facility for safety concerns, when in fact those same health concerns are the same for inspectors at its own domestic facilities or the facilities of its other trading partners? Perhaps the importer could prevail by providing data and evidence regarding a higher-level of transmissibility or lower precautions at the location of the facility in question. But this analysis invites a heightened degree of line-drawing that may give creative Members breathing room to distort competition within a particular industry.

The discussion by the Appellate Body concerning the burden of proof for determining the availability of measures also is instructive. Contrary to the need to describe the differences in situations with particularity under *TBT Agreement* Article 5:1:1, a complainant that seeks to propose less-restrictive measures of conformity need only describe hypothetical (albeit plausible) alternatives to an offending measure. Despite such a low burden, Ukraine still was unable to explain its alternatives with enough detail such that the Panel could deem them theoretically practicable. This result is a cautionary tale that countries dreaming up less-restrictive alternatives must describe, with particularity, how those alternatives may function – even if those details are purely theoretical.

Chapter 22

FIFTH PILLAR: GATT ARTICLE X AND TRANSPARENCY[967]

I. Why Transparency Matters

● Overview

Other than by luck, it is impossible to compete effectively, much less successfully, in a game the rules of which one is ignorant. Where rules are made available to some, but not all, competitors, the playing field is not level. Put conceptually, non-transparency of rules is an NTB to free, fair competition in two respects. First, some players – those "not in the loop" – are disadvantaged relative to players that understand the rules. Second, potential players – ones seeking entry into the game – are disadvantaged relative to players that understand the rules. Transparency is all about providing the opportunity to learn the rules to all existing and potential competitors on a non-discriminatory basis. It is not about the equality of result. Transparency does not demand that every existing or potential competitor actually understand and apply the rules to an equally masterful degree. Transparency also is not the same as participation. Transparency merely demands that every current or prospective player have the chance to learn the rules, not that all of them have a voice in shaping the rules.

To say transparency "merely" demands equality of opportunity is beguilingly simple. The object is to ensure international trade laws are sufficiently transparent so as to avoid constituting an NTB. Accordingly, in its entirety, the GATT Article X transparency rules states:

> **Article X**
> **Publication and Administration of Trade Regulations**
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> 1. Laws, regulations, judicial decisions and administrative rulings of general application, made effective by any contracting party, pertaining to the classification or the valuation of products for customs purposes, or to rates of duty, taxes or other charges, or to requirements, restrictions or prohibitions on imports or exports or on the transfer of payments therefor, or affecting their sale, distribution, transportation, insurance, warehousing, inspection, exhibition, processing, mixing or other use, shall be published promptly in such a manner as to enable governments and traders to become acquainted with them. Agreements affecting international trade policy which are in force between the government or a governmental agency of any contracting party and the government or governmental agency of any

[967] Documents References:
(1) GATT Article X
(2) Transparency provisions in agreements in *WTO Agreement* Annexes 1-4.

other contracting party [per GATT 1947, *i.e.*, WTO Member per GATT 1994] shall also be published. The provisions of this paragraph shall not require any contracting party to disclose confidential information which would impede law enforcement or otherwise be contrary to the public interest or would prejudice the legitimate commercial interests of particular enterprises, public or private.

2. No measure of general application taken by any contracting party effecting an advance in a rate of duty or other charge on imports under an established and uniform practice, or imposing a new or more burdensome requirement, restriction or prohibition on imports, or on the transfer of payments therefor, shall be enforced before such measure has been officially published.

3. (a) Each contracting party shall administer in a uniform, impartial and reasonable manner all its laws, regulations, decisions and rulings of the kind described in paragraph 1 of this Article.

(b) Each contracting party shall maintain, or institute as soon as practicable, judicial, arbitral or administrative tribunals or procedures for the purpose, *inter alia*, of the prompt review and correction of administrative action relating to customs matters. Such tribunals or procedures shall 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 with a court or tribunal of superior jurisdiction within the time prescribed for appeals to be lodged by importers; *Provided* that the central administration of such agency may take steps to obtain a review of the matter in another proceeding if there is good cause to believe that the decision is inconsistent with established principles of law or the actual facts.

(c) The provisions of sub-paragraph (b) of this paragraph shall not require the elimination or substitution of procedures in force in the territory of a contracting party on the date of this Agreement which in fact provide for an objective and impartial review of administrative action even though such procedures are not fully or formally independent of the agencies entrusted with administrative enforcement. Any contracting party employing such procedures shall, upon request, furnish the CONTRACTING PARTIES with full information thereon in order that they may determine whether such procedures conform to the requirements of this sub-paragraph.[968]

[968] https://kansas.sharepoint.com/:w:/t/WheatLawLibrary-Documents/EaCECtiEA7hDvm7vo1ab4MoBOXNmkCMVOtnjIrFHUVzFAQ?e=eoeBe6.

But, what does it mean, in practice, to say that a set of rules – like the body of international trade law in a WTO Member, or indeed the GATT-WTO regime itself – is "transparent"?

GATT Article X:1 provides some guidance, requiring prompt publication in such a manner as to allow governments and traders to become acquainted with the law. Article X:2 calls for enforcement of laws only after they have been officially published. Thus, in the 1989 *EEC Restrictions on Imports of Apples* case, at issue was an EEC import quota allocation scheme that was announced in April 1988.[969] Yet, the quota covered the period February-August 1988. Because the quota was back-dated two months before it was published, the GATT panel ruled that it ran afoul of Article X. Finally, Article X:3 speaks of the uniform, impartial, and reasonable administration of laws, the use of independent adjudicatory tribunals.

But, even this minimalist list of transparency variables is problematical. First, consider GATT Article X:1. How prompt is "prompt" publication – a day, week, month, year? What sort of publishing vehicle is needed to allow the players to familiarize themselves with the law? Is it enough for the government of the Kyrgyzstan to print copies of a new AD regulation in the Russian language and make the copies available on a table in a ministry office in downtown Bishkek (the capital city)? Or, must the Kyrgyz government publish the regulation in all of the official UN languages (Arabic, Chinese, English, French, Russian, and Spanish) on the internet at a website with a server that is accessible 24 hours a day from around the world?

- **Uruguay Round *Decision*, Doha Round Negotiations**

Doha Round negotiators, like their Uruguay and Tokyo Round predecessors, understood the importance of transparency to free and fair trade. The Uruguay Round negotiators affirmed the use of the *TPRM* to review systematically and periodically the trade laws and policies of each Member. In the *Ministerial Decision on Notification Procedures*,[970] Uruguay Round negotiators emphasized the importance of each Member notifying and publishing its trade measures, and agreed to create a central registry at the WTO to file notifications. The Council for Trade in Goods was allocated responsibility of reviewing notification obligations and procedures under WTO texts. What Doha Round processes or results (if any) enhanced transparency?

- **Built-In Transparency Rules**

Vitally, several texts contain their own transparency provisions that supplement general obligations in GATT Article X. Examples of built-in complementary or supplementary transparency rules include:

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969 *See* B.I.S.D. (36th Supp.) 135, 166-67 ¶¶ 5.20-5.23 (1989).

970 This *Decision* is a partial successor document to the 1979 Tokyo Round *Understanding Regarding Notification, Consultation, Dispute Settlement, and Surveillance*, B.I.S.D. (26th Supp.) 210 (1979).

(1) Article 2:9 of the *TBT Agreement*
(2) Articles 2(g) and 3(e) of the *Agreement on Rules of Origin*
(3) Article 25 of the *SCM Agreement*
(4) Article 12 of the *Agreement on Safeguards*
(5) Article 7 of the *SPS Agreement*
(6) Article 63 of the *TRIPs Agreement*
(7) Article 18:2-3 of the *Agreement on Agriculture*
(8) Article 6:1 of the *TRIMs Agreement*
(9) Article III of *GATS*.[971]

Yet, just how serious the Uruguay Round negotiators were is hardly evident from the subsequent operation of the WTO itself. The Organization is criticized severely for being staffed by faceless, secretive bureaucrats who follow procedures only they and a handful of outsiders understand, and circulate restricted documents amongst themselves but are hesitant (if not loathe) to publish those documents. How fair is this criticism?

To be fair, the WTO web site contains a wealth of information. Delays in making materials publicly available surely are due in part to the chronic triangular problem of excess work, short staffing, under funding – and, most of all, the politically correct but practically ridiculous demand to translate everything into French and Spanish. Still, as long as legitimate concerns exist about the transparency of the WTO itself, there will be a pharisaical ring in its calls for more transparency among Members.

II. Analyzing GATT Article X:1-3

Exactly what is the scope of Article X:1? That is, what must be published? In *Japan – Measures Affecting Consumer Photographic Film and Paper*, the infamous 1998 *Kodak-Fuji* dispute, the U.S. claimed Japan violated Article X:1.[972] Japan did not publish administrative rulings on two subjects, enforcement actions by Japan's antitrust regulator (the Japan Fair Trade Commission), and guidance given to regional offices of the Ministry of International Trade and Industry and to local authorities on the administration of a law on large retail stores. The Panel held Article X:1 does not require publication of administrative rulings addressed to specific entities, and the U.S. failed to prove the unpublished JFTC enforcement actions and MITI guidance resulted in changes in law. The U.S. did not appeal.

As for Article X:2, ought there be some minimum time between publication and enforcement? After all, not all the players will see new laws as soon as they are published – it may take some time for knowledge of it to filter out into the market place. Moreover,

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971 For an analysis of the history of transparency obligations in international trade dating to the 1923 International Convention Relating to the Simplification of Customs Formalities, and a discussion of them in PTAs, see Padideh Ala'i, *The WTO as a Forum for Regulatory Cooperation: Transparency and Open Plurilateral Agreements*, *in* THE FUTURE OF TRADE: A NORTH AMERICAN PERSPECTIVE Chapter 11, 252-275 (Cheltenham, United Kingdom: Edward Elgar, David A. Gantz & Tony Payan eds., 2023).

972 *See* WT/DS44/R (adopted 22 April 1998).

what if a WTO Member shares information about an impending change in law with some players, but not others, before actual publication?

The 1993 case of *Canada – Import, Distribution and Sale of Certain Alcoholic Drinks by Provincial Marketing Agencies* illustrates both issues.[973] The U.S. complained Ontario's legislative assembly announced a new pricing policy for beer only five days before its entry into force. The U.S. also charged the liquor board of British Colombia shared information about pricing policy with Canadian brewers before making that same information available to American authorities. Surely, these acts meant favoritism for Labatts and Molson (Canadian brands), and discrimination against Budweiser and Miller (American brands). Yet, the GATT Panel found no violation of Article X. That Article, said the Panel, did not mandate any waiting period between publication and application of a new trade rule, nor did it obligate a contracting party to share information simultaneously with foreign and domestic producers. The Panel thereby condoned the practice of helping domestic producers adjust to an impending change in law by telling only them of it early, and then making adjustment more difficult by enforcing the new law shortly after publication on unsuspecting foreign competitors.

Consider, finally, Article X:3. It cannot be interpreted literally. Rather, its language ought to be read as embodying an ideal type. As long as laws are administered by humans, they will not be applied in an entirely uniform, impartial, and reasonable manner, and no adjudicatory tribunal will be entirely independent. To advocate American-style separation-of-powers for every other WTO Member is unrealistic, and possibly even wrong-headed insofar as the doctrine arose and evolved in the unique American context. It is also naive to believe the separation is as great in practice as the doctrine would have it in theory. The real question is the permissible degree of variance among Members from the ideal type.

III. Omissions

Perhaps even more problematical than the items on the GATT Article X list are the omissions. What about all of the procedural due process protections that are so familiar in American administrative law? Ought WTO Members be obligated to provide opportunity for a public hearing on any proposed new trade law? Ought they to offer a 90 day notice and comment period, *i.e.*, to publish any proposed regulation and invite suggestions from the players during a review period, before re-publishing the regulation in final form? These sorts of questions raise deeper issues about the democratic character of a government. What American-trained lawyers may regard as a birthright for their importer and exporter clients may be seen in other political cultures as an expensive luxury, even an arrogant privilege.

IV. 1998 *EC Poultry Products* Case

● Facts

The post-Uruguay Round case of *EC – Poultry Products* involves a claim of violation of GATT Article X. To be sure, many more issues were at stake, most notably

973 *See* B.I.S.D. (39th Supp.) 27, 85-86 at ¶ 5.34 (1993).

critical questions about the non-discriminatory administration of tariff-rate quotas under GATT Article XIII (a matter discussed later in the context of the *Bananas* case). The large number of disputed issues, coupled with the obtuse nature of the textual provisions involved, mean the case makes for difficult reading (a common problem among many agriculture cases for the same reasons).

Essentially, a dispute arose out of a 1994 bilateral agreement, the "*Oilseeds Agreement*," negotiated between Brazil and the EC concerning (*inter alia*) trade in poultry under the authority of GATT Article XXVIII (which concerns modification of tariff schedules through agreement with WTO Members). This *Agreement* was negotiated after the CONTRACTING PARTIES adopted a panel report, *European Economic Community – Payments and Subsidies Paid to Processors and Producers of Oilseeds and Related Animal-feed Proteins* – the infamous *EEC Oilseeds* case that threatened to derail a successful conclusion to the Uruguay Round.[974] In the wake of that case, the CONTRACTING PARTIES authorized the EC to negotiate with interested parties under GATT Article XXVIII. The EC did so with respect to Brazil and nine other parties. Thus, the *Oilseeds Agreement* referred to in *EC – Poultry*, which is technically a set of Agreed Minutes signed on 31 January 1994, is the outcome of the EC-Brazil bilateral talks.

The *Oilseeds Agreement* authorized the EC to impose a duty-free global annual TRQ of 15,500 tons for frozen poultry meat imports. All imports under the quota were subject to presentation of an import license, though it was not necessary to show a license for an out-of-quota shipment. The EC Tariff Schedule indicated the TRQ, along with base duty rates for out-of-quota amounts. Also in its Schedule, the EC reserved the right to impose a special safeguard, in accord with Article 5 of the Uruguay Round *Agreement on Agriculture*. That remedy would result in an additional duty on out-of-quota imports, assuming the price of these imports fell below a trigger price pre-set and published by the EC. The import price would be measured as either a "representative price" (determined by accounting for third-country prices, "free-at-Community offer prices," and prices of imported products at various stages of marketing in the EC), or, at the request of the importer, the CIF price.

Brazil quarreled with a number of aspects of the way in which the EC implemented and administered the tariff-rate quota scheme. In addition to Brazil's transparency claim under GATT Article X, Brazil argued the EC had violated GATT Articles II (concerning tariff bindings), III (concerning non-discriminatory treatment between imports and like domestic products), and XIII (concerning the non-discriminatory administration of quantitative restrictions). On these substantive claims, the Panel ruled against Brazil. Brazil, however, prevailed with respect to some of its arguments that the EC had not implemented the TRQ in accordance the Uruguay Round *Agreement on Import Licensing Procedures*, and with respect to its argument the EC's definition of the CIF price had not complied with the *Agriculture Agreement*.

On appeal, Brazil raised a host of substantive issues, including whether a TRQ resulting from negotiations under GATT Article XXVIII must be administered in a non-

974 *See* GATT, B.I.S.D. (37th Supp.) 86 (1989-90) (adopted 25 January 1990).

discriminatory manner consistent with Article XIII, *i.e.*, whether the quota must be applied on an MFN basis. On this issue, the Appellate Body upheld the panel's ruling. For its part, the EC appealed the Panel's ruling that Article 5:1(b) of the *Agriculture Agreement* requires an import price to be the CIF price plus OCDs. Its appeal was successful, as the Appellate Body overturned the Panel ruling.

Underlying the substantive debate in *EC Poultry Products* is a significant difference in how Brazil and the EC viewed the *Oilseeds Agreement*. To Brazil, the *Agreement* was a means for the EC to negotiate with it separately from other frozen poultry meat exporters. Rather than pursue a strategy of compensating all exporters on a common, MFN basis, Brazil characterized the *Agreement* as a way the EC could give variable compensatory solutions, *i.e.*, *sui generis* solutions to specific Members. The *Agreement*, Brazil said, embodied a country-specific package for Brazil, and did not require MFN application of the tariff-rate quota share for Brazil.

Thus, for instance, it was not necessary for Brazil's share in the duty-free global annual quota of 15,500 tons to be the same as set forth in other bilateral agreements the EC might make with other WTO Members (*i.e.*, it was not necessary for shares to be allocated, as GATT Article XIII:2(d) suggests, among Members with a substantial interest based on proportions of imports into the EC during a previous representative period). Conversely, the EC – agreeing with the panel's finding – did not believe anything in GATT Article XXVIII (concerning modification of tariff schedules), or, for that matter, the *WTO Agreement*, waived the MFN obligations of Articles I and XIII.

The clashing characterizations of the *Oilseeds Agreement* were motivated by conflicting trade interests. Brazil would benefit from a larger, non-MFN share of the EC's TRQ, as opposed to a smaller, MFN share. Allocation of shares to non-Members would reduce Brazil's slice of the in-quota amount. Conversely, the EC would benefit from adherence to the MFN principle, because Brazil would reach its in-quota limitation more quickly than if it had an "extra" amount. In turn, the EC could apply a protectionist safeguard measure under the *Agriculture Agreement* sooner rather than later. At the least, the EC would garner the tariff revenue from over-quota shipments. Likewise, were the EC to allocate shares to non-Members, then Members like Brazil would be more likely to reach their reduced quota allotments more quickly than otherwise would happen.

- **Key Holding**

WTO APPELLATE BODY REPORT, *EUROPEAN COMMUNITIES – MEASURES AFFECTING THE IMPORTATION OF CERTAIN POULTRY PRODUCTS*, WT/DS69/AB/R (ADOPTED 23 JULY 1998)[975]

VI. ARTICLE X OF THE GATT 1994

110. With respect to Article X, the Panel found:

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975 Footnotes omitted.

> ... that Article X is applicable only to laws, regulations, judicial decisions and administrative rulings "of general application" ... licenses issued to a specific company or applied to a specific shipment cannot be considered to be a measure "of general application". In the present case, the information which Brazil claims the EC should have made available concerns a specific shipment, which is outside the scope of Article X of GATT.
>
> In view of the fact that the EC has demonstrated that it has complied with the obligation of publication of the regulations under Article X regarding the licensing rules of general application, without further evidence and argument in support of Brazil's position regarding how Article X is violated, we dismiss Brazil's claim on this point.

111. Article X:1 of the GATT 1994 makes it clear that Article X does not deal with specific transactions, but rather with rules "of general application." It is clear to us that the EC rules pertaining to import licensing ... are rules "of general application." The Panel found that with respect to these rules of general application, the European Communities had complied with its publication obligations under Article X. Brazil does not appeal this finding.

112. Brazil, however, argues that the Panel erred in law in assessing measures of general application in Article X … and that the Panel also misinterpreted Brazil's submissions relating to Article X. According to Brazil, the generally applicable rules of the European Communities relating to imports of frozen poultry meat do not allow Brazilian traders to know whether a particular shipment will be subject to the rules governing in-quota trade or to rules relating to out-of-quota trade, and Brazil maintains that this is a violation of Article X.

113. The approach to Article X … advocated by Brazil would require that a Member specify in advance the precise treatment to be accorded to each individual shipment of frozen poultry meat into the European Communities. Although it is true, as Brazil contends, that any measure of general application will always have to be applied in specific cases, nevertheless, the particular treatment accorded to each individual shipment cannot be considered a measure "of general application" within the meaning of Article X. The Panel cited the following passage from the panel report in *United States – Restrictions on Imports of Cotton and Man-made Fiber Underwear* [WT/DS24/R, adopted as modified by the Appellate Body on 25 February 1997]:

> The mere fact that the restraint at issue was an administrative order does not prevent us from concluding that the restraint was a measure of general application. Nor does the fact that it was a country-specific measure exclude the possibility of it being a measure of general application. If, for instance, the restraint was addressed to a specific company or applied to a specific shipment, it would not have qualified as a measure of general application. However, to the extent that the restraint affects an unidentified number of

> economic operators, including domestic and foreign producers, we find it to be a measure of general application.

We agree with the Panel that "conversely, licenses issued to a specific company or applied to a specific shipment cannot be considered to be a measure 'of general application'" within the meaning of Article X.

114. It is inherent in the nature of a tariff-rate quota that imports over the threshold quantity specified in the rules of general application will not benefit from the terms of the tariff-rate quota. Within the framework of the rules of general application that establish the terms of the tariff-rate quota for frozen poultry meat, the detailed arrangements concerning the importation of a particular shipment of frozen poultry into the European Communities are made primarily among private operators. These arrangements will determine whether a particular shipment falls within or outside the tariff-rate quota, and will consequently determine whether the rules relating to in-quota trade or those relating to out-of-quota trade will apply to a given shipment. These arrangements among private operators have been generally left to them by the government of the Member concerned. Article X of the GATT 1994 does not impose an obligation on Member governments to ensure that exporters are continuously notified by importers as to the treatment particular impending shipments will receive in relation to a tariff-rate quota.

115. Article X relates to the *publication* and *administration* of "laws, regulations, judicial decisions and administrative rulings of general application", rather than to the *substantive content* of such measures. In *EC – Bananas* [WT/DS27/AB/R, adopted 25 September 1997], we stated:

> The text of Article X:3(a) clearly indicates that the requirements of "uniformity, impartiality and reasonableness" do not apply to the laws, regulations, decisions and rulings *themselves*, but rather to the *administration* of those laws, regulations, decisions and rulings. The context of Article X:3(a) within Article X, which is entitled "Publication and Administration of Trade Regulations", and a reading of the other paragraphs of Article X, make it clear that Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994.

Thus, to the extent that Brazil's appeal relates to the *substantive content* of the EC rules themselves, and not to their *publication* or *administration*, that appeal falls outside the scope of Article X…. The WTO-consistency of such substantive content must be determined by reference to provisions of the covered agreements other than Article X of the GATT 1994.

116. For these reasons, we uphold the Panel's finding ... that "the information which Brazil claims the EC should have made available concerns a specific shipment, which is

outside the scope of Article X of GATT."

V. Challenging Substance and 2006 *EC Customs* Case

It is hard to believe poor pleading and argumentation by the U.S. in the *European Communities – Selected Customs Matters* would overcome facts so much in its favor that America would lose the case.[976] But, that happened, particularly as to framing the terms of reference of the Panel that heard the case. After all, anyone traveler to more than one EU member state knows the EU does not have a harmonized customs service. There are, for example, customs services in France, Luxembourg, Poland, and Romania – all with their idiosyncrasies and distinctive uniforms. So, the EU states do not necessarily administer, in every instance, harmonized approaches to classification, valuation, judicial review, audits, and penalties, so as to guarantee the same outcome. An exporter, therefore, of an identical product to two or more EU states must gird itself for the possibility of divergences in the manner in which the states may apply their rules. Rarely would those divergences – hence the American challenge under Article X:3(a).

The *EC Customs* case arose partly from different classifications of the same LCD flat monitors with a digital video interface by various states in the EC. The facts for the U.S. side were compelling. Some states classified the monitors under HS 8471 of the EC Common Customs Tariff as computer monitors. The consequence was zero duty treatment, because computer monitors fall under the *ITA*.[977] But, other EC states (such as The Netherlands) classified the goods as video monitors, with the result they were subject to a 14% duty under HS 8528. The essence of the American argument was the EC manner of administering its laws, regulations, decisions and rulings, as described in GATT Article X:1, is not uniform, impartial and reasonable, and is therefore inconsistent with Article X:3(a). As Professor David Gantz observes:

> Had the United States been fully successful in its broad challenge, based on Article X:3 of the GATT, the Appellate Body might have decreed, and the EC have been forced to adopt, a centralized customs decision review mechanism, which would have ensured a prompt, quasi-automatic centralized mechanism for review and coordination of the determinations of the national offices, and perhaps their auditing, in matters of classification, valuation and penalties, among others.
>
> However, that didn't happen. Instead, the Appellate Body, even though sympathizing with the United States' assertions on appeal that it had in fact been challenging broadly the EC customs administrative system, declined to "complete the analysis" for lack of a proper factual record. At best, the decision leaves open the possibility that the United States, with more extensive evidence, could launch a new attack on the EC customs administrative system, with much more extensive evidence as to how

976 *See* WT/DS315AB/R (adopted 11 December 2006).

977 *See Ministerial Declaration on Trade in Information Technology Products*, 13 December 2006, www.wto.org.

> individual EC member country decisions resulted in a system that is inconsistent with the requirements of Article X.[978]

The Appellate Body affirmed the Panel's finding that the classification divergence was a "non-uniform administration within the meaning of Article X:3(a) of the GATT 1994."[979]

But, that affirmance was not the key feature of the decision. Rather, as Professor Gantz suggests, the Appellate Body offered a significant innovation:

> [a] somewhat broader interpretation of GATT Article X:3(a), which instead of limiting challenges to the *application* of a Member's laws (as suggested by earlier decisions), leaves open the possibility of a challenge to "the substantive content of a legal instrument that regulates the administration" of customs related laws and regulations, to the manner in which a legal instrument is administered, provided that the claimant meets the burden of showing "how and why those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1."
>
> …
>
> … [T]he problem for the Appellate Body [in the *Customs* case] is that … two prior rulings, *EC – Bananas* and *EC – Poultry*, give at least the appearance of barring challenges under Article X:3(c) to the substance of the laws and regulations. In *EC – Bananas III*, the Appellate Body stated that "Article X applies to the *administration* of laws, regulations, decisions and rulings. To the extent that the laws, regulations, decisions and rulings themselves are discriminatory, they can be examined for their consistency with the relevant provisions of the GATT 1994." [*European Communities – Regime for the Importation, Sale and Distribution of Bananas*, WT/DS27/AB/R, ¶ 200 (adopted 25 September 1997)]. Similarly, in *EC – Poultry*, the Appellate Body concluded that to the extent the Brazilian appeal "relates to the *substantive content* of the [EC] rules themselves and not to their *publication or administration*, that appeal falls outside the scope of Article X of GATT 1994." [*European Communities – Measures Affecting the Importation of Certain Poultry Products*, WT/DS69/AB/R, ¶ 115 (adopted 23 July 1998).]

In a critical passage in its *EC Customs* decision, the Appellate Body distinguished the earlier precedents. Its prior statements

> do not exclude, however, the possibility of challenging under Article X:3(a) the substantive content of a legal instrument that regulates the administration of a legal instrument of the kind described in Article X:1 … While the substantive content of the legal instrument being administered is not challengeable under Article X:3(a), we see no reason why a legal

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978 Raj Bhala & David Gantz, *WTO Case Review 2006*, 24 ARIZONA JOURNAL OF INTERNATIONAL AND COMPARATIVE LAW (2007). [Hereinafter, Bhala & Gantz.]

979 Appellate Body Report, *EC Customs*, ¶ 260.

> instrument that regulates the application or implementation of that instrument cannot be examined under Article X:3(a) if it is alleged to lead to a lack of uniform, impartial or reasonable administration of that legal instrument. [Appellate Body Report, *Customs*, ¶ 200.]

What must one Member show to challenge successfully not simply the administration of trade laws, but the substantive rules governing the administration of laws?

> … [T]he burden on the claimant wishing to prevail on such allegations is substantial. It must show that the challenged legal instrument "necessarily leads to a lack of uniform, impartial or reasonable administration." It won't be enough for the claimant just to cite the legal instrument; it "must discharge the burden of substantiating how and who those provisions necessarily lead to impermissible administration of the legal instrument of the kind described in Article X:1."[980]

Jurisprudence on transparency is evolving, including in the context of CUs like the EU and *MERCOSUR*. Should GATT Article XXIV excuse transgressions against Article X:3(a)?

[980] Bhala & Gantz (*quoting* Appellate Body Report, *Customs*, ¶ 201).

Part Five

EXCEPTIONS:
CRACKS IN PILLARS OF GATT-WTO LAW

Chapter 23

NON-APPLICATION, WAIVERS, PREFERENCES, AND REMEDIES[981]

I. GATT Article XXXV, Meaning of Non-Application, and Syria

Suppose Syria accedes to the WTO. Is Syria legally entitled to have every WTO Member extend all multilateral trade obligations to it? The short answer is "yes, but…" Syria has this right, but any Member can invoke non-application. Suppose Lebanon is a WTO Member, having acceded before Syria. Assume, too, many Syrian exports are shipped abroad through Lebanese ports, such as Beirut and Tyre, and many imports come through these facilities. However, political relations between Syria and at least some constituencies in Lebanon and the other neighboring countries are poor, all the more so under the stresses and strains of the Syrian Civil War (March 2011-). The question is whether an existing Member of the club, such as Israel, Jordan, or Turkey, can opt not to treat the newly joining Member, Syria, as a Member?

The qualified affirmative answer – "yes, but" – is incongruous with multilateralism. Surely the right answer, if multilateral trade obligations are to be taken seriously, is there is no possibility of treating Syria as anything but a full WTO Member. Yet, the specter of non-application necessitates qualification. Non-application is not a new concept. The GATT drafters dedicated Article XXXV to it, and the Uruguay Round negotiators added to the *WTO Agreement* a complimentary provision, Article XIII, which is based on the GATT Article. These developments occurred for good reason.

What exactly does "non-application" mean? In brief, it is an opt-out from extending GATT-WTO benefits. Non-application is a unilateral right of either a contracting party (Member) or an acceding government to determine whether to apply GATT-WTO rules to each other. In practice, non-application means Members in question do not enter into multilateral trade law relations with one another. The scope of non-application is as broad or narrow as desired by the new or existing Member invoking it.

At one extreme, non-application can mean denial of all GATT-WTO obligations. At the other extreme, it can mean denial of just one obligation, such as MFN treatment under Article I:1, or tariff concessions under Article II:1(b). Non-application also allows for the converse scenario, whereby a new Member elects not to extend GATT-WTO obligations to an extant Member. Both scenarios arise only if the WTO Member invoking the non-application option satisfies certain criteria set forth in Article XXXV and Article XIII of GATT and the *WTO Agreement*, respectively. What, precisely, are those criteria?

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[981] Documents References:
(1) *Havana (ITO) Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, XX, XXI, XXIV, and XXXV
(3) 1979 Tokyo Round *Enabling Clause*
(4) *WTO Agreement* Articles IX, XIII

II. New Accession Scenario

Taking these two provisions together, non-application is possible in either of two scenarios. The scenarios may be labeled, respectively, "grandfathering" and "new accession." The first scenario is of historical import only. It relates only to founding WTO Members that had invoked Article XXXV of GATT before the birth date of the WTO. That is, non-application via grandfathering no longer is an option. As of the entry into force of the *WTO Agreement*, 1 January 1995, a GATT contracting party had to have invoked Article XXXV against another contracting party. Assuming both contracting parties carried through as WTO Members, then the non-application as between them that pre-dated the WTO also carries through. The scenario, then, is one in which a contracting party affirmatively wants to deny not only GATT rights, but also all benefits flowing from the *WTO Agreement* and its Annexes, to another contracting party after 1 January 1995. That desire is given legal effect through grandfathering.

As its rubric connotes, the second non-application scenario pertains to accessions of governments that were not original Members of the WTO. Suppose an existing Member like Turkey, decides it does not want to extend the rights and privileges of Membership to a newly acceding Member, like Syria. It might not want to do so in light of the poor relations between these countries associated with the long, bloody conflict in Syria. Practically speaking, that decision means the extant Member will not apply the *WTO Agreement*, nor the accords annexed to it. How does that Member go about effecting this decision?

The existing WTO Member (Turkey) must invoke the non-application at the time the other government (Syria) accedes to Membership. The Member must announce it will not apply GATT-WTO rules to Syria at the time Syria accedes to the WTO. To wait beyond that accession point is to forfeit the option of non-application. The same rule applies to the converse situation. Should the extant Member elect not to apply the rules to Syria, it had better make this announcement before acceding, or it loses the option of treating Syria as a non-Member. Specifically, in both instances, the announcement of intention to invoke non-application must be made through notification to the WTO Ministerial Conference before the Conference takes final action on the accession request.

Critically, an existing WTO Member cannot defer its decision about non-application regarding a newly acceding Member, and *vice versa*. This pre-requisite for non-application is eminently sensible. If deferral were permitted, then the multilateral effect of the *WTO Agreement* and its Annexes could be undermined at any time. The multilateral trading system would be akin to a sand castle awaiting the right tide to erode it from underneath and around its sides. The WTO might become something akin to the ICJ, which is enervated by countries opting in or opting out of compulsory jurisdiction based on national interest. Better, the logic is, to limit the period during which non-application is an option to the time before accession.

III. 2005 Case of Israel and Saudi Arabia, and 2007 Case of Vietnam and U.S.

To be sure, non-application is a potentially serious restraint on multilateralism, particularly if it occurs among large, commercially significant countries. A powerful domestic constituency in one country with its own political, social, or economic justification (*bona fide* or not), or a caustic, unilateralist leader in a country, might stir up trouble by deciding to pull out from GATT-WTO obligations with a target Member.

Happily, that did not happen between Israel and the Saudi Arabia. Israel publicly declared it would not invoke non-application in connection with the accession (which occurred on 11 December 2005) of KSA to the WTO (so long as the Kingdom withdrew from participation in the Arab Boycott of Israel.) Why cast an even longer, darker shadow over multilateralism by extending the time to invoke non-application indefinitely into the future?

Not all invocations of non-application are sinister, even as between former warring countries. In November 2006, just before the WTO General Council approved the terms of accession of Vietnam, the U.S. invoked it in respect of Vietnam, even though the two countries had signed a bilateral trade agreement, and the U.S. supported Vietnam's accession. (The accession occurred on 11 January 2007.) The U.S. did so because of an admixture of technical legal reasons and domestic politics. A Cold War Era trade statute, the *Jackson-Vanik Amendment* to the *Trade Act of 1974* required Presidential certification of human rights criteria (especially freedom of emigration for religious minorities) for the U.S. to grant NTR – *i.e.*, MFN treatment – to Communist countries.[982] (The certification was subject to Congressional over-ride.) If the U.S. treated Vietnam as a WTO Member, it would have to give Vietnam permanent, immediate, and unconditional MFN treatment – otherwise, Vietnam could sue the U.S. under the *DSU*. Yet, because of the *Jackson-Vanik Amendment*, the U.S. could not offer such treatment until Congress removed Vietnam from *Jackson-Vanik* reviews, and granted it permanent NTR (*i.e.*, PNTR) status.

Given the November 2006 election, seating of a new Congress, and change in control of political power of both the House and Senate, Congress did not get around to granting Vietnam PNTR status until 8 December 2006. Indeed, Congress refused to do so until the administration of President George W. Bush (1946-, President, 2001-2009) agreed to establish a program by which the DOC would monitor textile imports from Vietnam and self-initiate AD petitions if the DOC thought Vietnam dumped clothes into the U.S. (Vietnam, of course, complained the contingency was unfairly discriminatory.) The President signed the bill on 29 December, and the U.S. withdrew its non-application the day before Vietnam became a WTO Member.

IV. Modified Prerequisites

A key legal question, with important policy ramifications, is whether Article XIII of the *WTO Agreement* modifies the pre-requisites in Article XXXV of GATT for invoking non-application. A cursory comparison might indicate the *WTO Agreement* inherits the

982 *See* 19 U.S.C. 2431.

GATT requirements. But, that indication is wrong. Professor Wang's research points up this error.[983] He asks whether, as a matter of law, it is easier to achieve non-application under *WTO Agreement* Article XIII in comparison with GATT Article XXXV. He responds it is easier to achieve under Article XIII.

That is because GATT Article XXXV contains two pre-requisites before a contracting party can non-apply multilateral trade obligations to another contracting party. First, in Article XXXV:1(a), neither contracting party must have entered into tariff negotiations with the other. Once contracting parties enter into tariff negotiations, they cannot deny application of GATT obligations to each other. What does "enter into tariff negotiations" mean? Essentially, it means delegations from the contracting parties have held their first meeting, and exchanged lists of offers of tariff concessions.

Second, under Article XXXV:1(b), either contracting party must withhold consent to the application of GATT (or Article II thereof) at the time the applicant becomes a contracting party. Whereas the first pre-requisite is about talks, the second pre-requisite is about timing. The acceding party and the extant contracting parties lose recourse to the non-application clause upon accession. Therefore, non-application can occur only between contracting and acceding parties.

What does Article XIII of the *WTO Agreement* demand? Simply put, the first pre-requisite in GATT Article XXXV:1(a) no longer exists. The lack of tariff negotiations is not a condition for resorting to non-application. A WTO Member and an acceding party can engage in tariff concession negotiations without prejudice to the right of either the Member or party to invoke the non-application clause with respect to the other.

There are two points of continuity between the GATT and *WTO Agreement* on this subject. First, there never has been a need for a contracting party (Member) to state its purpose for non-application. The government invoking this option can be as secret or transparent as it wants about its motivations. Second, there never has been a requirement that a government invoking the option get approval from the CONTRACTING PARTIES (or WTO Members). The option always has been unilateral in every sense.

V. Policy Illogic?

What policy rationale justifies non-application, *i.e.*, why give the option to extant and newly acceding WTO Members? With non-application, two governments that have joined the same multilateral trade package are allowed not to enforce the rules in the package as between them. Put indelicately, why not say "grow up, act like adults, and treat everyone in the club, including each other, as an equal?"

The answer relates to the link between non-application under GATT Article XXXV and accession under Article XXXIII. In drafts of GATT discussed in the 1946 London and 1947 Geneva Preparatory Conferences, Article XXXIII implicitly required unanimous

983 *See* Lei Wang, *Non-Application Issues in the GATT and the WTO*, 28 JOURNAL OF WORLD TRADE 49 (1994).

consent of existing contracting parties to the accession of a new contracting party. The original text of the Article referred only to the accession of a new government on terms agreed to by that government and the CONTRACTING PARTIES – hence the implication of a unanimous consensus. But, certainly by the March 1948 Havana Conference, the drafters understood this implication might mean the barrier for some potential new contracting parties would be insurmountable. Thus, in that Conference, to encourage broad participation, the CONTRACTING PARTIES agreed to change the implicit unanimity rule for accession to an explicit rule of consent by a two-thirds majority.

Smart as this change was, it created a political problem. One or more existing contracting parties might find themselves bound by trade obligations to which they had not consented, because they were in the one-third minority opposing accession of the new government. The problem was not merely theoretical. India and Pakistan, both original contracting parties and signers of the *Protocol of Provisional Application* in June 1948, agreed on one point: neither wanted trade relations with South Africa (also an original contracting party). The reason, essentially, was the deplorable policy of apartheid in that country. Non-application under Article XXXV was the device to satisfy the Indian and Pakistani concerns, and each government invoked it against South Africa. Interestingly, the scope of India's invocation extended to all GATT obligations, whereas Pakistan declared it would deny only MFN obligations to South Africa.

The June 1948 use by India and Pakistan of Article XXXV against South Africa bespeaks the intentionally political nature of non-application. The opt-out option, as originally conceived, is for dissenters from a two-thirds vote for accession. The entry can occur, hence the two-thirds of governments seeking to engage constructively the new government can do so, and possibly thereby alter offensive conditions. The other countries can elect not to soil their hands or consciences by eschewing trade relations entirely or in part. Simply put, Article XXXV is intended for governments politically opposed to a new contracting party, not for advancing commercial aims. To be sure, that opposition may mollify domestic political constituencies, echoing their voice.

Of course, the logic of non-application – a political exception for dissenters from a particular accession – is weaker after the Uruguay Round. Professor Wang's point is the number of pre-requisites for invoking non-application has shrunk from two under Article XXXV of GATT to one under Article XIII of the *WTO Agreement*. Critically, the pre-requisite dropped by Uruguay Round negotiators was, pursuant to Article XXXV:1(b), that an extant contracting party (Member) must not have entered into trade negotiations with the applicant government. Under Article XIII, all that is required is a declaration before accession occurs. Consequently, an extant Member can enter into full-blown negotiations with the applicant and hold out the possibility of denying one or more GATT-WTO obligations if the applicant does not provide acceptable concessions.

This possibility may create considerable pressure on an applicant, depending on the political and economic context in which the negotiations take place. That is, the pressure makes a negotiation table that already is un-level in many accession negotiations even more tilted against the applicant. Most importantly, the failure to carry Article XXXV:1(b) of

GATT into Article XIII of the *WTO Agreement* means the justification for non-application may not always be political, much less noble, as when India and Pakistan took the option against South Africa in June 1948. Rather, non-application may be an economic tool – in contravention of the original intent of the GATT drafters.

Alternatively, might it be said non-application never was about "just" politics? Consider Japan, when it acceded to GATT in 1955, and faced non-application by 15 contracting parties, including Australia, France, and the U.K. (Years later, after hard bargaining on market access, they withdrew this status.) Were the reasons hard feelings from the Second World War, fear of Japan's rising economic might, or both?

VI. Waivers and their Contexts

Requests for waivers may arise in not only *post hoc, i.e.*, after an adverse adjudication, but also *a priori, i.e.*, before a case has been litigated. Indeed, typically, that is the more common context.

For instance, a WTO Member facing a BOP crisis may believe temporary relief from a GATT-WTO duty would help address that crisis. Perhaps a tax on imports from certain countries would work, though absent a waiver it would violate a tariff binding, or other pillar obligations. Perhaps an across-the-board tariff surcharge is needed, yet without a waiver the action would violate Article II. Sometimes, a Member may want the ability to manage agricultural imports, at least to ensure these imports do not undermine domestic price support schemes. (The waiver obtained by the U.S. to impose restrictions on agricultural imports if need be is an example, and one that has had a major impact on world trade.[984] Still other contexts in which waivers have been provided are for fiscal reform, introduction of new tariff nomenclature, and continuation of preferential treatment for a newly independent territory that had been provided before independence.

Surely in the long run, the multilateral trading system has an interest in providing episodic relief by means of waiver. Absent a mechanism for obtaining a waiver, the alternative may be the complete withdrawal of the Member from the WTO system, or the brazen, unilateral declaration of non-compliance by the Member. But, should waivers become too easy to obtain, then obligations may be observed more in the breech. Put differently, if multilateral trade obligations are solemn ones – if the pillars are not to develop cracks that will cause them to topple – then obligations must not be easily waived. In sum, small cracks can afford flexibility, but big ones can cause collapse.

VII. Waiver Criteria

It is, indeed, possible to obtain a waiver from multilateral trade obligations. "Possible" does not mean "easy." Rules on waivers of obligations are set forth in GATT Article XXV:5 and Article IX:3 of the *WTO Agreement*. While Article IX:3 contains more detail than Article XXV:5, the two rules contain the same key criteria, namely, that a waiver

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984 *See Waiver to the United States Regarding the Restrictions under the Agricultural Adjustment Act*, B.I.S.D. (3rd Supp.) 32 (1955).

(1) can be granted only in "exceptional circumstances," and (2) only upon the approval by a super-majority of the WTO Members.

What circumstances might be "exceptional"? No broad definition is provided, nor is an illustrative list. GATT Article XXV:5 speaks of exceptional circumstances "not elsewhere provided for in this agreement," so presumably a context contemplated by another GATT Article would not be "exceptional." It would seem, therefore, that a waiver concerning a proposed RTA would be inappropriate, unless the proposal is for an entity short of a full-fledged FTA or CU. After all, an exception for RTAs is set forth in GATT Article XXIV:5-10. In fact, the waiver power has been used for proposed RTAs that do not rise to the level of an Article XXIV:10 FTA or customs union. (A good example is the 1965 waiver granted to the U.S. and Canada for their agreement on automotive products.[985]

In addition, Article IX:4 of the *WTO Agreement* requires any favorable waiver decision to state the "exceptional circumstances" that justify the waiver, as well as any terms and conditions attached to the waiver. But, surely there ought to be more to the concept of "exceptional circumstances" than obtaining the necessary votes at the WTO based on a set of justifications that the club finds politically acceptable? Surely there ought to be some judgment that granting a waiver to one Member now will somehow advance the long-term interests of the Membership, of the GATT-WTO regime, or (at least) is not incongruous with those interests?

Perhaps a clue as to the meaning of "exceptional circumstances" is the preference in Article IX:4 for waivers of less than one year. Any waiver granted for longer than one year must be reviewed annually to ensure that the exceptional circumstances justifying it still exist, and to verify that any terms and conditions attached to the waiver have been met. Based on that annual review, the waiver may be extended, modified, or terminated. Thus, it might be inferred "exceptional circumstances" are short-term ones.

As for the voting threshold, GATT Article XXV:5 contains a two-pronged test. First, of the contracting parties voting on the question of whether to grant the applicant contracting party a waiver, at least two-thirds must vote in favor of the waiver. Second, this super-majority of contracting parties agreeing to the waiver must constitute more than half of all contracting parties. Interestingly, clause (i) of Article XXV:5 permits Members, using these same voting tests, to define certain categories of "exceptional circumstances" for which different voting requirements would apply. Conceivably, the Members could change the voting requirements for a specific type of "exceptional circumstance," but they could do so only by meeting the base-line "two-thirds" and "50% plus" tests.

Significantly, the two-pronged test in GATT Article XXV:5 was changed by the *WTO Agreement*. Article IX:3 mandates a simple "three-fourths" rule. Any waiver to an obligation created under an MTA, which of course includes the GATT itself, must be approved by a decision of three-quarters of the entire WTO Membership. In addition, Article IX:3(a) specifies that the decision is to be made at a Ministerial Conference, and that the normal practice of decision-making by consensus is to be used. If a consensus

985 *See* B.I.S.D. (14th Supp.) 37 (1966).

cannot be reached, then a vote is taken, and the three-fourths rule is used. Also, Article IX:3(b) contemplates a role in considering waiver requests for the Councils for Trade in Goods, Trade in Services, and TRIPs – *i.e.*, the Councils overseeing Annexes 1A, 1B, and 1C to the *WTO Agreement*, respectively.

Initially, an applicant Member submits its waiver request to the relevant Council, which must submit a report to the Ministerial Conference on the request within 90 days. Then, the Conference takes over the matter. Likewise, the Conference is responsible for stating the "exceptional circumstances" that justify a waiver, setting out any terms and conditions attached to a waiver, reviewing waivers exceeding one year in duration, and deciding whether to extend, modify, or terminate long-term waivers. In all these respects, the Conference plays the role the GATT Council played in the pre-Uruguay Round era.

Plainly, the straightforward "three-fourths" voting threshold in Article IX:3 is considerably stricter than the old GATT Article XXV:5 rule, *i.e.*, than the "two-thirds" and "50% plus" voting tests. Assume 160 contracting parties (WTO Members), and suppose 100 of them cast a vote on the waiver. Of the 100 voting, assume 80 contracting parties vote in favor of granting the applicant a waiver. Of the votes cast (100), clearly the applicant has satisfied the super-majority rule of two-thirds: it needed 66. However, the applicant failed to clear the 50% plus hurdle. By assumption, there are 160 contracting parties, so the applicant needed 81 contracting parties to vote in favor of the waiver. Yet, 81 is considerably fewer than the 120 required under the rule in Article IX:3 of the *WTO Agreement*. In brief, a waiver applicant must persuade many Members of the appropriateness of the deviation from an obligation.

In one other respect, the *WTO Agreement* raises the bar to obtain a waiver. Suppose the subject of a waiver concerns a transition period, or a period for a staged implementation of obligations. Several Uruguay Round agreements (*e.g.*, the *Agriculture*, *SCM*, and *TRIPs Agreements*) contain S&D treatment for developing and least developed countries in the form of transition or phase-in periods. Any waiver of an obligation subject to a transition or phase-in period must be approved by a consensus of the Ministerial Conference. A three-quarters majority will not do. Thus, in practice, that means there must be no objection, which in turn means it is nearly impossible to obtain the waiver. Third World countries may be particularly "hard hit" by this demanding rule, and be forced either to implement politically and economically difficult obligations, or to avoid performance of the obligation and suffer the likelihood of a WTO suit.

VIII. 2005-2017 Philippine Rice Waiver

The Philippines provides an example of successful invocation of Article XXV:5 of GATT and Article XI:3 of the *WTO Agreement*.[986] In June 2014, WTO Members approved its request for a waiver from its obligation under Article 4:2 of the WTO *Agreement on*

[986] *See* World Trade Organization, *Goods Council Approves Philippine Waiver Request for Rice*, 19 June 2014, www.wto.org/english/news_e/news14_e/good_24jun14_e.htm; World Trade Organization, *Request for Waiver Relating to Special Treatment for Rice for the Philippines*, G/C/W/665/Rev.4, 27 March 2014, www.wto.org.

Agriculture. That obligation is to "tariffy" – convert a non-tariff barrier to a tariff – protections on agricultural products. The Philippines obtained a waiver for rice that permitted it to maintain minimum market access country-specific quotas on rice imports through 30 June 2017, at which point (barring another extension), it would impose only OCDs. Under the waiver, the Philippines increased modestly its minimum access quota volume, cut the tariff on rice from *ASEAN* countries to 35%, and kept the tariff on non-*ASEAN* rice at 40%.

The "exceptional circumstances" were its dependence on rice imports: they were the critical source of food security for the Philippine population. The Philippines argued:

> 1.2 The Philippines has been in the forefront of trade reforms in the WTO to support economic development. Its WTO simple average bound tariff is 35% in agriculture, which is just over half of the average bound tariff for all WTO developing Members of 60%. The Philippines has virtually no trade-distorting domestic support or export subsidies. The Philippine's agriculture sector therefore can be considered as one of the most open agricultural trading regimes in the WTO.
>
> 1.3 Rice is a predominant staple in the Philippines, which has about 2.4 million rice farmers. These farmers account for 34% of the Philippines' labor force; however, agriculture contributed less than 15% of the GDP in 2008. "Palay" (rice in the husk) contributed about 19% of gross value added in agriculture, hunting, forestry and fishing in 2011.
>
> 1.4 The Philippines has encouraged greater participation by the private sector in the importation of rice to complement the role of the National Food Authority (the government agency with the sole authority to import rice) in ensuring food security, and also to stimulate gradual and healthy competition in the domestic rice production as it becomes more market-oriented. However, the steps toward tariffication are not yet complete.

Notably, the Philippines first obtained a waiver from 1 July 2005 through 30 June 2012. It requested a waiver extension in 2011, and then negotiated bilateral rice import agreements with key exporters, such as Thailand. The fact the extension ran through 30 June 2017 adduces that waivers can last a long time – in the Philippine rice case, 12 years.

IX. Preferences and 1979 Tokyo Round *Enabling Clause*

S&D treatment for poor countries is an obvious violation of the MFN obligation. However, an immunity for preferential trade programs (or, at least some of them) for poor

countries from GATT Article I:1 exists. A waiver granted from Article I obligations was made permanent in the Tokyo Round *Decision on Differential and More Favorable Treatment, Reciprocity and Fuller Participation of Developing Countries* – widely referred to as the *Enabling Clause* – of 28 November 1979.[987] Until that point, the waiver had been granted episodically by joint action of the GATT CONTRACTING PARTIES. Paragraph 1 of this *Clause* contains the operative MFN waiver: "Notwithstanding the provisions of Article I of the General Agreement, contracting parties may accord differential and more favorable treatment to developing countries [including, via footnote 1 to the *Clause*, developing territories], without according such treatment to other contracting parties."

Paragraph 2 of the *Enabling Clause* lists four programs that qualify for the waiver. The first three programs are designed to stimulate "North-South" trade (especially from the South to the North). Developed WTO Members can offer to less developed Members: preferential tariff treatment under the *GSP* (item a); differential and more favorable treatment concerning non-tariff measures (item b); and special treatment to least developed countries within the context of measures to help less developed countries (item d). The fourth scheme (item c) is designed to boost "South–South" trade. Less developed Members can form regional or global arrangements that cut or eliminate tariffs, and (in accord with conditions the WTO Members may prescribe) non-tariff measures, on products imported from one another.

Thus, to take a hypothetical example, assume the U.S. grants duty-free treatment to construction material exports from Eritrea, which is not yet a WTO Member. The U.S. does so because Eritrea is an LDC in need of help. The U.S. makes the same decision, for the same reason, for construction material exports from Egypt, which is a Member. The normal MFN rate of 15% continues to apply to those materials imported by the U.S. from Italy, which also is a Member. Would Italy have an Article I:1 grievance against the American decision? The answer is "no." The U.S. can grant duty-free treatment to developing countries under its *GSP* program, whether they are WTO Members or not. Paragraph 1 of the *Enabling Clause* provides the general MFN waiver, and Paragraph 2(a) specifically lists *GSP* programs as qualifying for the waiver.

That answer is reinforced by the 2004 Appellate Body decision in the *EC GSP* case (discussed in a separate Chapter). Suppose, however, the U.S. makes further distinctions among poor countries exporting the same construction materials, giving some – but not all – preferences, based on whether they support American foreign policy or national security goals. The *EC GSP* case addresses what might be called "extra-special special and differential treatment."

X. Trade Remedies

A number of exceptions to the MFN obligation, and indeed other GATT pillars, arise from trade remedies. When a country imposes an AD duty, a CVD, or safeguard measure, or takes action in response to a BOP crisis, it almost always is trespassing against

987 *See* B.I.S.D. (26th Supp.) 203-205 (1980).

the MFN rule – and other GATT-WTO commitments, too. However, there are built-in exceptions for trade remedies, namely:

(1) GATT Article VI and WTO *Antidumping Agreement*, for AD duties.
(2) GATT Articles VI and XVI, and WTO *SCM Agreement* for CVDs.
(3) GATT Article XIX and WTO *Agreement on Safeguards*, for general safeguards.
(4) GATT Articles XII and XVIII, and Uruguay Round *Understanding on the Balance of Payments Provisions of the General Agreement on Tariffs and Trade 1994*, for BOP safeguards.
(5) Article 5 of WTO *Agreement on Agriculture*, for special safeguards on farm products.

Accordingly, and briefly put, neither AD duties nor CVDs need be imposed on an MFN basis. After all, these remedies are targeted against merchandise subject to investigation (*i.e.*, "subject merchandise"), and that merchandise comes from one or a few countries alleged to be the source of dumping or illegal subsidization. However, in contrast, a safeguard remedy must be imposed on an MFN basis, though this requirement stems not from Article XIX. Rather, Article 2:2 of the WTO *Agreement on Safeguards* states "[s]afeguard measures shall be applied to a product being imported irrespective of its source." Must BOP safeguards be applied in an MFN manner?

Chapter 24

GATT ARTICLES XII AND XVIII AND BOP CRISES[988]

I. BOP Accounting

The Balance of Payments is a summary statement of a country's economic transactions with the rest of the world during a certain period, such as a quarter or a year. As such, it is an account of the amount of money residents of a country have spent abroad, and the amount of money foreigners have spent in the country. Thus, in the most general sense, the BOP provides a picture of the flows of payments coming into, and going out from, a country.

The BOP is presented as a table that depicts the total amounts the country received from the rest of the world, and the total amounts the country spent overseas. There are three basic parts to this table: the (1) Current Account, (2) Capital Account, and (3) FX reserves. Thus, in simple terms,

BOP	=	Current Account	+
		Capital Account	+
		FX Reserves	

In International Trade Law, the Current Account receives the bulk of attention. Often when a speaker refers to the "BOP," the reference is imprecise – the speaker means the Current Account. Or, to be even more precise, the speaker means the Balance of Trade.

● Current Account and Trade in Goods

The Current Account consists of transactions in which the payment is income to the recipient, or put conversely, an expenditure by the payor. This Account captures the money value of "visible" trade, *i.e.*, trade in goods. This portion of the Current Account is known as the "Balance of Trade" – the simple tally of exports and imports of goods alone. In an export transaction, the exporter receives income in the amount of the price of the exported good. The import transaction leads to a payment of income from the importer in the amount of the price of the imported good. The Trade Balance also is sometimes called the "Merchandise Trade Balance," or just "Merchandise Balance," reflecting the fact it covers trade in physical merchandise.

A balance of trade "surplus" results from an excess of visible exports over visible

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988 Documents References:
(1) *Havana (ITO) Charter* Articles 4, 6, 13, 20-21, 38-39
(2) GATT Articles XII, XVIII
(3) *NAFTA* 1.0 Chapters 9, 18
(4) Relevant provisions in other FTAs

imports. A "deficit" is the reverse. Often, politicians and commentators call a balance of trade surplus "favorable" and a deficit "unfavorable." These normative labels can be unfortunate, and sometimes bespeak a mercantilist attitude. The fact is exports are the price residents of a country must pay to buy imports, which they desire to consume. Thus, a deficit suggests the residents obtain all the imports they want, and more, and possibly finance the deficit through sales of overseas assets or loans from foreign lenders.

- **Current Account and Trade in Services**

The balance of trade is most certainly the most politically significant component of the Current Account, indeed, of the entire BOP. However, it is hardly the only portion of this account. This Account also captures trade in "invisibles," that is, in services. For example, foreigners spend money in a country on tourism, providing income to the tourist service providers. Conversely, the country's residents spend money overseas on tourism, providing income to foreign tourist service providers. Other examples of services traded embraced in the Current Account are banking, insurance, and shipping. The Current Account does not include official transfers in military goods or services.

In addition, the Current Account includes two other important items: factor incomes and gifts. Residents of a country typically hold assets overseas, such as financial instruments (stocks and bonds), real estate, and intellectual property rights. They also may have family or friends who hold jobs overseas, *i.e.*, who are migrant workers. And, they may receive pensions based on jobs they once held overseas. The residents receive income in the form of dividends and interest, remittances from migrant workers, and pensions. The dividends, interest, remittances, and pensions received from abroad are counted as inflows in the Current Account. Conversely, foreigners hold financial instruments, IPRs, and jobs in the country, and thus earn dividends, interest, royalties, wages, and pensions. These income payments flowing out of the country also are included in the country's Current Account. Thus, the Current Account includes incomes of various types paid to and from residents in the country. As for gifts, residents of a country receive gifts from overseas, and send gifts overseas. The Current Account includes these cross-border payments.

In sum, the Current Account can be represented formulaically as:

Current Account	=	Balance of Trade (trade in "visibles")	+
		Trade in Services (trade in "invisibles")	+
		Factor Income Received and Remitted	+
		Gifts Received and Remitted	

A Current Account "surplus" means that residents of the country have received more than they have spent, *i.e.*, they have exported more goods and services, and received more property income and gifts, than they have spent on imports of goods and services, property, and gifts. So, there is a net inflow of money. If they have spent more than they have received, then there is a Current Account "deficit." However, one must be cautious in drawing too strong an inference from an overall Current Account surplus or deficit.

A surplus position may result from a surplus in services trade that dwarfs a deficit in the merchandise trade balance. A deficit position may arise for converse reasons. Or, a deficit may occur in spite of a strong surplus in services trade and in most categories of merchandise trade. Its sources might be narrow, for example, from the American perspective, trade with one or two large partners like Japan and China, or a spike in prices in a key sector, like oil. Thus, in dealing with the Current Account, just as in dealing with the BOP in general, it is critical to disaggregate data and eschew quick, politically-motivated, consequentialist conclusions.

- **Capital Account**

The second major category within the BOP is the Capital Account. Transactions in the Capital Account do not generate income to the recipient of a payment, *i.e.*, they do not entail an expenditure of the payor. Rather, the transactions represent a change in the form in which an asset is held. An extension of credit is an example. A loan is neither income nor expenditure, but a receipt of funds coupled with a promise to repay the principal balance, plus interest, in the future. The Capital Account, therefore, covers all changes in a country's official and private assets and liabilities with the rest of the world.

There are two basic parts to the Capital Account. First, it encompasses inward and outward FDI. Second, it includes sales and purchases of foreign securities by residents of a country, and sales and purchases of securities in that country by non-residents. When the residents sell financial instruments like stocks and bonds to non-residents, or receive loans from abroad, they obtain funds. When the residents buy securities from non-residents, or loan money to non-residents, they expend funds. The Capital Account balance is, therefore, the difference between receipts from, and expenditures on, capital transactions with the rest of the world.

A Capital Account surplus could arise because a country's residents sell securities to foreigners, and (in exchange) receive loans from them. The result is an inflow of funds (in return for an outflow, or "export," of those securities). A Capital Account deficit could arise because the residents buy securities from foreigners, and (in exchange) make loans to them. The result is an outflow of funds (in return for an inflow, or "import" of those securities). The patterns on FDI are conceptually the same: direct investment overseas by a country's resident is an export of FDI in exchange for an import of returns from that investment, and vice versa.

Thus, the terms "surplus" and "deficit" should not be thought of automatically in normative terms. The nature and causes for surpluses and deficits need to be studies. And, there advantages and disadvantages of both surpluses and deficits need to be appreciated.

By definition, the overall BOP must have a zero balance. Thus, in a formulaic sense:

BOP	=	(Exports)	-
		(Imports)	-
		(Net Services Flows)	-
		(Income Transfers, Remittances, and Gifts)	-
		(Net Investment Flows)	-
		(Net Official Foreign Currency Reserve flows)	
	=	0	

Intuitively, the zero balance makes sense: total money inflows should be offset by total money outflows. (The operative word is "total.") Mechanically, the zero balance should result because the BOP table is constructed on the principle of double-entry book-keeping. Every transaction is recorded in two accounts, as a debit (*i.e.*, a decrease in one account) and as a credit (*i.e.*, an increase in another account).

For example, suppose Boeing sells 10 model 777 civilian aircraft to El Al Airlines on credit. The first BOP entry is a credit to the Current Account, specifically, to exports of physical goods. The offsetting entry is a debit entry in the Capital Account. The debit is a note payable (that is, an IOU) issued by El Al and held by Boeing, reflecting the loan Boeing has made to its customer. When El Al ultimately pays off the note, the debit entry will be reversed, meaning El Al has extinguished the note payable. There will be a corresponding entry to the Capital Account to show the inflow of funds from El Al. (Any interest income would be shown in the Current Account, which, of course, shows income, not mere asset and liability dispositions.)

But, it is not necessarily the case (indeed, not usually the case) that the Current and Capital Accounts balance individually. A Current Account surplus/deficit could be offset by a Capital Account deficit/surplus. Suppose both the Current and Capital Accounts are in surplus or deficit. Then, FX reserves, the third major component of the BOP, provides the necessary balancing mechanism. Official FX reserves constitute the amount of foreign currencies held by the central bank (or treasury) of the country. Changes in these reserves equal the sum of the Current and Capital Account balances.

In practice, even changes in FX reserves do not always result in a perfect balance in the BOP. Typically, discrepancies arise from two sources: unrecorded transactions (*i.e.*, "leakages" that make BOP accounting less than "total"), and lags between the time the movement of goods is recorded, and the time actual payment for goods is made.

Consequently, an errors and omissions entry near the bottom of the BOP table is used to ensure a balance. In some years, and for some countries, this entry, sometimes called the "statistical discrepancy," can be stunningly large.

To comprehend a BOP table requires an understanding of the sign convention used. In the Current Account, a plus (+) sign means an outflow of goods and services, and a minus (-) sign means an inflow of goods and services. Thus, a plus sign corresponds to a Current Account surplus, and a minus sign means a deficit.

The sign convention in the Capital Account is not quite as intuitive as in the Current Account. In the Capital Account, a minus sign connotes an increase in a country's assets, or a decrease in its liabilities. If the country is acquiring assets, then the residents of that country must be paying funds for the assets to foreigners, hence there is an outflow of funds – which justifies the minus sign. In effect, the country exported capital (money) to import assets (*e.g.*, securities or direct investments). If the country is decreasing its liabilities (*e.g.*, paying off loans), then the residents must be doing so by paying funds to foreigners, and the same logic applies. Conversely, a plus sign in the Capital Account signifies a decrease in the country's holdings of assets (because the residents are selling assets, and thus receiving an inflow of funds from the foreigners to whom they sell the assets), or an increase in its liabilities (because the residents are receiving funds from foreigners).

Thus, a negative Capital Account balance means a deficit. That deficit signifies the country's accumulation of asset holdings and discharge of liabilities generated a net export of funds from the country to the rest of the world. That happens when the residents of the country buy (import) more securities and/or obtain more direct investments from overseas than the securities they sell (export) and/or investments they make overseas. A positive Capital Account balance means a surplus. That surplus means the country received a net inflow of funds from selling assets and acquiring liabilities. That happens when the residents of the country sell (export) more securities and/or engage in more direct investment than they buy (import) and/or make overseas. Succinctly put, it is the flow of funds (*i.e.*, capital, money) generated by underlying securities or FDI transactions that distinguishes surplus versus deficit positions in the Capital Account.

The sign convention for FX reserves is the same as that for the Capital Account. A minus sign means an accumulation (in effect, imports) of official foreign currency reserves, which are paid for by a net outflow (exports) of the country's currency. A plus sign means a net inflow of funds generated by the sale of reserves. Again, caution is required before drawing any inferences. A plus sign in this account is not necessarily praiseworthy. It may result from the central bank selling its holdings of foreign currencies in exchange for the local currency in order to prop up the latter. If this FX intervention is ineffectual – as such interventions often are – the country will have lost precious currency reserves, and the plus sign in the foreign currency account is hardly a blessing.

There is a common theme to the sign convention in the current, capital, and FX reserve accounts. A plus sign signifies a net inflow of funds denominated in the country's currency. A negative sign means a net outflow of those funds. The difference among the

accounts is what gives rise to the flows: income-generating transactions (the Current Account); changes in asset and liability positions (the Capital Account); or changes in official holdings of foreign currencies (the FX reserve account).

II. Defining "BOP Crisis"

A BOP "crisis" is an immediate BOP "problem." The label "crisis" connotes that hard currency FX reserves held in the central bank of a country are eroding, or that they are being maintained by borrowing from foreign lenders. The situation is not sustainable in the medium or long term. Foreign lenders eventually will become worried about the credit and sovereign risk they are undertaking, and either charge extraordinarily high interest rates, or simply decline to lend new funds. A BOP "crisis" differs from a BOP "problem" in terms of time. A crisis calls for an immediate response, because the erosion in FX reserves is not sustainable even in the short run, and the exhaustion of borrowing capacity is fast approaching.

As a general rule, a country ought to maintain three months' worth of imports in its FX reserves. The logic behind the rule is that if export revenues, property income, gifts, sales of securities, and loans were cut off, so that the country had no source of foreign currency, it could pay for essential imports for three months. Presumably, this time would suffice for it to sort out its difficulties.

To resolve a BOP crisis, a country can pursue either or both of two basic strategies: improve the Current Account, or improve the Capital Account. (Either or both strategies may be undertaken in connection with a financial assistance package arranged by the IMF. Such packages usually contain a number of politically difficult and controversial conditions.) The country can improve its Current Account by boosting exports, thus earning precious new FX reserves. By devaluing its currency, or encouraging a depreciation of the currency, the country will make its exports more attractive to foreign buyers (subject, of course, to the J-curve effect). It also can enter into a recession in domestic activity, for example, by raising interest rates. The recession will force a decline in imports, and again improve the Current Account. Of course, raising interest rates tends to make a country's currency more attractive to foreign investors (because they get a higher rate of return on interest-earning assets in the country, and thus demand more of the country's currency to buy these assets).

A Capital Account strategy entails attempts to prevent capital flight, and attract capital into the country. An increase in interest rates can assist toward these ends. Note that some FTAs restrict the ability of Parties in the FTA to impose capital controls, and the U.S. in its FTA negotiating posture looks askance at such controls. Why?

III. Navigating GATT Article XII

Article XI:1 of GATT purports to promote free trade by taking a hard line against quantitative restrictions on imports. Certain FTAs take the same hard line. For example, *NAFTA* Article 309:1 incorporates Article XI:1 by reference. However, the proscriptive

rule is subject to several exceptions in Article XI:2, as well as in FTAs. One of the most important and widely used exceptions to the rule against QRs concerns a disequilibrium in a country's BOP. GATT Article XII applies to a WTO Member that must safeguard its external financial position and BOP. This Article, and its analog for poor countries, Article XVIII, are the longest and most complicated among the 38 Articles of GATT.[989]

- **BOP Crises and FX Controls**

The scenario contemplated is not always one in which a WTO Member invokes GATT Article XII immediately. Indeed, typically the imposition of FX controls is the first response. The scenario is simple to explain, but frequently nightmarishly complex to resolve. A Member has a serious Current Account deficit and is depleting its hard currency reserves to pay for imports. A "hard" currency is one that is freely convertible and widely accepted as a means of payment. U.S. dollars, British pound sterling, EU *euro*, Japanese *yen*. Conversely, a "soft" currency is one that is not easily convertible, and not widely accepted as a means of payment. Indonesian *rupiah*, Pakistani *rupees*, Turkish *lira*, and UAE *dirham* are examples. Exporters from a WTO Member with a soft currency prefer payment in a hard currency. They need hard currency to pay for raw materials and other imported inputs into their production processes. Moreover, if domestic inflation is unacceptably high, then the value of their soft currency is eroded.

In this scenario, a Member may administer FX controls to preserve precious hard currency reserves. One such control involves the central bank of the Member. Exporters are required to deposit a portion of their hard currency earnings with the central bank. The export earnings are withdrawn by the exporter only in local currency at an official exchange rate. Invariably, that rate is better for the central bank than the "black market" rate, which is closer to the true market equilibrium value.

For example, suppose an exporter earns $ 1 million and the black market rate is 10 units of the local, soft currency per $1. The exporter is entitled to 10 million units of the local currency. The official rate, however, is set at 7.5 units per $1, so the central bank gives the exporter just 7.5 million units of the local currency (*i.e.*, $1 million multiplied by 7.5 instead of 10). Small wonder why some exporters in this situation try to evade the currency controls by "under invoicing." Behaving illegally and unethically, the exporter presents a false invoice to its central bank, customs, and tax authorities, which understates the true amount of earnings – say, $600,000, not $1 million, in the hypothetical. The exporter arranges with the importer of its goods to receive the rest of the payment from the importer – $400,000 – in hard currency in an offshore account hidden from the authorities.

In any event, export earnings, which are hard currency reserves held in accounts at the central bank, are used by importers to pay for imports. Typically, a Member determines what may be imported, preferring essential raw materials, intermediate goods, and finished products over expenditures of precious reserves on luxury goods. (Of course, a corrupt regime will ensure the "right" senior officials get their luxury items.) The Member requires

989 Technically, there are 39 Articles, if Article XXVIII *bis* is counted as a distinct provision.

importers to convert at an official exchange rate the local soft currency into the hard currency they need to make payment for permissible imports.

- **Invoking GATT Article XII**

What if a WTO Member has a BOP deficit so serious that FX controls prove insufficient to preserve reserves? Evasion of the controls, along with capital flight, may be rampant. The importers' demand for hard currency may far exceed hard currency export revenues, and the Member cannot obtain even essential items. Recall the "rule of thumb" that a country ought to have hard currency reserves equivalent in value to at least three months' worth of imports. That way, if export revenues were completely shut off, the country could pay for what it needed for 12 weeks, and during that time re-arrange its finances and seek assistance from other countries and from multilateral and regional lending facilities. What if a Member's reserves are dangerously close to the three-month minimum, as occurred in Pakistan in 1999, when after trading nuclear tests with India the level was at two weeks' worth of imports? (Similarly, amidst a nightmarish political and security situation, Pakistan's FX reserves equalled 2.1 months' worth of imports in December 2022 and 1.7 months' worth of imports in January 2023.[990])

Under GATT Article XII, a Member may elect to enact quantitative barriers to imports that would otherwise run afoul of Article XI:1. For example, importers in the contracting party may be required to obtain a license from the government in order to import goods. In addition, import quotas may be placed on certain products. Imports of certain products, such as toys for the rich, may be banned completely. The restrictions may be drafted in terms of the quantity or value of imports.

There are six parameters within which a quantitative barrier scheme must operate.

(1) Under Article XII:2, quantitative barriers must "not exceed those necessary" to stem an "imminent" FX reserves crisis or to achieve a "reasonable" rate of increase in reserves.

(2) Under Article XIII:1, the barriers must be applied to all countries in a non-discriminatory fashion, *i.e.*, in an MFN manner. No one Member's exports can be singled out for restrictive treatment. (Article XII:4(c)-(d) makes clear the disciplines of Article XIII apply to BOP restrictions taken under Article XII:1.)

(3) Under Article XIII:2, the distribution of trade in a product subject to import restrictions must approximate the distribution that would occur without the restriction. In effect, there must be no distortion of the pattern of trade.

990 *See* CEIC, Pakistan Foreign Exchange Reserves: Months of Imports (1996-2023), www.ceicdata.com/en/indicator/pakistan/foreign-exchange-reserves-months-of-import.

(4) Article XIII:3 requires transparency in the establishment and administration of import licensing and quota programs. The restrictions must be published and information must be made available to interested parties.

(5) Article XIII:4 requires the Member to consult with other WTO Members, upon request, about adjusting the import restrictions.

(6) Under Article XII:5, "persistent and widespread" use of import restrictions that indicates a "general disequilibrium which is restricting international trade" will trigger discussions among WTO Members with a view to removing the underlying causes of the disequilibrium.

(The infamous and now classic case on GATT Article XIII is the 1997 *Bananas* dispute, discussed in a separate Chapter.)

Notably, the parameters in GATT Article XIII that constrain Article XII BOP restrictions are themselves subject to an important exception in Article XIV. A Member may deviate from Article XIII in respect of a "small" part of its trade "where the benefits to the contracting party ... substantially outweigh any injury which may result to the trade of other contracting parties." What, then, is the "bottom line" on deviating from Article XI:1 under the authority of BOP restrictions Article XII:1 condones?

The obligations of a Member adopting QRs may be summarized as follows:

(1) Restrictions shall be progressively relaxed as conditions permit;
(2) Measures should avoid uneconomic employment of productive resources;
(3) As far as possible, measures should be adopted that expand rather than contract international trade;
(4) [Measures should] [a]void unnecessary damage to commercial or economic interests of any other contracting parties;
(5) [Measures should] [a]llow minimum commercial quantities of each description of goods so as to avoid impairing regular channels of trade;
(6) [Measures should] [a]llow imports of commercial samples;
(7) [Measures should] [a]void restrictions that prevent compliance with "patent, trademark, copyright, or similar procedures;"
(8) But imports of certain products deemed more essential may be preferred over other imports.[991]

(GATT Article XI disciplines on QRs are discussed in separate Chapters.)

IV. Developing Countries and GATT XVIII:B

[991] JOHN H. JACKSON, WORLD TRADE AND THE LAW OF GATT 685 (1969).

A special exception to GATT Article XI:1 is provided for developing countries in GATT Article XVIII:B. In brief, GATT Article XVIII:B establishes a BOP exception to the rule against QRs for less developed countries (LDCs). As Article XVIII:4(a) makes clear, the exception applies specifically to WTO Members with an "economy ... [that] can only support low standards of living and is in the early stages of development." The BOP exceptions in GATT Articles XII and XVIII are not mutually exclusive, and some distinctions exist between these Articles.

For example, Article XVIII does not speak of an "imminent" reserves crisis and, therefore, seems to contemplate that a LDC may face a chronic problem and need to implement QRs for long periods. Moreover, Article XVIII:9 indicates that QRs may be used "to ensure a level of reserves adequate for the implementation of its [*i.e.*, the LDC's] program of economic development…." Thus, evaluating an LDC's right to invoke Article XVIII:B requires an examination of its development plans. Finally, a Member imposing a quantitative restriction for BOP reasons under Article XII must enter into annual consultations with the rest of the Membership. If the basis for the restriction is Article XVIII:B, then such consultations must be biennial. Significantly, pursuant to Article XIV, an Article XVIII BOP exception may be applied in a discriminatory fashion.

What is the difference among Sections A, B, and C of Article XVIII? The answer pertains to the measures these Sections authorize notwithstanding the violations the measures entail under one or more GATT Articles. Section A authorizes derogations from tariff commitments, while Section C covers subsidies.

V. 1999 *India Quantitative Restrictions* Case

● India's Consultations with GATT-WTO BOP Committee

Like many developing countries during their history, India maintained QRs on imports based on a BOP justification. India's restrictions, however, were extensive, affecting 2,714 tariff lines at the 8-digit level of its HS tariff schedule. In May 1997, during consultations, India gave notice of these restrictions to the WTO Committee on BOP Restrictions. It also gave notice in July 1996. Yet, the history of these restrictions and discussions is far longer than the late 1990s. India had been talking under GATT Article XVIII:B with the Committee on BOP Restrictions regularly since 1957.

During consultations in November 1994, the Committee stated it appreciated the courage and sagacity with which India carried out its economic reform program. It encouraged India to continue implementing its import liberalization program. Assuming India's BOP showed sustained improvement, India's aim was to move to a regime by 1996-1997 in which it would maintain import licensing restrictions only for environmental or safety reasons. The Committee welcomed the significant improvement in India's BOP situation since the last consultation, but recognized it remained volatile.

During the consultations held in December 1995, the Committee again commended India for the wide-scale economic reforms and comprehensive stabilization program over

the previous four years. The policies had led to a robust economic recovery. In particular, the reforms, which included a considerable measure of trade and financial liberalization, exchange rate unification and a move to Current Account convertibility, had contributed to a large increase in the share of trade in India's GDP. The Committee noted that, since 1992, rapid export growth and capital inflows had been the source of the turnaround in India's external sector and the steady increase in the level of FX reserves.

To be sure, the Committee took note that, in recent months, the trade balance deteriorated, investment inflows slowed, and FX reserves declined. In addition, the fiscal deficit and level of indebtedness remained high. The Committee recalled India's stated aim to move, by 1996-1997, to a trade regime under which QRs would be retained only for environmental, social, health and safety reasons, provided sustained improvement was shown in its BOP. The Committee also took note of the statement by the IMF that, with continued prudent macro-economic management, the transition to a tariff-based import regime with no QRs could reasonably be accomplished within two years.

The Committee pointed out since the last full consultation, there had been considerable liberalization of India's import regime, including a gradual increase in the number of consumer items that were freely importable. Still, almost one-third of tariff lines at 8-digit level under the HS classification remained subject to QRs. The Committee noted India's view that, in the context of a deteriorating BOP situation, it would be neither prudent nor feasible to consider the general lifting of QRs on imports at this stage. Many WTO Members supported India's continued use of import restrictions under GATT Article XVIII:B for BOP reasons in view of the uncertainty and fragility they perceived in India's BOP position. They felt liberalization and structural reform policies should continue at a pace and sequence suited to Indian conditions.

But, many other WTO Members stated India's BOP position was comfortable, India did not currently face the threat of a serious decline in FX reserves as set out in Article XVIII:9, and therefore India was not justified in its continued recourse to import restrictions for BOP reasons. They asked India to present a firm timetable for phasing out the restrictions, and more data, before resuming consultations.

The Committee welcomed India's readiness to resume the consultations in October 1996, and to notify the WTO of all remaining BOP restrictions soon after the announcement of the 1996-1997 Export-Import Policy. Consultations resumed in January 1997. The Committee noted the positive developments in India's economic situation since 1995. It appreciated the continued commitment of Indian authorities to economic reform, and gave credit for their progressive removal of QRs notified under Article XVIII:B. The Committee also pointed out the IMF had said India's current monetary reserves were not inadequate and were not threatened by a serious decline. The IMF also said the import restrictions could be removed within a relatively short period.

In response, India cautioned its BOP needed close monitoring, and abrupt removal of import restrictions notified under Article XVIII:B could undermine the stability of its economy and the reform process. The Committee agreed to resume consultations with India

at the beginning of June 1997 to consider an Indian proposal on a schedule to eliminate its remaining import restrictions notified under Article XVIII:B and to conclude the consultations consistently with all relevant WTO BOP rules.

In May 1997, India notified the Committee of import restrictions under Article XVIII:B in effect under its Export-Import Policy for 1997-2002. India offered a time schedule for the removal of its remaining import restrictions. The schedule was nine years, from 1 April 1997 to 31 March 2006, divided into three equal phases. India set forth a list of products in respect of which QRs on imports maintained under Article XVIII:B had been removed since the last notification of July 1996, as well as import policy changes announced on 1 April 1997 under its annual Export-Import Policy for 1997-1998.

In June 1997, the Committee resumed consultations with India to discuss the plan. An IMF representative said his position on India's BOP situation had not changed since the January 1997 consultation. During the consultations, all Members expressed their appreciation of India's commitment to eliminate the import restrictions over time and commended India on the comprehensiveness, transparency and timeliness of the plan.

But, many Members voiced concern about the length of the time-schedule. Some agreed India should adopt a cautious approach, others encouraged an acceleration of the phase out. Some Members considered India's BOP situation no longer justified recourse to Article XVIII:B. During the June 1997 consultations, India offered to revise the phase-out plan to seven years. Under the plan, India would eliminate most of the import restrictions in two phases of three years each. It would phase out restrictions on many items of high sensitivity (or bound at low rates of duty) during the third phase, reduced from three years to one year. The Committee could not reach a consensus on India's revised timetable.

- **India's Staggering BOP Restrictions**

At issue in the 1999 *India – Quantitative Restrictions* case are a staggering number of import barriers – 2,714. The barriers fell into two broad categories: import restrictions (*i.e.*, tariffs and quotas), and import licensing. All were justified by India under GATT Article XVIII:B as legitimate BOP restrictions. What was the basis under Indian law for the BOP measures? There were several relevant pieces of domestic legislation, described below. They are not unlike the legal authorities found in other developing countries. What makes India particularly instructive is that its domestic legislative framework for regulating imports is a sort of "worst case" scenario. The extensive nature of the framework, combined with endemic corruption associated with license applications and approvals, help explain why many observers of the Indian scene contend the economy is hamstrung by a "license raj" system.

(1) Section 11 of the *Customs Act, 1962*

This law provides that the Central Government of India may, by notification in the *Official Gazette*, prohibit (absolutely or subject to conditions), as specified in the notification, the import or export of any goods. The listed purposes for such prohibition

include, *inter alia*: Indian security; maintenance of public order and standards of decency or morality; conservation of FX and safeguarding of BOP; avoiding shortages of goods; prevention of surplus of any agricultural or fisheries product; establishment of any industry; prevention of serious injury to domestic production; conservation of exhaustible natural resources; carrying on of foreign trade in goods by the State or by a State-owned corporation; and "any other purpose conducive to the interests of the general public." Under Section 111(d) of the *Customs Act*, goods imported or exported (or attempted to be imported or exported) contrary to any prohibition are subject to confiscation.

(2) *The Foreign Trade (Development and Regulation) Act, 1992*

The "*FTDR Act*" replaced the *Imports and Exports (Control) Act, 1947*. Section 3(2) of the *FTDR Act* authorizes the Central Government to prohibit, restrict, or otherwise regulate the import or export of goods, by Order published in the *Official Gazette*. Under Section 3(3), all goods to which any Order under Section 3(2) applies are deemed to be goods the import or export of which Section 11 of the *Customs Act, 1962* prohibits (and thereby subject to confiscation under Section 111(d) of the *Customs Act*).

Section 11(1) of the *FTDR Act* forbids imports or exports by any person except in accordance with the provisions of the *FTDR Act*, rules and orders made thereunder and the Export and Import Policy currently in force. Under Section 11(2), when any person makes or abets or attempts to make any import or export in contravention of the *FTDR Act*, any rules or orders made thereunder, or the Policy, he is liable to a penalty of up to 1,000 *rupees*, or 5 times the value of the goods concerned, whichever is greater. Section 7 of the *FTDR Act* says only persons who have been granted an Importer-exporter Code Number (IEC Number) by the Director General of Foreign Trade may import or export. Under Section 9, the DGFT, which is authorized to grant, renew or deny import and export licenses, may suspend or cancel the IEC Number of any person who has contravened customs laws. (The DGFT is part of India's Ministry of Commerce.)

Section 9 of the *FTDR Act* also requires the DGFT to record reasons in writing if he fails to grant or renew an import license. If a license is granted, it specifies both the value and the quantity of the item that may be imported. The reasons for which the DGFT may deny a license are clearly set forth in Rule 7(1) of the FTR Rules, and include, among others: that an applicant is not eligible for a license in accordance with any provision of the Export and Import Policy, 1997-2002; and, in the case of a license for import, that no FX is available for the purpose.

Section 15 of the *FTDR Act* provides for an appeal of a decision or order made under the *Act*. This appeal right includes any decision to refuse a license. In the case of an order by an officer subordinate to the DGFT, appeal lies to the DGFT. For an order made by the DGFT, an appeal is to the Central Government. In addition, though Section 15(3) of the *FTDR Act* states "the order made in appeal by the Appellate Authority shall be final….", it can be challenged as violating a legal or constitutional right under Article 226 of the Indian Constitution before the High Court of any State in the Indian Union. Additionally, if an alleged violation is of a fundamental right contained in Part III of the

Constitution, it can be challenged under Article 32 of the Constitution before the Supreme Court of India. A challenge would lie, *inter alia*, on the ground the decision is arbitrary, irrational or discriminatory. The decision of a High Court in turn can be challenged in an appeal to the Supreme Court under various Constitutional provisions.

(3) Rules and Orders Promulgated under *FTDR Act*

Section 19 of the *FTDR Act* authorizes the Central Government to make rules for carrying out the provisions of the *Act*, by notification in the *Official Gazette*. The Foreign Trade (Regulation) Rules, 1993 were issued under the authority of Section 19 of the *FTDR Act*. They provide generally for license applications, license fees, license conditions, refusal, amendment, suspension or cancellation of licenses, and enforcement.

(4) The Export and Import Policy 1997-2002

Section 5 of the *FTDR Act* authorizes the Central Government to formulate and announce by notification in the *Official Gazette* its export and import policy. The first such policy, the Export and Import Policy 1992-1997, was in effect from 1992 until 31 March 1997. In effect at the time of the WTO adjudication was the Export and Import Policy, 1997-2002. India has issued Export and Import Policy statements once every five years, effective at the 1 April start of the government fiscal year. Revisions during the five-year period generally are published on 1 April of subsequent years during the five-year period, although changes may be made and announced in public notices at any time.

The Export and Import Policy 1997-2002 includes the Negative List of Imports. The Negative List is important, because it sets forth various prescribed procedures or conditions for imports, and the eligibility requirements including export performance that must be met to qualify for Special Import Licenses.

Section 4:7 of the Export-Import Policy 1997-2002 provides that "[n]o person may claim a license as a right and the Director General of Foreign Trade or the licensing authority shall have the power to refuse to grant or renew a license in accordance with the provisions of the *Act* and the Rules made thereunder."

In April 1997, India published *The Handbook of Procedures* effective for the period 1997 to 2002. *The Handbook* contains the procedures that must be followed to export or import specific goods, and provides application forms for import licenses. The ITC (HS) Classifications relates the rules set forth in the Export and Import Policy and the *Handbook* to the 8-digit product categories set forth in the HS for commodity classification. For each product listed at the 8-digit level, the *Handbook* indicates five types of information in five columns: the 8-digit code; the item description, the applicable policy ("prohibited," "restricted," "canalized." or "free"); any conditions relating to the Export and Import Policy (these conditions appear either indicated with the particular item or in licensing notes at the end of the HS Chapter or section thereof); and an indication of whether the product can be imported under a Special Import License.

(5) Licensing Regime and Negative List

India regulates imports by means of the Negative List. If an item is on the Negative List, a prospective importer must apply for a license to the DGFT.

The Negative List classifies all restricted imports in one of three categories: "prohibited items," "restricted items," and "canalized items." A "prohibited" item cannot be imported. "Canalized" items may, in principle, be imported only by a designated "canalizing" (government) agency. In effect, they are items for government procurement.

The key part of the Negative List concerns "restricted items." A "restricted" item can be imported only with a specific import license, or in accordance with a public notice issued for that purpose. The most significant "restricted" item on the Negative List is "consumer goods." Naturally, these are items in which American, European, and Japanese exporters are keenly interested.

The Negative List defines the term broadly to include "all consumer goods, howsoever described, of industrial, agricultural, mineral or animal origin, whether in SKD/CKD condition or ready to assemble sets or in finished form." Paragraph 3:14 of the Export and Import Policy further defines "consumer goods" as "any consumption goods which can directly satisfy human needs without further processing and include consumer durables and accessories thereof." Lest there be any doubt, the Negative List also lists seven product categories to be treated as consumer goods: consumer electronic goods, equipment and systems, howsoever described; consumer telecommunications equipment namely telephone instruments and electronic PABX; watches in SKD/CKD or assembled condition, watch cases and watch dials; cotton, woolen, silk, man-made and blended fabrics including cotton terry towel fabrics; concentrates of alcoholic beverages; wines (tonic or medicated); and saffron.

Suppose a person wants to import a restricted item. The prospective importer must submit an application for an import license to the DGFT, or to an officer authorized by the DGFT (the "licensing authority") with territorial jurisdiction. Import licenses are not transferable. Any person who imports or exports (with or without a license) must have an Importer-Exporter Code (IEC) number, unless specifically exempted. In addition, any person applying for an import or export license must present a Registration-cum-Membership Certificate (RCMC) granted by the Export Promotion Council relating to his line of business, the Federation of Indian Exporters Organization, or (if the products exported by him are not covered by any Export Promotion Council) the regional licensing authority. The application forms for the RCMC requires the applicant to claim status as a merchant exporter or manufacturer exporter of a specific product or products.

The application form for import of items covered by the Negative List requests information on the applicant's name and address, the type of unit, the applicant's registration number, the end product(s) to be manufactured with licensed capacity, details of the items applied for export, the total CIF (cost, insurance, and freight) value applied for, past production in the previous year, exports done during the previous year, and

"justification for import".

Whenever imports require a license, only the "Actual User" may import the goods, unless the licensing authority specifically dispenses with the Actual User condition. Paragraph 3:4 of the Export-Import Policy defines "Actual User" as one who may be either industrial or non-industrial. Paragraph 3:5 of the Policy defines "Actual User (Industrial)" as "a person who utilizes the imported goods for manufacturing in his own unit or manufacturing for his own use in another unit including a jobbing unit." Paragraph 3:6 of the Policy defines "Actual User (Non-Industrial)" as "a person who utilizes the imported goods for his own use in (i) any commercial establishment carrying on any business, trade, or profession; or (ii) any laboratory, Scientific or Research and Development (R&D) institution, university of other educational institution or hospital; or (iii) any service industry." The Actual User cannot legally transfer the imported goods to anyone except with prior permission from the licensing authority concerned, except for a transfer to another Actual User after a period of two years from the date of import.

About 10% of tariff lines subject to import licensing may also be imported under Special Import Licenses (SILs). Firms receive SILs from the Indian Government in proportion to their exports or net FX earnings. The DGFT or regional licensing authorities issue SILs. They are freely transferable (there are SIL brokers and a resale market for SILs). There are various methods by which a person or firm may apply for a SIL. First, an established private or state-run exporter which meets export performance criteria set forth in Chapter 12 of the Export and Import Policy, and elaborated upon in Chapter 12 of the *Handbook*, can qualify to be recognized by the regional licensing authority or the DGFT as an "Export House," "Trading House," "Star Trading House," or "Super Star Trading House." Such designated exporters automatically qualify for SILs on the basis of entitlement rates set out in Paragraph 12:7 of the *Handbook*. Additional bonuses are earned if a designated exporter exports specified products (products made by small-scale industries; fruits, vegetables, flowers or horticultural products; or products made in the North Eastern States) and where over 10% of such an exporter's exports are to one or more of 43 listed Central and Latin American countries and territories.

Other exporters can still receive Special Import Licenses equal to 4% of the FOB value of their exports, subject to certain minimum export criteria in Paragraph 11:11 of the *Handbook*. SILs are also granted to exporters of telecommunications equipment and electronic goods and services; to exporters of diamonds, gems and jewelry; to deemed exporters; and to small scale exporters holding certain quality certifications of the ISO.

- **Key Findings in 1999 *India Quantitative Restrictions* Case**

WTO APPELLATE BODY REPORT, *INDIA – QUANTITATIVE RESTRICTIONS ON IMPORTS OF AGRICULTURAL, TEXTILE AND INDUSTRIAL PRODUCTS*, WT/DS90/AB/R (ADOPTED 22 SEPTEMBER 1999)[992]

[992] Footnotes omitted, emphasis original. Omitted is the Appellate Body discussion of the Panel finding that India's BOP measures violated Article 4:2 of the *Agreement on Agriculture*, and nullified or impaired the benefits of the U.S. under GATT and the *Agreement*. Also omitted are the portions of the Appellate Body

I. Introduction

1. … The Panel was established to consider a complaint by the United States relating to quantitative restrictions imposed by India on imports of agricultural, textile and industrial products.

2. India maintains quantitative restrictions on the importation of agricultural, textile and industrial products falling in 2,714 tariff lines. India invoked balance-of-payments justification in accordance with Article XVIII:B of the GATT 1994, and notified these quantitative restrictions to the Committee on Balance-of-Payments Restrictions (the "BOP Committee"). On 30 June 1997, following consultations in the BOP Committee, India proposed eliminating its quantitative restrictions over a seven-year period. Some … of the Members of the BOP Committee, including the United States, were of the view that India's balance-of-payments restrictions could be phased out over a shorter period than that proposed by India. As a result, consensus on India's proposal could not be reached. …

…

5. … [T]he Panel concluded that:

> (i) the measures at issue applied by India violate Articles XI:1 and XVIII:11 of GATT 1994 and are not justified by Article XVIII:B….

…

V. The Note *Ad Article XVIII:11* of the GATT 1994

110. India appeals the Panel's interpretation of the Note *Ad Article XVIII:11* … and, in particular, the word "thereupon." India claims that the Panel erred in law in interpreting the word "thereupon" to mean "immediately." According to India, "thereupon":

> … indicates that there must be a *direct* causal link between the removal of measures imposed [for] balance-of-payments reasons and the recurrence of the conditions defined in Article XVIII:9. (Emphasis added.)

[The Indian argument, and American rebuttal, on the *Ad* Note issue are worth amplifying. To India, the word "thereupon" was critical. It set the scope of policy options available to a developing country. Note *Ad Article XVIII:11*, in which "thereupon" appears, is designed to help a developing country. The *Ad* Note applies in a situation where BOP difficulties cease to exist, but there is a threat they might return. India said its purpose is to allow a developing country to control the general level of imports over time to ensure imports do not outstrip the country's means to pay for them. By construing "thereupon" as "immediate," the Panel eviscerated the practical application of the *Ad* Note.

India said its proposed definition, a less severe one, was in keeping with the true purpose. By suggesting "thereupon" means a recurrence of BOP problems must be a direct consequence of removing BOP restrictions, India was saying that removal would lead to a

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Report on the competence of the Panel, burden of proof, and objective assessment of the facts under *DSU* Article 11.

clear, foreseeable rise in FX expenditure of such a magnitude that FX reserves no longer would be adequate. (India agreed an "indirect" test would be unworkable, because the indirect consequences of removing BOP restrictions on FX reserves are too difficult to trace and quantify.) In other words, India feared the Panel's definition of "thereupon" as "immediate" would force developing countries to abandon BOP measures when they could, in fact, foresee serious BOP difficulties on the horizon.

In brief, contended India, there must be a direct link between (1) removal of BOP measures and (2) level of FX reserve levels. If so, then the measures need not be removed. Applying India's proposed definition would mean developing countries could remove BOP restrictions gradually, so long as the clear and foreseeable consequence of an immediate removal would be renewed BOP difficulties.

For five reasons, the U.S. backed the Panel's definition. First, the U.S. said it was consistent with the interpretive principles of the *Vienna Convention*. Second, the French and Spanish texts of the GATT demanded translation of "thereupon" as "immediately." In these languages, "thereupon" has a temporal – not a causal – meaning. Third, GATT-WTO texts distinguish between "directly" and "thereupon." For example, the *WTO Agreement* uses "directly" in several Articles. In contrast, GATT uses "thereupon" in Articles XV:6 and XVIII:18. Fourth, the Panel definition gives proper effect to the purpose of Note *Ad Article XVIII:11*. That purpose is to ensure remote possibilities are not used to justify retaining BOP strictures after BOP difficulties end. Finally, India's proposed definition rested on an implicit assumption that was false: removal of BOP difficulties necessarily would lead to new BOP difficulties. In truth, many poor countries had dis-invoked Article XVIII:B measures without renewed problems.]

111. The Note *Ad Article XVIII:11* provides:

> The second sentence in Paragraph 11 shall not be interpreted to mean that a contracting party is required to relax or remove restrictions if such relaxation or removal *would thereupon produce* conditions justifying the intensification or institution, respectively, of restrictions under Paragraph 9 of Article XVIII. (Emphasis added.)

112. The conditions which justify the intensification or institution of balance-of-payments restrictions under Article XVIII:9 (a) and (b) are a threat of a serious decline in monetary reserves, a serious decline in monetary reserves, or inadequate monetary reserves.

113. The Panel found that to maintain balance-of-payments restrictions under the *Ad* Note:

> … it must be determined that one of the conditions contemplated in sub-Paragraphs (a) and (b) of Article XVIII:9 would appear <u>immediately after</u> the removal of the measures, and <u>a causal link</u> must be established between the anticipated reoccurrence of the conditions of Article XVIII:9 and the

> removal. It should be noted that the text requires more than a mere possibility of reoccurrence of the conditions ("*would* produce"). The *Ad* Note therefore allows for the maintenance of measures on the basis only of clearly identified circumstances, and not on the basis of a general possibility of worsening of balance-of-payments conditions after the measures have been removed. (underlining added [by Appellate Body])

114. We agree with the Panel that the *Ad* Note, and, in particular, the words "would thereupon produce," require a *causal link of a certain directness* between the removal of the balance-of-payments restrictions and the recurrence of one of the three conditions referred to in Article XVIII:9. As pointed out by the Panel, the *Ad* Note demands more than a mere possibility of recurrence of one of these three conditions and allows for the maintenance of balance-of-payments restrictions on the basis only of clearly identified circumstances. In order to meet the requirements of the *Ad* Note, the probability of occurrence of one of the conditions would have to be clear.

115. We also agree with the Panel that the *Ad* Note and, in particular, the word "thereupon," expresses a *notion of temporal sequence* between the removal of the balance-of-payments restrictions and the recurrence of one of the conditions of Article XVIII:9. We share the Panel's view that the purpose of the word "thereupon" is to ensure that measures are not maintained because of some distant possibility that a balance-of-payments difficulty may occur.

116. The Panel considered the various dictionary definitions of the word "thereupon" and came to the conclusion that "the most appropriate meaning should be 'immediately.'" The Panel found support for this interpretation in the context in which the word "thereupon" is used, the objective of Paragraphs 4 and 9 of Article XVIII and the *Ad* Note, and the object and purpose of the *WTO Agreement*.

117. … [B]alance-of-payments restrictions may be maintained under the *Ad* Note if their removal or relaxation would thereupon produce: (i) a threat of a serious decline in monetary reserves; (ii) a serious decline in monetary reserves; *or* (iii) inadequate monetary reserves. With regard to the first of these conditions, we agree with the Panel that the word "thereupon" means "immediately."

118. As to the two other conditions, *i.e.*, a serious decline in monetary reserves or inadequate monetary reserves, … the Panel ... qualified its understanding of the word "thereupon" as follows:

> We do not mean that the term "thereupon" should necessarily mean within the days or weeks following the relaxation or removal of the measures; this would be unrealistic even though instances of very rapid deterioration of balance-of-payments conditions could occur.

119. We agree with the Panel that it would be unrealistic to require that a serious decline or inadequacy in monetary reserves should actually occur within days or weeks following

the relaxation or removal of the balance-of-payments restrictions. The Panel was, therefore, correct to qualify its understanding of the word "thereupon" with regard to these two conditions. While not explicitly stating so, the Panel in fact interpreted the word "thereupon" for these two conditions as meaning "soon after." This is also one of the possible dictionary meanings of the word "thereupon." [The Appellate Body cited *The Concise Oxford English Dictionary* (Clarendon Press, 1995) at p. 1447.] We are of the view that instead of using the word "immediately," the Panel should have used the words "soon after" to express the temporal sequence required by the word "thereupon." However, in view of the Panel's own qualification of the word "thereupon," the use of "immediately" with respect to these two conditions does not amount to a legal error.

120. We, therefore, uphold the Panel's interpretation of the *Ad* Note and … the word "thereupon."

VI. The Proviso to Article XVIII:11 of the GATT 1994

121. India claims that the Panel erred in law:

> … by requiring India to use macro-economic and other development policy instruments to meet balance-of-payments problems caused by the immediate removal of its import restrictions.

India argues that such a requirement amounts to a change in its development policy, and is, therefore, inconsistent with the proviso to Article XVIII:11 of the GATT 1994.

…

122. The second sentence of Article XVIII:11 provides that Members:

> …shall progressively relax any restrictions applied under this Section as conditions improve, maintaining them only to the extent necessary under the terms of Paragraph 9 of this Article and shall eliminate them when conditions no longer justify such maintenance;

and adds the following proviso:

> *Provided* that no contracting party shall be required to withdraw or modify restrictions on the ground that a change in its development policy would render unnecessary the restrictions which it is applying under this Section.

123. In reply to a question by the Panel, the IMF stated:

> The Fund's view remains ... that the external situation can be managed using macro-economic policy instruments alone. Quantitative restrictions (QRs) are not needed for balance-of-payments adjustments and should be removed over a relatively short period of time. ...

124. In reaching its conclusion that the removal of India's balance-of-payments

restrictions will not "immediately" produce the recurrence of any of the conditions of Article XVIII:9 and that the maintenance of these measures is, therefore, not justified under the Note *Ad* Article XVIII:11, the Panel took this statement of the IMF into account.

125. India argues that the Panel required India to change its development policy in order that the removal of the balance-of-payments restrictions would not produce a recurrence of any of the conditions of Article XVIII:9. We disagree. Nothing in the Panel Report suggests that the Panel imposed this requirement. On the contrary, … the Panel stated:

> India had in the past used macroeconomic policy instruments to defend the rupee, suggesting that the use of macroeconomic policy instruments as mentioned by the IMF would not necessarily constitute a change in India's development policy.

126. Furthermore, we are of the opinion that the use of macroeconomic policy instruments is not related to any particular development policy, but is resorted to by all Members regardless of the type of development policy they pursue. The IMF statement that India can manage its balance-of-payments situation using macroeconomic policy instruments alone does not, therefore, imply a change in India's development policy.

127. ... [T]he Panel referred to the following IMF statement:

> The macroeconomic policy instruments would need to be complemented by structural measures such as scaling back reservations on certain products for small-scale units and pushing ahead with agricultural reforms.

128. … [S]tructural measures are different from macroeconomic instruments with respect to their relationship to development policy. If India were asked to implement agricultural reform or to scale back reservations on certain products for small-scale units as indispensable policy changes in order to overcome its balance-of-payments difficulties, such a requirement would probably have involved a change in India's development policy.

129. … [T]he Panel did not take a position on the question whether the adoption of the structural measures of the type mentioned by the IMF would entail a change in India's development policy. The Panel concluded ... as follows:

> The IMF's suggestions on "structural measures" should not be taken in isolation from the context in which they are made. We recall that the IMF began its reply to Question 3 by stating that India's "external situation can be managed by using macroeconomic policy instruments alone." Its comments on structural measures appear only at the end of its answer after it has suggested other liberalization measures, such as tariff reductions. The adoption by India of "structural measures" is not suggested as a condition for preserving India's reserve position. Thus, we cannot conclude that the removal of India's balance-of-payment measures would thereupon lead to conditions justifying their re-institution that could be avoided only by a

change in India's development policy.

Clearly, the Panel interpreted the IMF statement to the effect that the implementation of structural measures is not a condition for the preservation of India's external financial position. We consider this interpretation to be reasonable.

…

IX. Findings and Conclusions

153. For the reasons set out in this Report, the Appellate Body:

…

(b) upholds the Panel's interpretation of the Note *Ad Article XVIII:11* of the GATT 1994 and, in particular, the word "thereupon"; [and]

(c) concludes that the Panel did not require India to change its development policy and, therefore, did not err in law with regard to the proviso to Article XVIII:11 of the GATT 1994….

154. The Appellate Body recommends that the DSB request that India bring its balance-of-payments restrictions, which the Panel found to be inconsistent with Articles XI:1 and XVIII:11 of the GATT 1994….

VI. BOP Authority under Section 122

HOUSE COMMITTEE ON WAYS AND MEANS, 111TH CONGRESS, 2ND SESSION, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, PART I OF II, 216-218 (COMMITTEE PRINT, DECEMBER 2010)

Section 122 of the *Trade Act of 1974* [Public Law Number 93-618, 3 January 1975, 19 U.S.C. § 2132] authorizes the President to increase or reduce restrictions on imports into the United States to deal with balance of payments problems. Tighter restrictions in the form of an import surcharge (not to exceed 15 percent *ad valorem*), import quota, or a combination of the two may be imposed for up to 150 days (unless extended by act of Congress) whenever fundamental international payments problems make such restrictions necessary to deal with large and serious U.S. balance of payments deficits, to prevent an imminent and significant depreciation of the dollar, or to cooperate with other countries in correcting an international balance of payments disequilibrium.

Existing imports restrictions may be eased for a period of up to 150 days (unless extended by act of Congress) through a reduction in the rate of duty on any article (not to exceed 5 percent *ad valorem*), an increase in the value or quantity of imports subject to any type of import restriction, or a suspension of any import restriction. Such restrictions may be eased whenever fundamental international payments problems require special measures to deal with large and serious balance of payments surpluses or to prevent significant appreciation of the dollar. Trade liberalizing measures must be broad and uniform as to articles covered. The President may not, however, liberalize imports of those products for which increased imports will cause or contribute to material injury to domestic firms or workers, impairment of national security, or otherwise be contrary to the national interest.

Certain conditions also are placed on the President's use of import restrictions for balance of payments purposes. Quotas may be imposed only if international agreements to which the United States is a party permit them as a balance of payments measure and only to the extent that the imbalance cannot be dealt with through an import surcharge. If the President determines that import restrictions are contrary to the national interest, he may refrain from imposing them but must inform and consult with Congress.

Section 122(d) requires that import restrictions be applied on a non-discriminatory basis; it also requires that quotas aim to distribute foreign trade with the United States in a manner that reflects existing trade patterns. If the President finds, however, that the purposes of the provision would best be served by action against one or more countries with large and persistent balance of payment surpluses, he may exempt all other countries from such action. This Section also expresses the sense of Congress that the President seek modifications in international agreements to allow the use of surcharges instead of quotas for balance of payments adjustment purposes. If such international reforms are achieved, the President's authority to exempt all but one or two surplus countries from import restrictions must be applied in a manner consistent with the new international rules.

Section 122(e) provides that import restrictions be of broad and uniform application as to produce coverage, unless U.S. economic needs dictate otherwise. Exceptions under this Section are limited to the unavailability of domestic supply at reasonable prices, the necessary importation of raw materials and similar factors, or if uniform restrictions will be unnecessary or ineffective (*i.e.*, if products already are subject to import restrictions, are in transit, or are subject to binding contracts). The Section prohibits the use of balance of payments authority or the exceptions authority to protect domestic industries from import competition. Any quantitative restriction imposed may not be more restrictive than the level of imports entered during the most recent representative period, and must take into account any increase in domestic consumption since the most recent representative period.

The President is authorized to modify, suspend, or terminate any proclamation issued under the section, either during the initial 150-day period or during any subsequent extension by act of Congress.

Background

Anticipating that oil-consuming nations would face large balance of payments deficits in an era of rapidly increasing oil prices, and believing that neither a reduction in the price of oil nor the necessary international monetary cooperation were certain to take place, Congress considered it necessary to authorize the President to impose surcharges or other import restrictions for balance of payments purposes, even though Congress assumed that under existing circumstances such authority was not likely to be used. [*See* Senate *Report* 93-1298 at 87-88.] The use of surcharges for balance of payments purposes had gained *de facto* acceptance among industrialized GATT member countries during the two decades preceding the *1974 Trade Act*, but explicit GATT rules had never been adopted.

When it passed the *Trade Act of 1974*, Congress urged the President to seek changes in international agreements allowing the use of surcharges as well as (and in preference to) quotas for balance-of-payments adjustment purposes and providing rules for their use. [*See id*.] The Tokyo Round of GATT multilateral trade negotiations in 1979 adopted, as part of the so-called *Framework Agreement*, the *Declaration on Trade Measures Taken for Balance-of-Payments Purposes*, which elaborated on the rules for the use of import restrictions for balance-of-payments adjustments. [*See* MTN/FR/W/20/Rev. 2, *reprinted in* House Document 96-153, Part I, at 626.] While this *Declaration* noted the wide use, for balance-of-payments adjustments, of import restrictions other than quotas (which alone are addressed in the GATT) and implicitly sanctioned it, it still did not fundamentally alter GATT rules in this area by explicitly allowing such other restrictions.

The balance-of-payments issue was revisited in the *Omnibus Trade and Competitiveness Act of 1988*, which stated as one of the principal negotiating objectives of the United States the development of "rules to address large and persistent global current account imbalances of countries." [Public Law Number 100-418, Sections 122(d)(4), 1101(b)(5), 19 U.S.C. § 2901(b)(5).]

VII. 1994 Uruguay Round BOP *Understanding*

HOUSE COMMITTEE ON WAYS AND MEANS, 111TH CONGRESS, 2ND SESSION, OVERVIEW AND COMPILATION OF U.S. TRADE STATUTES, PART I OF II, 218 (COMMITTEE PRINT, DECEMBER 2010)

The [Uruguay Round] *Understanding on the Balance-of-Payments Provisions of the General Agreements on Tariffs and Trade 1994* specifically provides for (and gives preference to) "price-based measures" for balance-of-payments adjustments, including import surcharges and deposit requirements, and limits the imposition of new quantitative restrictions. The *Understanding* also provides that preference should be given to those measures that have the least disruptive effect on trade, and that restrictive import measures taken for balance-of-payments purposes may be applied only to control the general level of imports, may not exceed what is necessary to address the balance-of-payments situation, and must be applied in a transparent manner. Finally, the *Understanding* sets forth consultation procedures for the use of all restrictive import measures taken for balance-of-payments purposes. Article XII of the *General Agreement on Trade in Services* permits members to adopt or maintain restrictions on trade in services in the event of serious balance-of-payments and external financial difficulties.

[Could the President invoke Section 122 to deal with a persistent trade deficit with a WTO Member, such as China? If so, then would it be necessary to follow GATT and *GATS* Article XII, and the *Understanding*, so that the Section 122 action was WTO consistent? Or, could the President "just do it"? Is Section 122 a useful remedy against currency manipulation by a foreign government? If the President invokes it in that circumstance, then are WTO requirements pertinent? Or, notwithstanding GATT Article XV:4, is there a multilateral legal vacuum as to currency manipulation, in which the President has a free hand to use Section 122? In sum, how does Section 122 relate to

GATT-WTO BOP rules?]

VIII. Do Trade Deficits Matter with Global Value-Added Chains?

In May 2023, Senator Josh Hawley (Republican-Missouri) introduced the *Raising Tariffs on Imports from China Act*. The proposed *Act*:

> (1) Require[d]the President to calculate and subsequently publish the total value of imports into the United States from China and total value of exports from the United States to China annually,
> (2) Mandate[d] the President to impose an additional duty of 25% on all goods imported from China if, a bilateral deficit is published in the previous calendar year [that is, a levy on top of the applicable MFN tariff, and the Section 301 tariffs in the Sino-American Trade War, discussed in a separate Chapter], and
> (3) Authorize[d] the President to remove duties if, during the previous calendar year, the United States publishes a bilateral surplus with China.[993]

Senator Hawley pointed to the yawning bilateral trade deficit, which averaged $350 billion annually ever since President Clinton granted China permanent NTR status in connection with China's WTO accession.[994] He viewed that deficit as the cause for the loss of 3.82 million American jobs, including 2.89 million positions in manufacturing. Was the *Act* an example of unsound economics amidst populist politics?

Or, was this legislative initiative based (at least in part) on the economic argument of Michael Pettis, a Senior Fellow at the Carnegie Endowment for International Peace:

> The global trading system has been broken for decades. A well-functioning trading regime would permit neither the large, persistent trade imbalances that characterize the current global trading system nor the perverse flow of capital from developing economies to advanced economies. The system needs new rules that encourage a return to the benefits of free trade and comparative advantage.
>
> Until this happens, trade imbalances will persist. This matters especially to the United States because of the role it plays in anchoring global imbalances. Countries that run large, persistent trade surpluses must acquire foreign assets to balance these surpluses. American assets are particularly attractive for this purpose, and the United States allows nearly unfettered

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993 John Brew & Emily Devereaux, Crowell & Moring LLP, *Legislation on Higher Tariffs on China Seeks to Reduce U.S. Trade Deficit*, This Month in International Trade – May 2023 (9 June 2023), www.crowell.com/en/insights/client-alerts/the-month-in-international-trade-may-2023#ITB00. Hereinafter, *Legislation on Higher Tariffs*.] The legislation is Senate Bill 1537, 118th Congress (2023-2024), www.congress.gov/bill/118th-congress/senate-bill/1537.

994 *See Legislation on Higher Tariffs*.

> access to these assets. As a result, surplus countries prefer to acquire assets in the United States in exchange for their surpluses, which also means that the United States must run the corresponding trade deficits.
>
> This has important implications for U.S. manufacturing, unemployment, and debt. It means that the U.S. share of global manufacturing must decline while that of surplus countries must rise. Because surplus countries are those that subsidize their manufacturing at the expense of domestic consumption, American manufactures are forced indirectly to subsidize U.S. consumption. This is why, during the past five decades, manufacturing has consistently migrated from deficit countries (mainly the United States) to surplus countries (mainly China). Until global rebalances are resolved, this will continue.
>
> It also means that for all the talk of reshoring and friendshoring, the U.S. trade deficits cannot decline as long as surplus economies can continue to acquire assets in the United States with the proceeds of their surpluses. The United States, in other words, has no choice but to run deficits to balance the surpluses of the rest of the world.
>
> What's more, while many mainstream economists assume that foreign inflows lower U.S. interest rates and finance U.S. investment, as occurred in the nineteenth century, this hasn't been the case for decades. Foreign inflows instead force adjustments in the U.S. economy that result in lower U.S. savings, mainly through some combination of higher unemployment, higher household debt, investment bubbles, and a higher fiscal deficit.
>
> To rebalance its economy toward manufacturing while reining in debt and generating higher-paying employment, the United States must either transform the global trading regime or unilaterally opt out of its current role. Not only would this benefit the U.S. economy, but it would also benefit the global economy by eliminating the persistent downward pressure on global demand created by the surplus countries.
>
> This won't be easy, however. Any meaningful resolution of global trade imbalances will be strongly opposed by surplus countries and would result in a diminished global role for the U.S. dollar.[995]

In the above-quoted research paper, and his book, *Trade Wars Are Class Wars* (2021, co-authored with Matthew Klein), Pettis calls for a complete re-think of the modern multilateral trading system, which he argues is riddled with government interventionist policies that help elites and harm workers. So, bilateral trade deficits matter because of the increased inequality within deficit countries (*e.g.*, Australia, Canada, U.K., and U.S.), and

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[995] Michael Pettis, *Can Trade Intervention Lead to Freer Trade?*, Carnegie Endowment for International Peace (23 February 2024), https://carnegieendowment.org/chinafinancialmarkets/91738

tensions between them in surplus countries (*e.g.*, China, Germany, and Korea) that can undermine peace.

There are flaws in this line of reasoning. First, inequality has risen in some deficit countries, too (including China). Depending on the country and period measured, metrics such as Gini coefficients (discussed in a separate Chapter) have increased along with globalization. Second, territorial disputes (as concerning the Nine Dash Line in the South China Sea, and with respect to Taiwan) are not the cause of trade imbalances. They are more fundamental than import-export flows. Still, the gist of the Hawley-Pettis point captures a considerable following, with implications for elections, and must be taken seriously.

To begin, then, consider the term "global supply chain," or its synonym, "global value-added chain." They connote the concept and attendant measurement of the contribution to the total value of a product made in a particular country. Because of global supply (also called global value) production chains, many products are manufactured in multiple countries. That is, production of the finished good does not occur entirely in one country. Rather, certain aspects of the production occur in one country, other aspects in another country, and still other aspects in a third country. The entire chain of production is the global supply or global value chain. Producers engage in different tasks in different countries, sourcing inputs and intermediate goods based on various considerations, including cost.

Global supply chains challenge the traditional BOP statistical approach whereby the entire value of a finished product is attributed to the last country of origin of that product. Suppose a t-shirt has cotton from Egypt worth $1, yarn (that is, cotton fabric) produced in Pakistan worth $5, a design from France worth $4, cutting and sewing in Bangladesh worth $2, and assembly in China worth $3. Suppose further the shirt is imported into the U.S. at a cost of $20. While the typical ROO would be Yarn Forward to determine country of origin, which is not China, but rather Pakistan, for purposes of customs valuation, the entire value of the shirt, $15, would be attributed to China.

Thus, in trade balance statistics, $15 is attributed to China as an export to the U.S. Yet, in fact, $15 of the value of the shirt was not added in China. Hence, this attribution overstates the true export position of China relative to the U.S. That is, assuming China has a trade surplus, this attribution overstates the trade surplus. In turn, poor or ill-informed political decisions may result because of a failure to appreciate the true domestic value added to the finished good in each country in the global production chain.

Overall, the bilateral American trade deficit with China is cut by 25% if trade is measured in terms of value added, as opposed to the traditional way, which is gross commercial value.[996] That is, the 2009 Chinese trade surplus with America falls from $176

[996] *See* Rick Mitchell, *OECD/WTO "Value-Added" Trade Measure Shows Exchange Rate Issues Overstated*, 30 International Trade Reporter (BNA) 131 (24 January 2013). [Hereinafter, *OECD/WTO*.]

The Director General, Pascal Lamy, appears to have overstated the correct figure, saying it was 30%. *See Lamy: "Better Statistics Today Will Contribute to Better Policies Tomorrow," World Trade*

billion to $131 billion, when computed on a value added basis. Why? By summing up the gross flow of goods and services every time a good or service crosses an international boundary, the traditional measure counts the same good or service multiple times. It is more accurate to account for the foreign sourced content in exported merchandise (*e.g.*, American inputs in a Chinese finished product that is then exported to the U.S.). For example, with respect to an Apple iPod (as of 2010) made in China with an ex-factory (factory gate) price in China of $144, China contributed less than 10% to that price. Most components, worth $100, came from Japan, and the rest from Korea and the U.S.

As an example, suppose coke is counted the first time when it is shipped from Canada to Thailand to make steel. Then, it is counted a second time, as part of the gross commercial value of the Thai steel, when that steel is shipped to Korea to make cars. Then, the coke is included in the gross commercial value of the Korean car when that car is shipped to America. In fact, what the U.S. imported from Korea was the value added by Korean workers to the Canadian coke and Thai steel. So, the true amount of what America imported was not, say, $30,000, the gross commercial value of the vehicle, but rather $20,000, a figure reached by subtracting off the $7,000 worth of steel from Thailand and $3,000 worth of coke from Canada.

There also is the possibility the surplus position of a country can increase on a value added basis. That is true for Germany, Japan, and Korea, which ship intermediate goods that are inputs into the production process.[997] For instance, Germany exports electronic items to China, which China then turns into finished goods and re-exports back to Germany. If the full value of the finished good is included in the Sino-German trade balance, which it is under the conventional approach, then the intermediate electronic good is included as an export from China. That inclusion makes it appear China exported something of greater value to Germany than it actually did. In truth, part of the finished good (the intermediate electronic item) came from Germany. So, it should not count against Germany as an import. Rather, it should count only as an export from Germany. What Germany really imported from China was the Chinese contribution to the finished good, *i.e.*, the value Chinese factors of production added to the German intermediate good. And, conversely, China should not get the benefit of boosting its export position with Germany by including the German input.

Conversely, bilateral trade surpluses of commodity exporting countries like Australia, Brazil, and Canada with their major trading partners fall when computations are on a value added basis. That is because their trading partners process the raw materials from Australia, Brazil, and Canada into finished goods, which they then export back to those three countries.

Organization, 16 January 2013 (Speech at Organization for Economic Cooperation and Development (OECD), Paris), www.wto.org.

997 *See OECD/WTO*.

One way to summarize the point is "imports increase exports."[998] By importing merchandise from China, America boosts its exports, as it incorporates those imports into its exports. This point cautions against focusing excessively on the role of exchange rates in determining bilateral trade balances. Large bilateral trade surpluses or deficits lead some officials and observers to clamor for FX appreciations or depreciations, respectively. But, if those balances are overstated, and a value added approach gives a better picture, then exchange rate adjustment is less significant than thought.

Similarly, with respect to cross-border trade in services, the problem of multiple counting exists. Focusing on their value added contribution to goods, rather than on the gross commercial value of those goods, matters. One example might be the intellectual property service content from California that is exported to China to make Apple electronic products. Services account for 20% of global trade in gross terms. But, in value added terms, their contribution doubles. That is, services account for about 40% of what is traded internationally, in value added terms, and for countries that are in the OECD, 50% of the value added of their exports comes from services.[999] In contrast, measured conventionally, services account for less than 25% of world trade. Why the increase? Services are incorporated into the value of, and add considerable value to, manufactured items. Examples include logistics and research and development. Such examples typically are what make possible global value added chains.

The contribution of services to American exports is evident in value added terms. In terms of the value added of all of its exports (as of 2012), goods and services, 56% is in services. The figures are 55% for the EU, and 42% for Japan. As regards the total value of American services exports, domestic services account for 93%.

Another example, which covers goods, services, and IP, is from a surprising sector: the T&A industry. In February 2012, the Trans Pacific Partnership Apparel Coalition released an economic study, *Analyzing the Value for Apparel Designed in the United States and Manufactured Overseas*, concerning:

> where and how American workers contribute to the value and global production of apparel.
>
> The report, … found that on average, 70.3 percent of final retail price of studied apparel is created by workers in the United States. Specifically, the global value chain for apparel relies on a full range of highly-skilled and highly-compensated American workers in blue-collar and white-collar jobs that contribute to the design, development, production, importation,

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998 *Lamy: "Better Statistics Today Will Contribute to Better Policies Tomorrow," World Trade Organization*, 16 January 2013 (Speech at Organization for Economic Cooperation and Development (OECD), Paris), www.wto.org.

The WTO and OECD have a "Made in the World" Initiative as of spring 2012 in which they established a publicly accessible data base on international trade flows estimated in value added terms. In January 2013, the two entities launched an OECD-WTO Trade in Value Added Data Base.

999 *See OECD/WTO*.

distribution and sale of apparel in the United States.[1000]

To be sure, the Coalition sought lower tariffs on T&A imports, as its members were importers that turned the imports into finished products, from branded high fashion to innovative outdoor apparel. Still, its point is well taken: job creation in the U.S. is linked to these imports. As Kevin M. Burke, President and CEO, American Apparel & Footwear Association remarked: "When we get dressed each day, we wear U.S. jobs." With a global value chain for the T&A industry, and with the U.S. at the higher end of that chain, lowering tariffs on T&A merchandise should not be seen as a zero-sum game.

IX. J Curve

The topic of how to "fix" trade deficits took on renewed interest with the Administration of President Donald J. Trump (1946-, President, 2017-), which assumed such deficits do matter. One model – the J Curve – holds that if currencies float freely, they will adjust automatically to correct imbalances.[1001]

The J-Curve is an economic proposition about the effect of a depreciation or devaluation of a country's currency on that country's balance of trade, specifically, its current account. The J-Curve posits that immediately after the decline in the value of the country's currency relative to the value of the currencies of its trading partners, the country may experience a current account deficit. However, this deficit is eliminated over time, and eventually the country experiences a surplus balance. There is, in other words, a lag in the effect of an exchange rate adjustment on the current account.

The reason is that the volume of a country's imports and exports cannot possibly react immediately to the exchange rate change. Importers already have placed orders weeks, or even months, in advance with foreign sellers. Exporters are filling orders placed by foreign buyers weeks or months earlier. Thus, the volume of imports stays high, and the volume of exports remains low, in the period immediately following the depreciation or devaluation. In addition, the position of importers and exporters in the country worsens if both groups are quoting prices in their country's currency.

For example, suppose the Indian *rupee* depreciates in value relative to the United States dollar. Indian importers must pay more *rupees* to import goods from the United States. American exporters want dollars for their goods, and it takes more *rupees* to buy each dollar to pay for the goods. Therefore, the cost of imports into India, denominated in *rupees*, rises. As for Indian exporters, suppose they want *rupees* for their goods. American buyers do not need to spend so many dollars to buy rupees to pay for the goods, because the *rupee* is cheaper relative to the dollar following the depreciation. Thus, the dollar value

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[1000] Press Release, Retail Industry Leaders Association, *Study Finds U.S. Workers Contribute Substantially to U.S. Apparel Imports*, 13 February 2013. The study is www.rila.org. Your *E-Textbook* author is grateful to his former Research Assistant, David R. Jackson, former Senior Director, Customs & Industry Compliance, Retail Industry Leaders Association (RILA) and University of Kansas J.D. Class of 2007, for these materials and his insights.

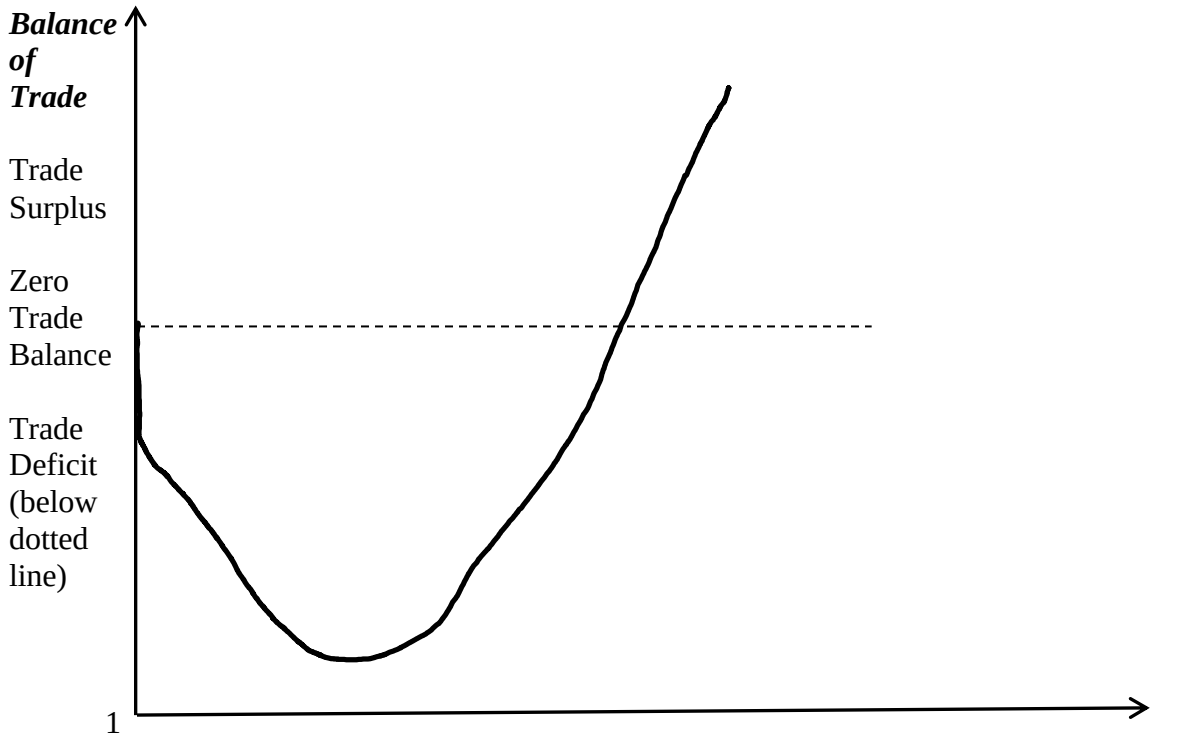
[1001] *See* IAN BREMMER, THE J CURVE: A NEW WAY TO UNDERSTAND WHY NATIONS RISE AND FALL (2006); David Backus, Patrick Kehoe & Finn Kydland, *Dynamics of the Trade Balance and the Terms of Trade: The J-Curve?*, 84 AMERICAN ECONOMIC REVIEW 84-103 (1994).

of Indian exports falls. In brief, devaluation or depreciation results in an immediate rise in the domestic (*rupee*) price of imports, and an immediate fall in the foreign (dollar) price of exports.

However, in time the change in relative prices – specifically, the increase in the price of imports, and decrease in the price of exports, as denominated in the country's currency – that is caused by the exchange rate shift will take effect. Importers will curtail their purchases, because imports have become more expensive. Exporters will find that demand for their products has increased because those products, in foreign currency terms, are cheaper. The exporters will, therefore, expand output – assuming they are able to do so, given constraints on factors of production. In brief, the expectation is that over time, importers and exporters alike will negotiate new trade contracts. The result will be a decline in the volume of imports, and an increase in the volume of exports, hence an improved current account balance.

Graphically, per Graph 24-1, if time following a depreciation (or devaluation) of the relative value of a country's currency is plotted on the horizontal (X) axis, and the balance of trade of that country on the vertical (Y) axis, then the time path of the current account will approximate the shape of the letter "J." The downward portion of the "J," corresponding to the static or worsening deficit immediately after depreciation (or devaluation), is generally anticipated to last about two to three quarters. Thereafter, movement is expected on the upward portion, as the balance improves and moves to a surplus position.

Graph 24-1
J Curve



The use of tariffs is another way, which the Trump Administration advocated, to cure trade deficits. (The Sino-American Trade War was the most notorious of such contexts, as discussed in a separate Chapter.) However, this method runs up against IMF analysis. In an October 2018 article, *Macroeconomic Consequences of Tariffs*, IMF economists Davide Furceri, Swarnali Hannan, and Jonathan Ostry, with Andrew Rose of the University of California (Berkeley), summarized their empirical research:

> We study the macroeconomic consequences of tariffs. We estimate impulse response functions from local projections using a panel of annual data that spans 151 countries over 1963-2014. We find that tariff increases lead, in the medium term, to economically and statistically significant declines in domestic output and productivity. *Tariff increases also result in more unemployment, higher inequality, and real exchange rate appreciation, but only small effects on the trade balance*. The effects on output and productivity tend to be magnified when tariffs rise during expansions, for advanced economies, and when tariffs go up, not down.[1002]

[1002] Presented at 19th Jacques Polak Annual Research Conference on "International Spillovers and Cooperation" (Washington, D.C., 1-2 November 2018), www.imf.org/en/News/Seminars/Conferences/2018/02/08/19th-annual-research-conference-on-international-spillovers-and-cooperation. (Abstract, emphasis added; *see also id.*, pages 22-23.)

Alas, the empirical debate about the existence and nature of the J curve, and the most salubrious economic, political, and legal policies to affect trade balances, is sure to continue.

X. Obscure Section 338 Remedy

The U.S. has two unilateral weapons in its trade law arsenal to address bilateral trade deficits through the unilateral imposition of tariffs, or even an import ban: the well-known *International Emergency Economic Powers Act of 1977* (discussed in a separate Chapter), and the obscure Section 338 of the *Tariff Act of 1930*, as amended (19 U.S.C Section 1338). Entitled "Discrimination by Foreign Countries, Section 338 states, in pertinent part:

> (a) Additional duties
> The President when he finds that the public interest will be served shall by proclamation specify and declare new or additional duties as hereinafter provided upon articles wholly or in part the growth or product of, or imported in a vessel of, any foreign country whenever he shall find as a fact that such country –
>
> (1) Imposes, directly or indirectly, upon the disposition in or transportation in transit through or reexportation from such country of any article wholly or in part the growth or product of the United States any unreasonable charge, exaction, regulation, or limitation which is not equally enforced upon the like articles of every foreign country; or
>
> (2) Discriminates in fact against the commerce of the United States, directly or indirectly, by law or administrative regulation or practice, by or in respect to any customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction, or prohibition, in such manner as to place the commerce of the United States at a disadvantage compared with the commerce of any foreign country.
>
> (b) Exclusion from importation
> If at any time the President shall find it to be a fact that any foreign country has not only discriminated against the commerce of the United States, as aforesaid, but has, after the issuance of a proclamation as authorized in subdivision (a) of this section, maintained or increased its said discriminations against the commerce of the United States, the President is authorized, if he deems it consistent with the interests of the United States, to issue a further proclamation directing that such products of said country or

such articles imported in its vessels as he shall deem consistent with the public interests shall be excluded from importation into the United States.

…

(d) Duties to offset commercial disadvantages

Whenever the President shall find as a fact that any foreign country places any burden or disadvantage upon the commerce of the United States by any of the unequal impositions or discriminations aforesaid, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty as he shall determine will offset such burden or disadvantage, not to exceed 50 per centum ad valorem or its equivalent, on any products of, or on articles imported in a vessel of, such foreign country; and thirty days after the date of such proclamation there shall be levied, collected, and paid upon the articles enumerated in such proclamation when imported into the United States from such foreign country such new or additional rate or rates of duty; or, in case of articles declared subject to exclusion from importation into the United States under the provisions of subdivision (b) of this section, such articles shall be excluded from importation.

(e) Duties to offset benefits to third country

Whenever the President shall find as a fact that any foreign country imposes any unequal imposition or discrimination as aforesaid upon the commerce of the United States, or that any benefits accrue or are likely to accrue to any industry in any foreign country by reason of any such imposition or discrimination imposed by any foreign country other than the foreign country in which such industry is located, and whenever the President shall determine that any new or additional rate or rates of duty or any prohibition hereinbefore provided for do not effectively remove such imposition or discrimination and that any benefits from any such imposition or discrimination accrue or are likely to accrue to any industry in any foreign country, he shall, when he finds that the public interest will be served thereby, by proclamation specify and declare such new or additional rate or rates of duty upon the articles wholly or in part the growth or product of any such industry as he shall determine will offset such benefits, not to exceed 50 per centum ad valorem or its equivalent, upon importation from any foreign country into the United States of such articles; and on and after thirty days after the date of any such proclamation such new or additional rate or rates of duty so specified and declared in such proclamation shall be levied, collected, and paid upon such articles.

(f) Forfeiture of articles

> All articles imported contrary to the provisions of this section shall be forfeited to the United States and shall be liable to be seized, prosecuted, and condemned in like manner and under the same regulations, restrictions, and provisions as may from time to time be established for the recovery, collection, distribution, and remission of forfeitures to the United States by the several revenue laws. Whenever the provisions of this chapter shall be applicable to importations into the United States of articles wholly or in part the growth or product of any foreign country, they shall be applicable thereto whether such articles are imported directly or indirectly.
>
> (g) Ascertainment by Commission of discriminations
>
> It shall be the duty of the commission to ascertain and at all times to be informed whether any of the discriminations against the commerce of the United States enumerated in subdivisions (a), (b), and (e) of this section are practiced by any country; and if and when such discriminatory acts are disclosed, it shall be the duty of the commission to bring the matter to the attention of the President, together with recommendations.

Simply put:

> Section 338 permits the president to impose "new or additional duties" [per the *chapeau* of Section 338(a))] on countries that have discriminated against commerce of the United States. Section 338 authority is triggered when the president finds that a foreign country has either (1) imposed an "unreasonable charge, exaction, regulation, or limitation" on U.S. products which is "not equally enforced upon the like articles of every foreign country;" [per Section 338(a)(1)] or (2) "[d]iscriminate[d] in fact" against U.S. commerce "in respect to customs, tonnage, or port duty, fee, charge, exaction, classification, regulation, condition, restriction or prohibition" so as to "disadvantage" U.S. commerce as compared to the commerce of any foreign country [per Section 338(a)(2)].
>
> Whenever the president finds such discrimination, Section 338 authorizes him to impose additional duties of up to 50 percent of the product's value [per Section 338(d)-(e)]. If a country continues to discriminate against U.S. goods, the president may then move to block imports from that country [per Section 338(b)]. An investigation under Section 338 could be initiated by the government or through private-party petitions to the … the U.S. International Trade Commission … [(ITC), per Section 338(g)].[1003]

[1003] John Veroneau & Catherine Gibson, *The President's Long-Forgotten Power To Raise Tariffs*, LAW 360 (14 December 2016), www.cov.com/-/media/files/corporate/publications/2016/12/law360_the_presidents_long_forgotten_power_to_raise_tariffs.pdf . [Hereinafter, *The President's Long-Forgotten*.]

For the U.S. to invoke Section 338 would be aggressively neo-mercantilist, if for no other reason than it has almost never done so.

Indeed, ITC reports:

> … indicate that action was taken at least once in connection with Section 338. In 1935, the president found that Germany and Australia had "discriminate[d] against the commerce of the United States." It appears, however, that the president did not use his authority under Section 338 to raise tariffs in that case but instead withdrew other unspecified "benefits" pursuant to broader powers under the [*Reciprocal*] *Trade Agreements Act* [of 1934].
>
> Separately, use of Section 338 was threatened in the course of various trade negotiations in the 1930s. For example, its use was threatened against France in 1932 in response to discriminatory taxes and quotas on U.S. goods. Around the same time, U.S. officials considered using Section 338 as leverage in negotiations with Spain regarding most-favored-nation treatment of American goods. Section 338 was likewise discussed, and construed broadly, in the context of trade relations with Japan and China. Internal memoranda from the late 1930s show that State Department officials considered invoking Section 338 in response to Japan's steps to alter China's trade relationships in Japan's favor. Section 338 later appears in U.S. diplomatic correspondence with respect to trade relations with China. A telegram in 1949 from Secretary of State Dean Acheson to the consul at Shanghai mentions Section 338 as a possible response to discrimination by China against American trade, and observes that Section 338 would permit the president not only to impose tariffs but also to exclude Chinese goods entirely.[1004]

But, there is "no public record relating to Section 338 since the Acheson telegram in 1949," and the ITC's "1942-1943 report states that activity under Section 338 had been limited due to wartime trade controls."[1005] *Id*. Thereafter, Section 338 is not mentioned in any ITC annual reports.[1006] *See id*.

The *de facto* disappearance of Section 338 almost certainly is because of a *de jure* reality: its invocation was effectively neutered by the GATT Article II:1(b) tariff binding rule, which entered into force on 1 January 1948 following the 30 October 1947 signing of GATT. Manifestly, invocation of Section 338 (or the *IEEPA*) to raise applied rates above bound rates would violate this pillar GATT obligation (discussed in separate Chapters). Put differently, to deploy Section 338 would be to disrespect three-quarters of a century of multilateralism. Moreover, insofar as Section 338 targets a broad array of discriminatory

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1004 *The President's Long-Forgotten*.
1005 *The President's Long-Forgotten*.
1006 *The President's Long-Forgotten*.

foreign government practices, arguably it was effectively superseded by Section 301 of the *Trade Act of 1974*, as amended (discussed in a separate Chapter).

Chapter 25

GATT ARTICLE XX GENERAL EXCEPTIONS AND HUMAN RIGHTS[1007]

I. Article XX "Laundry List"

All pillars of GATT, and indeed all other GATT-WTO obligations, are subject to a general set of exceptions set forth in Article XX. The grand free trade principle on which GATT stands – the pillars – are not without cracks. Article XX begins with a *chapeau*, proceeds to itemize 10 exceptions, and is followed by an Interpretative Note:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect public morals;
> (b) necessary to protect human, animal or plant life or health;
> (c) relating to the importation or exportation of gold or silver;
> (d) necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement, including those relating to customs enforcement, the enforcement of monopolies operated under paragraph 4 of Article II and Article XVII, the protection of patents, trade marks and copyrights, and the prevention of deceptive practices;
> (e) relating to the products of prison labor;
> (f) imposed for the protection of national treasures of artistic, historic or archaeological value;
> (g) relating to the conservation of exhaustible natural resources if such measures are made effective in conjunction with restrictions on domestic production or consumption;
> (h) undertaken in pursuance of obligations under any intergovernmental commodity agreement which conforms to criteria submitted to the CONTRACTING PARTIES and not disapproved by them or which is itself so submitted and not so disapproved;*****
> (i) involving restrictions on exports of domestic materials necessary to ensure essential quantities of such materials to a domestic processing industry during periods when the domestic price of such materials is held below the world price as part of a governmental

[1007] Documents References:
(1) *Havana Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, XX, XXI, XXIV, and XXXV
(3) 1979 Tokyo Round *Enabling Clause*

stabilization plan; *Provided* that such restrictions shall not operate to increase the exports of or the protection afforded to such domestic industry, and shall not depart from the provisions of this Agreement relating to non-discrimination;

(j) essential to the acquisition or distribution of products in general or local short supply; *Provided* that any such measures shall be consistent with the principle that all contracting parties are entitled to an equitable share of the international supply of such products, and that any such measures, which are inconsistent with the other provisions of this Agreement shall be discontinued as soon as the conditions giving rise to them have ceased to exist. The CONTRACTING PARTIES shall review the need for this sub-paragraph not later than 30 June 1960.

Ad Article XX

Sub-Paragraph (h)

The exception provided for in this sub-paragraph extends to any commodity agreement which conforms to the principles approved by the Economic and Social Council in its resolution 30(IV) of 28 March 1947.

Interpretation of this provision, through successive Appellate Body Reports involves the so-called "Two Step Test."

Essentially, a respondent WTO Member is accused of a trade-restrictive measure that offends one or more GATT obligations, and defends against that claim by invoking one or more of the Article XX exceptions. In Step One, the eligibility of the respondent's offending measure for an itemized exception is scrutinized. If the measure is eligible, then in Step Two the language of the chapeau is applied to the measure. In brief, an importing WTO Member adopting a trade-restrictive measure and invoking an Article XX defense must first prove the measure fits within one of the 10 Paragraphs in the Article, and if it does, then must show the measure passes muster under the requirements set forth in the *chapeau* to Article XX. (The Two Step Test is discussed below, and in separate Chapters.)

The Article XX "laundry list," albeit incomplete, generates some of the most hotly and frequently debated problems in the multilateral trading system. (Accordingly, many of them are the subjects of whole Chapters.) Why? What on this list generates controversy?

Premiere examples are Articles XX(b) and (g), which encompass restrictions on imports to promote environmental interests, *i.e.*, SPS measures and natural resource protection. Indeed, it is the pre- and post-Uruguay Round cases involving these two exceptions that spawned the vital jurisprudence on how to read Article XX, and the practical Two-Step Test.

Paragraph (e) (discussed in a separate Chapter) is another example of an important

item on the general exceptions list. Article XX(e) permits derogations from GATT-WTO obligations, such as a ban on imports of prison-labor products. There is no express exception in Article XX for human rights. GATT Article XX(e), for prison labor, comes closest to a human rights exception. But, being so narrow, it is far off.

The U.S. has maintained a prohibition on prison-labor products that pre-dates GATT. Whether that provision has been circumvented has been the subject of great controversy in the context of Sino-American trade relations. For instance, in 1993 and 1994 in connection with the renewal of China's MFN status, the U.S. accused China of exporting products made by convicts, including political prisoners. To the present day, many American trade officials and observers believe China is not complying with a bilateral *MOU* to prevent prison-labor exports.

What of the other items on the Article XX laundry list? From an interdisciplinary perspective, perhaps the most intriguing exception on the Article XX "laundry list" is the first. Paragraph (a) condones derogations from GATT-WTO obligations for trade measures necessary to protect public morals. The U.S. has a pre-GATT statute for precisely this purpose.[1008] (This exception is discussed in other Chapters.)

Paragraph (d) contains a potentially large exception, one for any measure that is necessary to secure compliance with a law or regulation that is itself not inconsistent with the GATT. In other words, given an acceptable law, a trade measure that violates GATT would be permissible if it is necessary to ensure the law is obeyed. This "Administrative Necessity" exception, along with the "Short Supply" exception, were invoked by India (unsuccessfully) in the 2016 *Solar Cells* case (discussed below).

Article XX also contains three specific, less-often-invoked, exceptions. Paragraph (c) covers measures on gold or silver exports, Paragraph (f) focuses on measures to protect national artistic, historic, or archaeological treasures, and Paragraph (h) permits measures in pursuance of inter-governmental commodity arrangements. Article XX(h) allows for production and export quotas on goods managed by international commodity cartels, such as the OPEC.

As the "OPEC exception" suggests, with respect to all items on the Article XX list, because of the broad wording of the *chapeau*, the trade measures embraced include restrictions on exports as well as imports. Thus, suppose Syria – like Jordan – is a WTO Member. Jordan is plagued by pilfering of artifacts in Petra by Bedouins from Syria. The *Bedu* tribes people abscond with their booty and contribute to a vibrant secondary market that flourished in Syria. Jordan could invoke Paragraph (f) to justify a ban on exports of its artifacts from Petra to Syria – a ban that, because it does not apply to exports to all other Members, runs afoul of the MFN obligation of GATT Article I:1.

II. Article XX(j) Short Supply Exception and 2016 *India Solar Cells* Case

[1008] *See* 19 U.S.C. § 1305; *U.S. v. Various Articles of Obscene Merchandise*, 705 F.2d 41 (2d Cir. 1983) (discussing Constitutional tests for "obscenity" in the context of magazines imported from Germany).

- **India's Losing Arguments**

In the 2016 *India Solar Cells* case, India's first defense against the GATT Article III:4 national treatment violation associated with its DCR measures was Article III:8(a), which (as discussed in a separate Chapter) was unsuccessful. India's contingent defenses were the Article XX(j) and XX(d) exceptions. On appeal, under Article XX(j), India claimed the Panel erred in its interpretation and application of this Short Supply exception when it found that solar cells and modules are not "products in general or local short supply" in India. Also on appeal, India claimed the Panel erred in its interpretation and application of the Article XX(d) Administrative Necessity exception when it found the DCR measures were not ones "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT]." Neither of these defenses was successful.

The issue presented to the Panel was whether India's DCR measures were, in the language of GATT Article XX(j), "essential to the acquisition or distribution of products in general or local short supply." On appeal, India claimed the Panel erred in its interpretation and application of Article XX(j). Specifically, India argued before the Appellate Body that the lack of manufacturing capacity of solar cells and modules in India amounted to "a situation of local and general short supply" under Article XX(j).[1009] India urged that the terms "general or local short supply" should be read as contemplating that short supply is distinct from situations that can be addressed by international supply. In India's view, Article XX(j) applies only when a WTO Member applies export restraints, not import restraints.

- **Holding and Rationale**[1010]

The Appellate Body began its analysis by recognizing its own two-tiered analysis of the general exceptions in Article XX of the GATT from previous WTO jurisprudence.[1011] Step One of this analysis requires first determining whether a measure in dispute is provisionally justified under one of the paragraphs of Article XX. Step Two requires determining whether the measure in dispute is consistent with the *chapeau* of Article XX. With respect to Step One, a respondent must show: (1) the measure addresses the particular interest specified under the general exceptions; and (2) there is a sufficient nexus between the measure and the interest protected, which is specified through the use of terms such as "necessary to" in Article XX(d) of the GATT or "essential to" in Article XX(j).

India Solar Cells provided the first opportunity for the Appellate Body to interpret Article XX(j). Given that Article XX(j) does not include the term "necessary," as it does in Article XX(d), a key interpretive issue was whether the term "essential" in Article XX(j) introduces a more stringent legal threshold than its counterpart ("necessary"). In previous

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1009 *India Solar Cells* Appellate Body Report, ¶ 5:51 (*citing* India's appellant submission, ¶ 106).

1010 *India Solar Cells* Appellate Body Report, ¶¶ 5:45-5:90.

1011 *India Solar Cells* Appellate Body Report, ¶ 5:56 (*citing*, *e.g.*, Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996).

Reports, the Appellate Body explained the meaning "necessary" is closer to "indispensable" than to "making a contribution to."[1012] Here, the Appellate Body felt the process of "weighing and balances" factors used in relation to Article XX(d) is relevant in assessing the "essential" nature of a measure under Article XX(j).

Specifically, the Appellate Body called for a weighing and balancing of the extent to which a disputed measure contributes to:

(i) "[T]he acquisition or distribution of products in general or local short supply;"
(ii) The relative importance of the societal interests or values that the measure is intended to protect; and
(iii) The trade-restrictiveness of the challenged measure.[1013]

The Appellate Body began its textual analysis of Article XX(j) by examining the phrase "products in ... short supply." Referring to the *Shorter Oxford English Dictionary* (6th ed.), the Appellate Body recognized that the language refers to products "available only in limited quantity, scarce,"[1014] referring also to a "shortage", defined as a "[d]efficiency in quantity; an amount lacking."[1015] The Appellate Body justified its use of the term by pointing out that the official French and Spanish translations of Article XX(j) refer to "*pénurie*" and "*penuria*," respectively, the English translations of which are "shortage." With respect to the word "supply," the Appellate Body referred to its definition as the "amount of any commodity actually produced and available for purpose," emphasizing also the ordinary meaning of the word "supply" correlates directly to "demand."[1016]

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

> The dictionary definitions of "local" include "in a particular locality or neighborhood, esp. a town, county, etc., as opp. [opposed] to the country as a whole" and "limited or peculiar to a particular place or places." [Citation omitted]. The word "general," in turn, is relevantly defined as "all or nearly all of the parts of a (specified or implied) whole, as a territory, community, organization, etc.; completely or nearly universal; not partial, particular,

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[1012] *India Solar Cells* Appellate Body Report, ¶ 5:62 (*citing* Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R ¶ 161 (adopted 10 January 2001)).
[1013] *India Solar Cells* Appellate Body Report, ¶ 5:63 (*citing, e.g., European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R ¶ 5:169 (adopted 18 June 2014)).
[1014] *India Solar Cells* Appellate Body Report, ¶ 5:65 (*citing Shorter Oxford English Dictionary*, 6th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 3115)).
[1015] *India Solar Cells* Appellate Body Report, ¶ 5:65 (*citing Shorter Oxford English Dictionary*, 6th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2007), Vol. 2, p. 2813)).
[1016] *India Solar Cells* Appellate Body Report, ¶ 5:66 (*citing Shorter Oxford English Dictionary*, 5th ed, W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 2, p. 3118)).

local, or sectional."[1017]

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

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

Lastly, with respect to any temporal aspect of the phrase "products of general or local short supply," the Appellate Body recognized that any measures justified under Article XX(j) must cease once the conditioning giving rise to them are no longer present. That is, a measure in question is not expected to last indefinitely. In the Appellate Body's view, "[a]n analysis of whether a respondent has identified 'products in general or local short supply' is therefore not satisfied ... by considering only whether there is a mathematical difference at a single point in time between demand and the quantity of supply that is 'available' for purchase in a particular geographical area or market."[1018] And, instead, a holistic consideration of trends in supply and demand over time is required.

Overall, the Appellate Body made clear that an assessment of whether a WTO Member has identified "products in general or local short supply" requires a case-by-case analysis of the relationship between supply and demand based on a holistic consideration of all relevant facts. The Appellate Body then turned to its assessment of India's argument that alleged risks inherent in India's continued dependence on imported solar cells and modules relates to the issue of supply availability. In this assessment, the Appellate Body relied on the Panel's factual finding that India had failed to identify any actual disruptions in imports of solar cells and modules into the Indian market. That failure helped doom India's Article XX(j) defense.

The Appellate Body also dismissed policy arguments put forth by India. The Appellate Body agreed that such considerations may inform the nature and extent of supply and demand. Nevertheless, respondents still must prove that imported products are not "available" to meet demand.

Lastly, the Appellate Body rejected India's argument that the Panel's reading of Article XX(j) allows only for export restraints to fall under its scope. Here, the Appellate Body again relied on the Panel's reasoning. The Panel pointed out that, for example, a WTO Member could "establish a temporary monopoly in respect of the sale of that product as a measure essential to the distribution of such products within its territory," and that such "a monopoly could be enforced and given effect through restrictions on both the

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[1017] *India Solar Cells* Appellate Body Report, ¶ 5:67 (*citing Shorter Oxford English Dictionary*, 5th ed., W.R. Trumble, A. Stevenson (eds.) (Oxford University Press, 2002), Vol. 1, p. 1619, p. 1081)).

[1018] *India Solar Cells* Appellate Body Report, ¶ 5:70

exportation and the importation by private traders of the product concerned."[1019]

Accordingly, the Appellate Body rejected India's argument that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in its market. The Appellate Body again emphasized the case-by-case nature of the analysis and that, here, the evidence did not show a lack of "availability" to meet the demand of India's market. So, the Appellate Body upheld the Panel's findings that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j). Thus, India's DCR measures are not justified under that GATT exception.

III. Article XX(d) Administrative Necessity Exception and 2016 *India Solar Panel* Case

● Holding and Rationale[1020]

On appeal, India claimed that the Panel erred in its interpretation and application of GATT Article XX(d) of the GATT when the Panel found that the international instruments identified by India did not have direct effect in India and, therefore, were not "laws or regulations" under this exception. Logically, then, the Appellate Body focused first on the examination of the proper interpretation of the terms "laws or regulations" in the context of the phrase "to secure compliance with laws or regulations."

The Appellate Body's textual analysis began with the ordinary meaning of the terms "laws" and "regulations." Here again, the OED was its go-to source. The Appellate Body noted the term "law" means "a rule of conduct imposed by authority," and "regulation" means "[a] rule of principle governing behavior or practice; *esp.* such a directive established and maintained by an authority."[1021]

Further, relying on its own analysis in *Mexico – Taxes on Soft Drinks*,[1022] the Appellate Body re-iterated that the terms "laws or regulations" in Article XX(d) refer to "rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system."[1023] The Appellate Body similarly reiterated that such "laws and regulations"

[1019] *India Solar Cells* Appellate Body Report, ¶ 5:83 (quoting *India Solar Cells* Panel Report, footnote 566 at ¶ 7:230).

[1020] *See India Solar Cells* Appellate Body Report, ¶¶ 5:91-5:151.

[1021] *India Solar Cells* Appellate Body Report, ¶ 5:106 (*citing Oxford English Dictionary* online, definitions of the word "law" and "regulation," www.oed.com/view/Entry/106405 and www.oed.com/view/Entry/161427, respectively).

[1022] Appellate Body Report, *Mexico – Tax Measures on Soft Drinks and Other Beverages*, WT/DS308/AB/R ¶ 79 (adopted 24 March 2006). [Hereinafter, *Mexico Soft Drinks* Appellate Body Report.] ¶ 79.

[1023] *India Solar Cells* Appellate Body Report, ¶ 5:106 (*citing Mexico Soft Drinks* Appellate Body Report, ¶ 70).

encompass "rules adopted by a WTO Member's legislative or executive branches."[1024] In *Mexico Soft Drinks*, the Appellate Body also explained that "to secure compliance" within the meaning of Article XX(d) is not the same as to enforce compliance. That is, "absolute certainty in the achievement of a measure's stated goal, as well as the use of coercion, are not necessary components of a measure designed 'to secure compliance' within the meaning of Article XX(d)."[1025] Measures qualify under Article XX(d) as long as they seek to secure observance of specific rules, regardless of the outcome.

The Appellate Body summed up its analysis here by stating:

> ... [I]n determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. In particular, it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a [WTO] Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant rule.[1026]

The Appellate Body then turned an analysis of whether the Panel erred in assessment of the domestic instruments identified by India.

The Panel found that India failed to demonstrate its DCR measures were designed to secure compliance with laws or regulations under Article XX(d). India argued on appeal proceeded that the non-binding instruments at issue (*i.e.,* the *National Electricity Policy*, *National Electricity Plan*, and *National Action Plan on Climate Change*) still qualify as "laws" under Article XX(d). That is because, said India:

> (1) The Indian legal system comprises both "binding" laws, as well as policies and plans, which together India terms a "framework for executive action;"[1027]

1024 *India Solar Cells* Appellate Body Report, ¶ 5:106 (*citing Mexico Soft Drinks* Appellate Body Report, ¶ 69).

1025 *India Solar Cells* Appellate Body Report, ¶ 5:108 (*citing Mexico Soft Drinks* Appellate Body Report, ¶ 74).

1026 *India Solar Cells* Appellate Body Report, ¶ 5:113.

1027 *India Solar Cells* Appellate Body Report, ¶ 5:117 (*citing* India's appellant submission, ¶ 171).

(2) The Panel's interpretation of "to secure compliance" limits the scope of Article XX(d) to measures that prevent actions that would be illegal under the laws or regulations at issue; and

(3) The Panel should not have considered a fourth measure, Section 3 of India's *Electricity Act of 2003,* in isolation of the three non-binding instruments mentioned above because, taken together, all four instruments set out an obligation to ensure ecologically sustainable growth in India, for which the DCR measures at issue secure compliance.

Note that India's argument raises a deep jurisprudential question: what is "law"? It is a question that arises in other WTO litigation (such as the 1998 *India Patent Protection* and 2000 *Section 301* cases, discussed in separate Chapters). And, it is a question susceptible to prejudicial judgments, for instance, that instruments in Non-Western legal cultures are disqualified from counting as "law," whereas similar or even the same instruments, when manifest in a Western context, count.

With respect to India's first argument, the Appellate Body disagreed with the Panel to the extent that the Panel may have suggested that the scope of "laws or regulations" under Article XX(d) is limited to "legally enforceable rules of conduct under the domestic legal system of a WTO Member.[1028] As to India's second argument, the Appellate Body disagreed with India. The Appellate Body did not see the Panel as concluding that "to secure compliance" in Article XX(d) restricts the scope of this exception to measures that prevent actions that would otherwise be illegal. The underlying action (for which a measure is taken to secure compliance with) can be lawful (and the measure still covered by Article XX(d)).

After ruling on India's first two arguments, the Appellate Body turned to India's third contention. The Appellate Body recalled the Panel had examined the four instruments individually to determine whether any of them qualified as "laws or regulations" under Article XX(d), ultimately deciding that Section 3 of *India's Electricity Act of 2003* qualified as a "law," but also finding that the DCR measures at issue were not designed to secure compliance with this law. The Appellate Body noted, however, that a respondent may be able to identify a specific provision of a single domestic instrument that contains a given rule, obligation, or requirement with which it seeks "to secure compliance" for purposes of Article XX(d). On this basis, the Appellate Body mildly chastised the Panel, stating: "it may have been appropriate for the Panel to have begun by assessing whether the passages and provisions of the domestic instruments that India identified, when considered together, set out the rule alleged by India."[1029] Nonetheless, the Appellate Body found that such a consideration would not have led to a different conclusion by the Panel.

The last substantive point India put forward that the Appellate Body addressed was whether the Panel erred in its assessment of the international instruments identified by India, and in particular whether such instruments had direct effect in India and were thus

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1028 *India Solar Cells* Appellate Body Report, ¶ 5:121 (*citing India Solar Cells* Panel Report, ¶ 7:311).

1029 *India Solar Cells* Appellate Body Report, ¶ 5:128.

"laws or regulations" under Article XX(d). India argued that international instruments have direct effect in India, because the Executive branch of the Central Government has the authority to "implement" or "execute" such instruments absent any actions by its Legislative branch, the Parliament. India also relied on opinions of its own Supreme Court, which recognize the principles of sustainable development under International Environmental Law to be part of the environmental and developmental governance of India.

The Appellate Body repeated its mantra about case-by-case analysis: "[a]n assessment of whether a given international instrument or rule forms part of the domestic legal system of a [WTO] Member must be carried out on a case-by-case basis, in light of the nature of the instrument or rule and the subject matter of the law at issue, and taking into account the functioning of the domestic legal system of the Member in question."[1030] The Appellate Body then acknowledged India's arguments and explanations pertaining to the power of its Executive branch to "implement" international instruments as long as they are not in conflict with domestic legislation. However, the Appellate Body reiterated that a determination of whether such instruments fall within the scope of "laws or regulations" under Article XX(d) still requires a case-by-case basis.

The Appellate Body examined India's argument that given the jurisprudence of its Supreme Court, the relevant international instruments have direct effect in India. The Appellate Body did not consider the decisions and observations of the Indian Supreme Court to be sufficient to demonstrate the requirements of Article XX(d). Instead, the Appellate Body stated that the decisions and observations India cited by India merely highlighted "the relevance of the international instruments and rules identified by India for purposes of interpreting provisions of India's domestic law, as well as ... guid[ed] the exercise of the decision-making power of the executive branch of the Central Government."[1031] So, the Appellate Body upheld the Panel's findings that India failed to demonstrate the relevant international instruments qualified as "laws or regulations" under Article XX(d).

India thus lost on all of its claims under Article XX. The Appellate Body acknowledged Step Two of its analysis under Article XX would involve the "essentiality" and "necessity" of the measures at issue under Article XX(j) and XX(d), respectively, and the *chapeau* of Article XX, but found it unnecessary to take that Step, as India had not passed Step One.

IV. Crack for Human Rights and Resurrection of Immanuel Kant?

Perhaps few if any of the drafters of GATT digested (as much as one ever can) the philosophical works of Immanuel Kant (1724-1804). If they did, then perhaps they were unmoved. Nowhere in GATT is there an exception to obligations for advancing the cause, or protesting the abuse, of human rights. The silence looms in all Uruguay Round texts. The GATT-WTO system is quintessentially state-centered, pre-supposing the irreducible

1030 *India Solar Cells* Appellate Body Report, ¶ 5:140.
1031 *India Solar Cells* Appellate Body Report, ¶ 5:148.

elements in multilateral trade law are sovereign states, not individuals. If "justice" is, as Plato says, a conception of a Right Order, then the regime seems not to have a vision of that Order beyond a general aim of trade liberalization under fair conditions.

Only the exception in GATT Article XX(e) for prison labor products veers toward a human rights concern, though there are good reasons to believe even this provision was spawned by fear that prison labor products were a form of unfair competition. Forget about possible mistreatment of prisoners. What really mattered was their products were made for free, aside from the cost of the prisoners' upkeep at around subsistence level – or, sometimes horrifyingly below that. Hence, prison labor products could be analogized to illegally subsidized goods, and they could easily be dumped.

The rising chorus of protest voices traditionally excluded or not heard loudly at the WTO – individual and NGO voices – may signal a resurrection of Kant's thesis that an international legal regime is just insofar as it makes the normative state of the individual its central concern. As Kant argues in his 1795 essay (revised slightly in 1796), *Toward Perpetual Peace: A Philosophical Sketch*, it will not do to divorce the business of international law, and the concern for justice in the international realm, from injustice in the domestic sphere. The legitimacy of International Law is not derived exclusively from whether each government that participates in the creation of international rights and obligations controls the people in its territory. That is far too cold an approach. Rather, says Kant, the legitimacy of International Law depends on how each state treats the people in its territory.

To Kant, a morally legitimate international legal system is based not just on (1) the allegiance of states to the international rule of law, nor simply on (2) the derivation of mutually advantageous benefits from peaceful intercourse. Legitimacy also demands as a building block for the international legal order (3) a shared commitment among states to individual freedom. The chain of logic in these three Kantian Definite Articles is thus: international law is morally legitimate if states are morally legitimate; states are morally legitimate if they adhere to a liberal conception of democracy and human rights, *i.e.*, domestic justice; hence, international law is legitimate if the states in the international legal system are committed to a just domestic order.

And so, perhaps, it goes with international trade law. If the GATT-WTO regime is a just one, in the sense of Kant or his modern-day apostles of liberal democratic theory, then the central focus of this regime must be on the protection and service of the individual. Put bluntly, human rights – and, by extension, democratic civil liberties, labor rights, and environmental rights – must be a, if not the, normative priority for GATT and the WTO if the multilateral trading system is "legitimate." It will not do to hide behind the veil of sovereignty. That dirty "S" word, under the traditional state-centric paradigm of international law, presumes that virtually every established government represents its people, that every state is free to adopt any form of political, social, and economic organization. That approach counsels against intervention of one state in the affairs of another state, even a far more authoritarian one. In contrast, the Kantian argument is not every state is as sovereign as every other. Only just states – those committed to domestic

justice – are entitled to the shield of sovereignty. In brief, in the Kantian universe, there is no room for a WTO Member to say, "trade is trade, but human rights are a wholly unrelated matter for each Member to address individually as it sees fit."

What should be made of this universe? No doubt it is a realm for the noble, the passionately committed defenders who hear the cry of the individual in the face of inexorable globalization. But, consider the universe from a dispassionate distance.

First, does the Kantian thesis mask an underlying intolerance of all domestic conceptions of justice other than a liberal democratic one? Is it an attempt, albeit philosophically elegant, to force upon the rest of the world a Western conception of how to run a polity? If so, how could the WTO be a vehicle for the extraterritorial application of one set of political values without tearing the institution apart? Should it be that vehicle in the first place? Have the WTO and its previous incarnation, GATT, been successful in liberalizing world trade because they have defined and focused their mission in a narrow, precise manner? Why not leave the grander – and perhaps insoluble – conflict of linking international and domestic justice to the U.N., which already is half-wrecked?

Second, is the Kantian thesis internally flawed? What of the positivist response, which divorces moral from legal obligations, and teaches that the foundation of international law is the consent of states, and that consent is based on each state's self-interest? Is that not a more accurate explanation of the GATT-WTO regime? One strain of this positivist perspective – reciprocal entitlements theory – holds that even when a state has a selfish incentive to breach a rule, it might not do so in order to help preserve the international legal order from which the state derives, over the long run, many benefits. Does that help explain why WTO Members typically comply with panel and Appellate Body recommendations? To be sure, there is a latent normativity in positivism – that actors are motivated by self-interest. But, that latent assumption permits escape from the central paradox of a Kantian-style democratic liberalism, namely, the intolerance of all other "illiberal" systems. (This paradox is an example of a fundamental conundrum in philosophy: tolerance does not allow intolerance.)

Third, what of the application of the argument of John Rawls (1921-2002) to international trade law, namely, that it is folly to exclude a hierarchical or communal state – like China or Iran – from the international legal order? These states, while not based on liberal principles, are based on concepts that are rational in their own domestic contexts. Since when is it the white man's burden to denigrate those concepts and try to compel changes in those contexts? Short of irrationality – *i.e.*, tyranny of the most abominable kind that cannot be ignored – it is simply not "just" for liberal states to coerce these other states. In brief, can we say with Rawls that core human rights are contingent western liberal rights that are not enforceable under International Law?

This question is all the more poignant in view of the fact that deep-seated religious beliefs and traditions sometimes are the roots of so-called "illiberal" systems. To what extent can – and, more importantly, should – the multilateral trading system be the fiat for western-style democratic political reform, when such reform necessitates a change in

underlying religious doctrine and culture? Consider a government measure to ban imports from countries in which women wear a *ḥijāb* (veil). The exporting country takes the case to the WTO, claiming this sartorial code is not listed in GATT Article XX as a basis for deviating from Article XI:1. The respondent importing country argues women's rights are accepted under international law as human rights, and the *ḥijāb* represents the denial of those rights. In the WTO hearing room, the respondent holds up pictures of Afghan women as "Exhibit A," and solemnly declares it does not want to support such oppression by doing business with such countries.

The WTO Panel is faced with a dilemma. It can focus on the language of the GATT, and thereby support religious freedom, but thereby risk triggering condemnation for its narrow-minded support of corporate interests. Or, it can incorporate into that language a human rights exception of its own making, but thereby risk undermining its own legitimacy by judicial activism that infringes on sovereignty. The obvious point is that defining and enforcing human rights law sometimes becomes inextricably intertwined with religious values. Is the GATT-WTO regime really supposed to handle such matters, and at the same time not lose focus on its core mission of trade liberalization? Or, is that core mission inevitably a broad messianic one that leads to normative decisions about religious values?

In answering these questions, it is ever so difficult to think objectively, as a world citizen. *A propos* the example of the *ḥijāb*, most westerners would be shocked to learn that women in Iran are enfranchised from the age of 15, and that they obtained the right to vote before their sisters in Switzerland (the home of the WTO). More generally, they would be stunned by the insights into Iranian society and the condition of women provided by Robin Wright of *The Sunday Times* (London). She contends much of the most profound discourse in the Islamic world is taking place in Iran.

Finally, if Kant and his followers are so confident of the superiority of western enlightenment values, then why not stand aside and watch the international legal order evolve naturally toward a greater focus on individuals? If the values are superior, then surely even most octagenarian despots and firebrand *mullahs* will figure that out, perhaps with a little nudging from domestic constituencies. As people and businesses in those constituencies trade with people and businesses in democratic states, liberal political, economic, and social ideas will flow across borders, along with goods and services. Put simply, will Engagement through trade – market forces – lead inevitably to the realization of Kant's vision of legitimacy?

V. Case Study: U.K.-GCC Trade and Rights of Women and LGBTQ+ Persons

If GATT-WTO says little about human rights, then consider whether trade agreements that are not multilateral may be used to advance them. That is the question the U.K. Parliament considered in 2023, as it contemplated whether to pursue FTAs with *GCC* countries. Could such deals promote the rights of women and LGBT+ persons, and labor rights generally, and if so, how? This topic is considered further in a separate Chapter, where USMCA and *CPTPP* provisions are analyzed.)

HOUSE OF COMMONS, INTERNATIONAL TRADE COMMITTEE, *FREE TRADE AGREEMENT NEGOTIATIONS WITH THE GULF COOPERATION COUNCIL*, SEVENTH REPORT OF SESSION 2022-2023, HC 79, 3, 6-11, 19-26 (26 APRIL 2023)[1032]

Summary

In June 2020 the Department for International Trade (DIT) began a review into market access opportunities with the Gulf Cooperation Council (GCC), a political and economic alliance of six Gulf states. Following a consultation, the UK government is currently undertaking negotiations to agree a Free Trade Agreement (FTA) with the GCC. There have been three rounds of negotiations to date. The potential of all new possible FTAs is welcome but it will be important to make sure they are the right FTAs which will benefit the U.K. and its people.

This Report aims to assist the Government with the focus of their FTA negotiations by highlighting key areas of opportunity and risk as raised by the evidence presented to us. We examine the nature of the GCC and the U.K.'s relationship with this region, exploring the possibilities of pursuing multilateral or bilateral agreements with the nations involved. We also assess export opportunities and risks for the U.K. in areas such as agri-food and financial services. Finally, our Report *highlights major regional issues such as human rights concerns* and weak environmental standards, and the importance of the U.K. Government ensuring that any agreement contains binding commitments to protect people and the environment, and *an agreement does not compromise U.K. values* and obligations.

Throughout our Report, we have reiterated our concerns that the Government has not published a trade strategy and regret that the Government did not prioritize sending a minister to give evidence to the Committee. Without a strategy, or an opportunity to question a Minister, we have not been able to fully ascertain the Government's position on key aspects of the negotiations for this agreement.

…

Chapter 2: Wider Context

The Nature of the GCC

11. The … GCC is a political and economic alliance comprised of six countries: The United Arab Emirates (UAE), The State of Bahrain, The Kingdom of Saudi Arabia, The Sultanate of Oman, The State of Qatar, and The State of Kuwait. The grouping was established in 1981 and is headquartered in Riyadh, Saudi Arabia. These states have a large amount in common historically, culturally, socially, and linguistically and the Government, in its Strategic Approach document, describes the relationship between the U.K. and GGC states to be "as broad as it is deep" and to "encompass extensive political, commercial, financial, security, and socio-cultural links, including trade and investment."

[1032] https://committees.parliament.uk/publications/39159/documents/192632/default/ (Footnotes omitted, emphasis in bold and bold italics original, emphasis in italics only added.)

…

14. We heard about *inconsistencies in the implementation of policies across the six GCC states*, including differing net zero targets; *human rights commitments and concerns*; agri-food import controls; and implementation of intellectual property provisions. …

15. We considered *whether the GCC can truly be treated as a single trade actor with which the U.K. can negotiate*, given the diverse opportunities and starting points; differing national regulations and the potential for misalignment; challenges to establishing standards and a level playing field for British businesses; and potential discrepancies in the willingness of states to engage on issues of concern and importance to the U.K.

Bilateral and Multilateral Agreements

Bilateral Agreements

6. *Numerous witnesses noted the merits of pursuing bilateral agreements with the individual GCC states rather than with the GCC bloc. Professor Bhala, Professor at the University of Kansas School of Law, strongly recommended this approach as it would allow the U.K. to incrementally approach those countries reluctant to agree to the UK's standards*. Sayed Alwadaei, Director of the Bahrain Institute for Rights and Democracy, supported a bilateral approach, to enable the U.K. to work with each country on the basis of its own individual merits. Dr. [David] Roberts [Associate Professor at King's College London] pointed out that this approach might also be preferred by the GCC states as they "have long preferred a bilateral engagement because they feel it is much more specialized."

17. Should the Government consider pursuing a bilateral agreement, witnesses recommended focusing on Saudi Arabia, the largest state in the GCC in terms of geography, demographics, and GDP. A bilateral agreement with Saudi Arabia could then set a precedent for negotiations with the other GCC states but, as Dr. [Joseph A.] Kéchichian [Senior Fellow at the King Faisal Center for Research and Islamic Studies] caveated, negotiating a series of bilateral agreements would be time consuming.

…

21. **We question whether the U.K. should, as the Government appears to be determined to do, pursue an FTA with the GCC as a bloc, or whether it would be more efficient, effective and in the interests of the UK to pursue tailored bilateral agreements with the individual GCC states.**

22. ***Given the differing legal systems within the GCC and the bloc's history as a trade actor, we believe that, in this instance, bilateral agreements would allow us to push individual states further to be more ambitious with, for example, human rights provisions, rather than settling for a lowest common shared standard.***

…

A U.K. Trade Strategy

32. **The U.K. needs to reflect our values within our trade policy, regardless of the type of agreement we pursue, and this agreement is likely to set a precedent for how the U.K. engages in trade negotiations in the future.**

…

33. **Without a comprehensive trade strategy, as we have requested from the Government on numerous occasions, it is difficult to assess whether the Government is choosing the most strategically advantageous approach to this agreement.**

34. ***We recommend that the Government produce, as a matter of urgency, a trade strategy to guide its approach to negotiations and, ultimately, decision-making on FTAs.***

35. **In order for this FTA, and our wider trade policy, to reflect the views of the public, trade unions and the devolved administrations, the Government needs to adequately consider the interests of these groups within its negotiating objectives.**

36. ***We, therefore, recommend that the Government strengthens engagement with trade unions during the negotiating process as we need to demonstrate best practice when discussing the need to strengthen the rights of workers in other countries.***

Chapter 3: Export Opportunities for the U.K.

38. A UK-GCC (Gulf Cooperation Council) FTA (free trade agreement) could present a significant economic opportunity for UK exporters. According to the Government's UK-GCC FTA Strategic Approach, this FTA has the potential to increase U.K. GDP by up to £3.1 billion, and boost trade by up to £15.8 billion in 2035.

[In 2022, U.K.GDP was £2.2 trillion, and total trade (imports plus exports, £889.2 billion and £781.2 billion, respectively) was £1.67 trillion. So, the projected increase in U.K. GDP would be 0.14%, and in trade would be 0.95%. Manifestly, such an FTA would be commercially insignificant for the U.K., especially given these increases would be spread over a decade from entry into force through 2035. If there is little macro-economic logic to the FTA, then is the rationale micro-economic, in that certain politically favored sectors, constituents, regions, and/or specific, well-connected businesses – would enjoy the benefits? Additionally, from a purely Utilitarian perspective, would – or should such small overall benefits be outweighed by the potentially great human rights costs?]

39. … DIT expects expansion in the majority of sectors modelled, particularly in the manufacture of machinery, motor vehicles and parts, and textiles and clothing. The outputs of the processed foods and financial services sector are also likely to be higher with an agreement in place.

Chapter 4: Addressing Concerns

Human Rights

Gender and LGBTQ+ Rights

77. Yasmine Ahmed, U.K. Director at Human Rights Watch, told us of serious human rights abuses occurring across the GCC states. Some of the most pressing concerns include the continued repression of women, the repression of the rights of LGBTQ+ individuals, and a crackdown on activists and the civic space. Other witnesses also highlighted significant concerns about freedom of expression and freedom of conscience.

78. We heard some examples of positive reforms in the human rights space in the GCC states in recent years. For example, there have been reforms in women's rights and freedom of expression in Saudi Arabia, including women's right to drive and travel overseas.

79. Witnesses told us, however, that whilst there are some "superficial but meaningful reforms," there continues to be numerous systematic examples of discrimination against women, including male guardianship laws and the mistreatment of female activists. The rights of LGBTQ+ people have also worsened, with witnesses describing a "climate of fear" as a result of the increasing criminalization of LGBTQ rights and "repressive crackdowns."

80. **We are extremely concerned about the substantial and persistent human rights abuses in GCC countries highlighted in evidence to this inquiry.**

81. *Regarding the impact of the FTA on women, Professor Raj Bhala, Professor at University of Kansas School of Law, highlighted WTO research demonstrating that tariffs tend to be higher on goods produced or consumed by women, and non-tariff barriers tend to be higher on services women provide. This provides U.K. negotiators the opportunity to "identify and root out the tariff and non-tariff barriers that discriminate against women."* The Trade Justice Movement, however, also noted that a U.K.-GCC FTA could potentially disproportionately impact women if provisions, such as those on intellectual property, increase the cost of medication. … [W]omen would be disproportionately affected as they are likely to have less ability to pay for goods. Women may also be further impacted as small business owners and consumers if there is further retail liberalization through this FTA.

82. We also heard that *a U.K.-GCC FTA could damage the rights of LGBTQ+ communities if references to their rights are omitted, and that any formal agreement would demonstrate that the U.K. is willing to maintain "political relationships and economic ties with countries that have severe human rights records."*

83. Witnesses highlighted to us *the opportunity the FTA might provide for the U.K. to influence the human rights situation in the GCC for the better. Their perspective was that the U.K. Government should utilize its political leverage to take a stand on human rights, including LGBTQ+ rights, ahead of an FTA being signed, rather than retrospectively.* However, the Government, while making reference to the importance of "upholding existing commitments relating to gender equality," makes no mention of safeguarding the rights of LGBTQ+ individuals in the objectives it has outlined for the U.K.-GCC FTA.

84. Rosie Rowe, an Advisor at Pillar Two, considered that it would be critical for both a human rights impact assessment to be conducted ahead of an agreement being signed, and that there should be ongoing monitoring of the regional impact of an FTA on human rights. Similarly, the Trade Justice Movement called for consultations with women's groups as part of a "gender responsive impact assessment process." …

85. In its written response to our questions, the Government told us:

> The U.K. is a leading advocate for human rights and the government will continue to show global leadership in encouraging all states to uphold international human rights obligations and hold those who violate or abuse human rights to account. *This activity is undertaken separately to the negotiation of Free Trade Agreements*.

86. ***Ahead of the completion of this Agreement, we recommend that the Government evaluate, and publish, the likely impact of this FTA on the human rights situation in the GCC member states. This must include specific assessments of the likely impact on both women and LGBTQ+ individuals, in order to anticipate and mitigate negative impacts during the negotiations process.***

87. ***Once this FTA is signed, the Government must undertake regular meaningful evaluations of the ongoing impact of this Agreement on human rights in the GCC region through its biennial FTA monitoring reports.***

…

91. Regarding the protection of LGBTQ+ rights within an FTA, Professor Bhala drew our attention to Article 23:9 of the United States-Mexico-Canada Agreement (USMCA) that specifically references sexual orientation and gender identity in the context of workplace discrimination. While noteworthy in its own right, it is unclear whether the political context is favorable for the inclusion of such a provision in a U.K.-GCC FTA or whether the U.K. would have sufficient leverage in negotiating such an outcome.

…

93. Professor Gammage, Professor of International Commercial Law at Exeter University, suggested that the U.K. should take a "more holistic approach" to human rights within trade agreements with whatever is negotiated complementing the work currently taking place around human rights. She went on to state that human rights clauses should be embedded within other legally binding chapters of an FTA, so they are enforceable and within the FTA's dispute settlement mechanism. In relation to this, *Professor Bhala pointed to the importance of grammatical structures, and the specific construction of verbs within FTA provisions, as this can determine whether they are hard law or soft law, and therefore the enforceability of such provisions*.

94. A more radical solution may be to pursue bilateral agreements with the individual GCC states and then use agreements with other GCC states as leverage within the bloc. *Professor Bhala suggested that if the U.K. secured a bilateral with one GCC state the other states could be incentivized to gain a similar deal to gain the benefits being enjoyed by*

their neighbor. *However*, Tom Wills of the Business and Human Rights Resource Centre concluded that:

> I have very little confidence that the UK's negotiating position, as it has currently been laid out, and what exists of the UK's trade strategy – this is pieced together from various comments made by Government Ministers over the last few years – adds up to any kind of guarantee that an agreement with the GCC, whether it is done at bloc level or on an individual, country-by-country level, would adequately protect and uphold human rights and labor rights in the region.
>
> …

97. ***The Government must ensure this FTA includes ambitious, binding and properly enforced human rights provisions. Specifically:***

a) ***It is imperative that the Government uses its diplomatic leverage ahead of, rather than following, an agreement being signed in order to promote ambitious and tangible human rights reforms.***

b) ***This agreement should take a holistic approach and prioritize the rights of minority groups, including women, and LGBTQ+ individuals, and set both immediate necessary standards, and aspirational standards to be achieved in the coming years. The Government should also take specific measures to promote the interests of minority groups, such as removing tariff or non-tariff barrier that disproportionately affect women.***

c) ***FTAs do not usually contain specific human rights chapters, and labor chapters are often not binding and subject to dispute settlement mechanisms. Therefore, owing to the lack of a dedicated chapter, this agreement should embed specific human rights provisions within other chapters of the agreement that are binding, to ensure these provisions are meaningful and enforceable.***

d) ***The Government must continue to monitor the ongoing human rights situation in GCC countries and use an FTA to establish co-operative dialogue mechanisms to discuss relevant issues.***

e) ***The U.K. Government should also use the negotiations to press for a reduction in the funding by GCC member governments of misogynistic and homophobic versions of Islam within the U.K.***

…

Labor Rights

98. The GCC works on the basis of the *kafala* system (see box 1). Several witnesses raised significant concerns about this. …

…

101. Witnesses stressed the importance of using the prospect of an FTA as leverage, maximizing all diplomatic channels now in a concerted effort, rather than seeking to make gains only after the fact (which are unlikely to work). Sayed Alwadaei fundamentally questions as to whether the U.K. should enter into an FTA with the GCC but, if there is to be an agreement, the Government should seek any opportunity through the FTA to

influence the human rights situation. Rosa Crawford called on the Government to achieve this by utilizing its diplomatic channels, including through the U.N. Human Rights Council.

…

Box 1: The *kafala* system

Gulf countries depend on migrant workers who on average make up about 70% of the Gulf states' workforce. The *kafala* system is a legal framework that has been used in all GCC states. It operates as a sponsorship system that ties workers to a local sponsor who is effectively their employer. Workers are not able to change their jobs without their sponsor's permission which puts power in the hands of the employer and often locks workers in exploitative forms of employment. It has been reported that workers within the system are often subject to abuses such as physical violence, sexual violence, very long hours, underpayment of wages and very low pay. Of the GCC states, Bahrain and Qatar claim to have abolished the *kafala* system, but critics refute these claims.

102. Witnesses also identified a number of ways in which trade policy and levers could be used to protect labor rights. As with the issue of protecting gender and LGBTQ+ rights, some witnesses highlighted *USMCA* and the merits of the Rapid Response Mechanism [RRM, discussed in a separate Chapter] included within it. This is a labor rights mechanism which enables workers or civil society organizations to make a complaint to a U.S. trade representative if there has been an abuse of labor rights, and there is an obligation to investigate this within 30 days of the complaint being submitted. The mechanism then allows "preferential market access to be swiftly removed in response to labor rights violations in specific factories, regions, or supply chains."

…

104. Witnesses also discussed the use of the five core International Labor Organization (ILO) Conventions [discussed in a separate Chapter]. … Tom Wills advocated for the ratification of the core U.N. and ILO *Conventions* as a condition of initiating negotiations, as this pre-ratification conditionality has been used in other FTAs, including by the U.S. …

…

108. A major concern raised by witnesses was the risk that any unenforceable provisions or mechanisms for upholding labor rights would serve instead to undermine them, alongside the U.K.'s international reputation. Ineffective or unenforced provisions could improve the image of labor rights in the GCC without actually achieving progress; and without effective mechanisms for provisions, it can become "window dressing", and could even discredit the U.K. as a partner.

109. *If there are limitations on what the U.K. can achieve through FTA negotiations, we heard that there are options for tightening domestic legislation to minimize U.K. business*

complicity. Professor Bhala stated that "a final way to secure labor rights is in the supply chain." He also explained that the customs law provisions of the FTA can be used to bar the entry of goods "that is suspected of containing forced labor inputs or of using labor that violates any of the ILO top five" labor laws. This has been demonstrated in the U.S. through *Uyghur Forced Labor Prevention Act* [*UFLPA*, discussed in a separate Chapter]: although the context is different, the principles can be the same for the U.K.

…

111. **The U.K. retains avenues and means to promote the rights of workers in the GCC. The U.K.'s leverage is highest now, before signing an FTA, and this should be utilized to build a "negotiating agenda" which includes metrics, enforcement mechanisms, and aspirational standards to be achieved in the coming years. It will also be important to use our diplomatic channels to address rights issues ahead of an agreement being signed.**

112. ***Whilst being extremely concerned by the labor rights abuses we have heard about, we also recognize that the UK has limited leverage in the domestic affairs of the GCC states to reform labor rights legislation. Therefore, we have considered opportunities in which the U.K. can tighten its own legislation, so it is not complicit in rights abuses. We support the comprehensive and meaningful implementation of the Trade Act 2021 and the Modern Slavery Act 2015 as a means to ensure the U.K. is not complicit in rights abuses through its supply chains.***

113. ***In the absence of power to influence domestic labor reforms in the GCC, the Government should build business confidence in the U.K. by strengthening and enforcing domestic legislation on modern slavery, forced labor, ethical supply chains and due diligence.***

VI. Catholic Social Justice Theory, Human Dignity, and 10 Human Rights

There is a connection between respect for human dignity, on the one hand, and human rights, on the other hand. Catholic Social Teaching holds that respect for human dignity is an inviolable human right. Theologians agree on the link:

> Law, morality, justice, the common good and human rights are inter-linked in the Christian understanding of things. The purpose of the law is to give justice, to see that each gets what is his due; we know what is just because the moral law of God instructs us. The common good [discussed more fully below] means the good of each and the good of all. And we can see that good is being achieved when all have their human rights. These too are founded in God's law; being made in God's image and likeness; all men must be treated according to that dignity.[1033]

[1033] RODGER CHARLES, S.J., AN INTRODUCTION TO CATHOLIC SOCIAL TEACHING 46 (1999). [Hereinafter, CHARLES.] *See also* MONSIGNOR DAVID BOHR, CATHOLIC MORAL TRADITION 324 (rev'd ed. 1999) (observing "Pope Leo XIII rooted his social ethics in the *supreme value of the human person*," and "[a]ll political and social structures need to respect and respond to this *primary moral claim of human dignity*.") (Emphasis added.) [Hereinafter, BOHR.]

Respect for human dignity necessarily means the promotion of human rights, because they derive from that dignity, which in turn is divine in origin and nature.[1034] Upon what, specifically, are those rights founded other than the precept (or axiom) of respect for human dignity itself?[1035]

In *Pacem in Terris* (1963), Pope John XXIII (1881-1963, Pope, 1958-1963) identified fundamental human rights that follow from respect for human dignity. That dignity comes from the creation of each person, namely, in the image and likeness of God. In summary form, there are 10 such human rights.[1036]

- **1st: Right to Life and Development**

A person has a right to live, which implies a right "to bodily integrity and the means necessary for proper development, to food, clothing, medical care, rest, [and] necessary social services," which include care during "unemployment or whenever through no fault of his own he is deprived of the means of livelihood."[1037]

- **2nd: Right to Be Respected**

A person has a right to be respected, that is, "to a good name, to freedom in investigating the truth, and – within the limits of the moral order and the common good – to freedom of speech and publication, to pursue whatever profession he may choose," and to be informed accurately about public affairs.[1038]

- **3rd: Right to Education**

1034 *See* CHARLES, 29.

1035 Father Massaro points out

> the Catholic view of human rights is distinctive because it is grounded on a complete theological framework, in which God is the ultimate source of our rights. … In comparison, purely secular doctrines of rights have no similar foundation in a compelling portrayal of human nature and its origin. In a sense, they are doctrines without a solid theory behind them. They are exposed to the weighty charge that rights just seem to "float abound," sticking to people without any justification behind their passing claims.

THOMAS MASSARO, S.J., LIVING JUSTICE – CATHOLIC SOCIAL TEACHING IN ACTION 118 (2000). [Hereinafter, MASSARO.]

1036 *See* JOHN XXIII, ENCYCLICAL LETTER, PACEM IN TERRIS ("Peace on Earth") ¶¶ 11-27 (11 April 1963), listed in CHARLES, 30-31.

1037 CHARLES, 30.

1038 CHARLES, 30. *See also* JOHN XXIII, ENCYCLICAL LETTER, PACEM IN TERRIS ("Peace on Earth") ¶¶ 63-65 (11 April 1963) (declaring that "[t]he influence of the State must never be exerted to the extent of depriving the individual citizen of his freedom," and that "[i]t must augment his freedom while guaranteeing protection of everyone's rights"). *See generally* MATTHEW F. KOHMESCHER, CATHOLICISM TODAY – A SURVEY OF CATHOLIC BELIEF AND PRACTICE 156 (3rd ed. 1999) (stating "[w]e all have the duty not only to respect the basic rights of others but to work with them in order that these rights be respected, cherished and promoted by all. We should do this not to gain our own selfish ends but because it is right and just to treat others as we would want to be treated").

A person has the right to "a good general education, technical or professional training consistent with the degree of educational development in his own country, to engage in advanced studies," and so far as possible, to a position of responsibility commensurate with his training and talent.[1039]

- **4th: Right to Worship**

A person has a right to worship God in accordance with his conscience, and to private and public profession of his religion.[1040]

- **5th: Right to Choose a Lifestyle**

A person has a right to choose the kind of life he finds appealing, including on matters concerning marriage and family.[1041]

- **6th: Right to Work**

A person has the right to the opportunity to work, to earn a just wage, and to conditions of employment that do not diminish or degrade his physical or moral state.[1042]

1039 CHARLES, 30.

1040 *See* JOHN PAUL II, RESPECT FOR HUMAN RIGHTS: THE SECRET OF TRUE PEACE (Message for the Celebration of the World Day of Peace) ¶ 5 (stating "[r]eligious freedom therefore constitutes the very heart of human rights," because "[r]eligion expresses the deepest aspirations of the human person … and basically it offers the answer to the question of the true meaning of life," and adding that "no one can be compelled to accept a particular religion, whatever the circumstances or motives").

1041 *See generally* MASSARO, 124-27 (discussing family life).

1042 As Leo XIII states:

> The first task is to *save workers from the brutality of those who make use of human beings as mere instruments in the creation of wealth*, impose a burden of labor which *stupefies minds and exhausts bodies*. Let workers and employers make bargains freely about wages, but there underlies a requirement of natural justice higher and older than any bargain: *a wage ought not to be insufficient for needs*.

ENCYCYLICAL LETTER, RERUM NOVARUM ("On the Condition of the Working Classes") ¶¶ 43, 45 (15 May 1891). (Emphasis added.) (*quoted in* CHARLES, 34).

This task is "first" because its fulfillment is part of what it means to respect human dignity. As John Paul II explains in *Labourem Exercens*, it is a person who does work, who "ought to imitate God his Creator in working," and who "by means of work … participates in the activity of God himself … [as] *given particular prominence by Jesus Christ*…," and "[t]he Christian finds in human work a small part of the Cross of Christ…."). ENCYCLICAL LETTER, LABOUREM EXERCENS ("On Human Work") ¶¶ 25-27 (14 September 1981). (Emphasis original.) *See also* id. at ¶¶ 16-19 (discussing the right and duty to work, and identifying "no more important way of securing a just relationship between the worker and the employer" than payment of "just remuneration," because it is "a *practical means* whereby the vast majority of people can have access to those goods which are intended for common use: both the goods of nature and manufactured goods," and "is the concrete means of *verifying the justice* of the whole socio-economic system") (Emphasis original.); CHARLES, 61 (stating "[i]t is the task of the state to ensure economic freedom and to see that that freedom is not abused, but that, through it, all may have access to the means of a decent livelihood") and 63 ((1) discussing the spiritual significance of work, in that man – as made in God's image – shares in the creative activity of God through work, and can liken vicissitudes at work to the hardships endured by Jesus, (2) arguing Jesus gave work a new dignity, because he spent most of his earthly life working with his hands, and

- **7th: Right to Associate and Participate**

A person has the right to form associations with others, including her fellow workers, so as to achieve legitimate aims, and to participate actively in public life.[1043]

- **8th: Right to Private Property**

A person has the right to own private property, including economic assets (*i.e.*, productive resources).[1044]

- **9th: Right to Migrate**

A person has the right to move freely within his own country, and if need be, to migrate to another country.[1045]

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(3) affirming "[t]he *subject* of work is more important than the work done or the *object* achieved by it" (Emphasis original.)).

[1043] As John XXIII writes:

> The dignity of the human person also requires that every man enjoy the *right to act freely and responsibly*. For this reason, therefore, in social relations man should exercise his rights, fulfill his obligations and, in the countless forms of collaboration with others, act chiefly on his own responsibility and initiative. This is to be done in such a way that each one acts on his own decision, of set purpose and from a consciousness of obligation, *without being moved by force or pressure brought to bear on him externally*. For any human society that is established on relations of force must be regarded as *inhuman*, inasmuch as the personality of its members is repressed or restricted, when in fact they should be provided with *appropriate incentives and means for developing and perfecting themselves*.

JOHN XXIII, ENCYCLICAL LETTER PACEM IN TERRIS ("Peace on Earth") ¶ 34 at 13-14 (11 April 1963). (Emphasis added.) *See generally* MASSARO, 138-141 (on worker rights and labor unions).

Leo XIII counseled that workers would be empowered by banding together in an association, but that workers' associations operated under "a general and constant law," namely, "that the individual members of the association secure, so far as possible, an increase in the goods of body, of soul, and of prosperity." LEO XII, ENCYCLICAL LETTER, RERUM NOVARUM ("On the Condition of the Working Classes") ¶¶ 69-77 at 42-49 (15 May 1891). *See also* JOHN PAUL II, ENCYCLICAL LETTER, LABOUREM EXERCENS ("On Human Work") ¶ 20 (14 September 1981) (observing that by protecting worker rights and enhancing worker solidarity in a constructive manner within the framework of the common good, and by eschewing class egoism, conflict, and political power battles, trade unions play an indispensable role in advancing social justice).

[1044] *See, e.g.*, CHARLES, 61 (stating man "must have freedom to choose his work, to prosper at it *and to own property*," and "[u]nless he has these freedoms all other freedoms are at risk from his economic masters"). (Emphasis added.) *See generally* MASSARO, 132-138 (discussing the rights and responsibilities of property ownership).

Interestingly, Church Fathers such as Saint Ambrose viewed private property as an illusion, because all property belongs to God. Private ownership, and more specifically inequality of distribution, was unknown before the Fall, and said by them to be a consequence of sin. Consequently, Saint Ambrose characterized almsgiving by an avaricious person as the restitution of goods stolen from the poor. *See* BOHR, 330.

[1045] *See, e.g.*, JOHN PAUL II, ENCYCLICAL LETTER, LABOUREM EXERCENS ("On Human Work") ¶ 23 (14 September 1981) (declaring that "[m]an has the right to leave his native land for various motives – and also the right to return – in order to seek better conditions of life in another country," and that "[t]he most important thing is that the person working away from his native land, whether as a permanent emigrant or as

- **10th: Right to Legal Protection**

A person has the right to have the aforementioned human rights enshrined in the legal system of her country, and to the enforcement of these rights in an efficacious and unbiased way.[1046]

Not every political or economic society respects all of these human rights to the fullest degree (or even to a minimal degree) at all times. Human dignity is under attack, at any given historical moment, in one or more societies – hence the need for its tenacious defense.[1047]

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a seasonal worker, should not be *placed at a disadvantage* in comparison with the other workers in that society in the matter of working rights").

[1046] The government authority in a political or economic society is responsible for providing this protection. That responsibility is especially important with respect to poor members in the society. This importance derives from more than just the preference for the poor (a Catholic response to the third moral problem, discussed below). As Pope Leo XIII put it bluntly: "[r]ich people can protect themselves; the poor have to depend above all upon the state." LEO XIII, ENCYCLICAL LETTER, RERUM NOVARUM ("On the Condition of the Working Classes") ¶¶ 37-38 (15 May 1891) (*quoted in* CHARLES, 35).

This responsibility does not inexorably compel the conclusion that democracy is the best form of government, and Catholic Social Justice Theory does not go that far. Saint Thomas Aquinas urged a mixed form of government as optimal, combining monarchy, aristocracy, and democracy, and thereby the respective advantages of an authoritative figure, involvement of qualified persons, and choice by the people. *See* SUMMA THEOLOGICA Ia IIae Q. 105 Art. 1 (*quoted in* CHARLES, 40).

For a discussion of Gelasian theory (named for Pope Gelasius, whose pontificate was in the 5th century, from 492-496 A.D.), also called the "theory of two swords," see BOHR, 329, CHARLES, 50-54). In brief, the theory holds that the Church and State are powers established by God on earth to operate autonomously in different spheres, the ecclesiological and the secular, respectively, and that Church and State authorities are to respect and support each other. This theory dominated most of the Middle Ages, though the reign of Charlemagne was marked by a "theocratic character," and starting in the 11th century A.D., conflict between popes and emperors was "the norm for the next several centuries." BOHR, CATHOLIC MORAL TRADITION, *supra*, at 329. The opposite of Gelasian theory is "hierocratic" theory, articulated by Pope Boniface VIII in *Unam Sanctum* (1302), whereby the Church is viewed as superior to the State, hence a pontiff is authorized to intervene in political affairs to save souls. *See* BOHR, CATHOLIC MORAL TRADITION, *supra*, at 331. The grand theological synthesis of political theories, developed by Saint Thomas Aquinas, is discussed *id.* at 331-332.

The responsibility for providing legal protection of human rights also does not inexorably mean the government must regulate the ownership and use of private property. Regulation entails the risk of undermining the institution of private property. Hence, the key principle that ought to constrain the government from excessive intervention is promotion of the common good. *See* CHARLES, 61.

[1047] This defense is sometimes put in terms of the duty to do justice toward others:

> *Human society demands that men be guided by justice, respect the rights of others and do their duty. They must feel the needs of others as their own.* So considered, we think of society as primarily a spiritual reality. Its foundation is truth, brought into effect by justice. Such an order, absolute, immutable in its principles, *finds its source in the true personal and transcendent God,* who is the first truth and the highest good, the deepest source from which human society can draw its genuine vitality.

JOHN XXIII, ENCYCLICAL LETTER, PACEM IN TERRIS ("Peace on Earth") 35-38 (11th April 1963) (*quoted in* CHARLES, 31-32). (Emphasis added.)

In turn, International Trade Law is not just about Trade or Law anymore. It never was. Actual or alleged human rights abuses are part of every existing or proposed effort to advance free trade. That was clear in the raucous debate on China's entry into the WTO,[1048] and from the burgeoning literature on the link between trade and human rights led by scholars such as Professor Frank Garcia.[1049] Closely allied with the link between trade and human rights is the link between trade and labor rights. Some work-related rights are claimed to be human rights. The above list – directly, the 6th and 7th rights, and indirectly, the 1st, 3rd, 9th, and 10th rights – is an example.

[1048] *See, e.g.,* Raj Bhala, *Enter the Dragon: An Essay on China's WTO Accession Saga*, 15 AMERICAN UNIVERSITY INTERNATIONAL LAW REVIEW 1469-1538 (2000).

[1049] *See, e.g.*, Frank J. Garcia, *The Global Market and Human Rights: Trading Away the Human Rights Principle*, 25 BROOKLYN JOURNAL OF INTERNATIONAL LAW 51 (1999).

Chapter 26

GATT ARTICLE XX(a) MORALITY EXCEPTION: ISLAMIC JURISDICTIONS, ALCOHOL, AND PORNOGRAPHY[1050]

I. Diversity within Unity

How do Muslim countries treat importation of goods that Islamic Law (*Sharī'a*) considers *ḥarām* (forbidden), namely, alcoholic beverages and pork products? Why do they do so? What might Muslim countries do, in accordance with GATT-WTO rules, to alter their policies?[1051]

Based on painstaking empirical research of the WTO *Protocols of Accession* and Schedules of tariff concessions of every Islamic country in the world, this Chapter answers each of these three questions, which may be summarized in aggregate as "diversity within unity." All of the pertinent countries are members of both the WTO and OIC, and a majority of their populations profess adherence to one of the world's great faiths – Islam. Therein is their unity. But, OIC-WTO Muslim majority countries are no all alike in their import measures on products the consumption of which the *Sharī'a* proscribes. Their diversity is in their trade policies.

On the first question, strictly speaking, it is illegal under the *Sharī'a* for Muslims to consume alcohol or pork. Therefore, the logical expectation is Muslim countries would invoke GATT Article XX(a), which is the famous public morality exception, and ban importation of alcohol and pork under this Article.

Yet, in fact, almost no Muslim country invokes the Article XX(a) exception. To the contrary, almost all Muslim countries allow importation of alcohol and pork, and impose tariffs of varying degrees and forms, on these products. In brief, Muslim countries tend to behave like non-Muslim ones (especially developing ones) in terms of their trade policies toward alcohol and pork. Thus, they may be classified into low, medium, and high-tariff countries, and compared against aggregate statistics for non-Muslim ones. Doing so reveals the diversity of their import policies on *ḥarām* products.

Another way to put the first point is it appears the import rules of Muslim countries on alcohol and pork products are rather similar to those of non-Muslim countries. That is, Islamic countries tend to behave like everyone else in deciding the extent to which they

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[1050] (1) *Havana (ITO) Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, XX, XXI, XXIV, and XXXV

[1051] These questions do not have static answers across cultures and countries. Different Muslim countries offer different answers in their quest (sometimes strained if not tortured) to balance a claim to "true" Islamic theology and commercial self-interest. *See, e.g.*, Simon Kerr, *Dubai Suspends 30% Tax on Alcohol Sales to Boost Tourism*, FINANCIAL TIMES, 2 January 2022, www.ft.com/content/1488146c-e7ca-4f4e-a367-9e42afcd31f4?shareType=nongift. For a discussion of alcohol and Islamic Law, see Raj Bhala, *Understanding Islamic Law (Sharī'a)* (Durham, North Carolina: Carolina Academic Press, 3rd ed., 2023). [Hereinafter, BHALA, UNDERSTANDING ISLAMIC LAW.]

impede market access for foreign alcoholic beverage and pork product exporters. Diversity in import policies transcends religious boundaries. To put the point differently, we all worship the same God, but in different ways, and so too we are alike in our diverse trade policies to goods at which we look askance in that worship.

As to the second question, four tentative explanations may account for the similarity: a lack of legal capacity; tolerance toward religious minorities; moral relativism; and secularism. Legal capacity, specifically, a lack of expertise in GATT-WTO matters, is a well-known problem in developing and least developed countries, regardless of whether they are Muslim. Tolerance is a part of Islamic history. As to moral relativism and secularism, these general trends in the Muslim and non-Muslim world have been the focus of attention of leading theologians and senior clergy, such as Pope Emeritus Benedict XVI (1927-2022, Pope, 2005-2013) and Pope Francis (1936-, Pope, 2013-).

On the third question, Islamic countries may avail themselves of GATT flexibilities to modify their tariff concessions on alcohol and pork products, should they seek to do so. But, they must be ready to pay compensation to, or even suffer trade retaliation from, interested WTO exporting countries. So, they have to make choices, trading off greater protection against adjustment payments.

What follows is an empirical analysis of the import rules of Muslim countries around the world on goods the consumption of which Islamic Law regards as forbidden.[1052] The point is not to appraise whether those countries "practice what they preach." To the contrary, by bringing to light the diversity of their trade measures, their similarity to non-Muslim countries, and their future policy choices, the article reveals the richness of International Trade Law across the Islamic world. The diversity within authentic Islam is redolent of what Mahatma Gandhi (1869-1948) said of the different religions of the world: they are beautiful flowers from the same garden.

II. GATT Article XX(a) Public Morality Exception

Article XX(a) remains one of the most underappreciated exceptions to GATT obligations. There appear to be three reasons for this phenomenon. First, until the 2010 *China Audio Visual Products* case (discussed in a separate Chapter), there were no adopted GATT Panel or WTO Appellate Body Report on this exception.[1053]

Second, many International Trade Law practitioners and scholars are in the grip of the Classical and Neo-Classical free market economic paradigm. Trade is about wealth

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[1052] This discussion draws on Raj Bhala & Shannon B. Keating, *Diversity within Unity Import Laws of Islamic Countries on Ḥarām (Forbidden) Products*, 47 THE INTERNATIONAL LAWYER number 3, 343-406 (2014). [Hereinafter, *Diversity within Unity*.]

That article contains a Statistical Annex with 5 Tables. Tables 1-4 lay out the data in detail on a country-specific basis that are discussed herein above. In addition, Table 5, which is posted online at *The International Lawyer*, contains a full-length Table of data and sources from which Tables 1-4 are derived.

[1053] *See* WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/AB/R (adopted 19 January 2010).

generation and maximization, and not much more, except for a few obvious externalities (*e.g.*, environmental degradation or labor rights infringements) championed by vocal and well-financed interest groups.

The third reason is an ideological disposition in many parts of the international legal academy toward so-called "value free" scholarship. This reason is more sinister than the second. That is because the second reason bespeaks a narrow bent of mind, but the third reason reflects implicit bias, indeed, intolerance – ironically, it is fundamentally anti-intellectual. What "value free" really means is "politically correct" values.[1054] Many non-specialists (the mainstream of America, as it were), and a minority in the international legal academy, see those "values" as so elastic and arrogant as to lack any principled ethical or religious core. Apparently aware of this opposition, there might be a preference to forget about, or ignore, Article XX(a). Mentioning it will only stir up another battle in the "Culture Wars" of modern times. Why not focus on the environmental exceptions in Article XX(b) and (g), and possibly team up with like-minded economists?

Yet, there its stands starkly, the first item the drafters of GATT put in the list of general exceptions. Article XX(a) states:

> Subject to the requirement that such measures are not applied in a manner which would constitute a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, or a disguised restriction on international trade, nothing in this Agreement [*i.e.*, GATT] shall be construed to prevent the adoption or enforcement by any contracting party of measures:
>
> (a) necessary to protect *public morals*….[1055]

This statement is nothing less than a choice among competing values. The drafters intoned public morality matters more than trade liberalization.

They did not define what "public morality" means. They left that thorny question to each contracting party (WTO Member) – and properly so. In practice, absent a dispute settlement case, the question is self-judging – or, it may be avoided (consciously or

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1054 As just one example, in a book entitled *Foundations of International Law and Politics* (2004), Yale Law School Dean Emeritus Harold Hongju Koh and Professor Oona A. Hathaway collect and edit 39 previously published works. Hardly two of them, put at the end (a co-authored piece by Professors Jack L. Goldsmith and Stephen D. Krasner, and a piece by Professor John Yoo) could be considered as well outside the liberal tradition. In 13 sections, there is a full section on liberal theory, but none dedicated to "neo-conservative theory" (though one covers realism in international relations). Five pieces are from the works of the editors themselves. No works are from the considerable Catholic tradition on international relations (*e.g.*, Papal Encyclicals and statements from the U.S. Conference of Catholic Bishops), nor from any other religious faith (*e.g.*, for principles of international law in Buddhist doctrine, K.N. Jayatilleke, *Dhamma, Man and Law* (Buddhist Cultural Centre, Dehiwela, Sri Lanka, August 2000), and on Muslim doctrines concerning international law, Majid Khadduri, *The Islamic Law of Nations – Shaybānī's Siyar* (Baltimore, Maryland: The Johns Hopkins University Press, 1966)).

1055 Emphasis added.

unconsciously). But, by inserting this exception, the drafters made clear from the outset there is a moral dimension to cross-border transactions.

That the drafters should take this position is not surprising. They had at least one major precedent on which to rely. The United States has had in its trade statutes a provision to take measures against importation necessary to protect public morals. This statute, 19 U.S.C. § 1305, from the *Tariff Act of 1930*, as amended, pre-dates GATT. Indubitably, the American exception covers obscene materials, which include pornographic films and printed matter, and child pornography.[1056] Few if any WTO Members would contest the inclusion of such materials in the ambit of Article XX(a).

But, how each Member would delineate the obscene from the tolerable would vary from one Member to another. Would the exception permit an import ban on the music of certain "rap" artists, the lyrics of which include profanity? Such an inquiry is pertinent to Islamic countries, to the extent they may seek to align their import measures with *Sharī'a* rules about products that are not to be indigested, namely, alcohol and pork.

III. Islamic Law (*Sharī'a*) and Forbidden (*Ḥarām*) Products

● *Sharī'a* Doctrine

Drawing the line on importation of "immoral" merchandise under Article XX(a), if a WTO Member is inclined to do so, can be a challenge in a variety of contexts. Consider, for instance, the WTO accession negotiations of the Kingdom of Saudi Arabia, which culminated in the WTO approving the terms of entry for the Kingdom on 11 December 2005 at the Hong Kong Ministerial Conference.[1057] As an Islamic country, the Kingdom has had a long-standing ban – one that pre-dates the WTO accession of the Kingdom – on imports of alcohol, pork, pork products, and pornography.[1058] Under Islamic Law (*Sharī'a*), consumption of these items is *ḥarām* to Muslims (with an exception, known as *ḍarūrāh*, for necessity, which could be relevant in extreme circumstances).[1059]

1056 *See, e.g., U.S. v. Various Articles of Obscene Merchandise*, 705 F.2d 41 (2d Cir. 1983) (discussing the Constitutional tests for "obscenity" in the context of magazines imported from Germany).

1057 This illustration draws on Raj Bhala, *Saudi Arabia, the WTO, and American Trade Law and Policy*, 38 THE INTERNATIONAL LAWYER pt. IV.A (Fall 2004).

1058 The Kingdom bans importation of 73 products, including the above-mentioned items for religious reasons. The other products, which are banned for various reasons (*e.g.*, SPS protection, security concerns, social preferences, etc.) include animal fertilizer, asbestos, electronic greeting cards, mobile phones fitted with cameras, mobile phone chips, prepaid mobile phone cards, satellite Internet receivers, used tires, video boosters. *See* Daniel Pruzin, *Saudis Flexible on Easing Investment Curbs During WTO Accession Talks, Report States*, 21 International Trade Reporter (BNA) 288 (12 February 2004) (summarizing the banned imports).

1059 *See* Robin Allen, *Saudis Blame "Unique Status" for Delays in Joining WTO*, FINANCIAL TIMES, 14 June 2000, at 8 (*quoting* the Kingdom's former Minister of Commerce, Osama Jafar al-Faqih, as follows: "Under no circumstances will we allow the importation of *pork, pork items or alcohol which are traditionally prohibited according to our religion* and our culture, nor will we allow access of *audio-visuals which offend our public morals*." (Emphasis added.) For an overview of goods that are *ḥarām*, see Jamila Hussain, *Islamic Law and Society – An Introduction* 114-116 (1999). On the *ḍarūrāh* exception, see Joseph Schacht, *An Introduction to Islamic Law* 84, 298 (Oxford, England: Clarendon Paperbacks, 1982).

Never mind that some medicines contain alcohol, that some soaps have oil from pigs, or that some easily-available magazines contain "soft" pornography. The fact is serious practice of the *Sharī'a* entails forswearing these products. Indeed, consumption of alcohol is among the most serious of crimes, a *ḥaqq Allāh* offense (*i.e.*, a claim of God), and triggers severe punishment (a large number of lashes).

- **High Tariffs versus Import Bans**

Can this religious mortification and GATT obligations be squared, and if so, how? The starting point is a reminder there is no affirmative duty in multilateral trade law to import any product, least of all merchandise forbidden on religious grounds.[1060] Many Muslim countries in the WTO – including Arab Muslim Members that acceded in 2000, Jordan and Oman – content themselves with a "prohibitive" tariff on alcohol, pork, and pork products, using the Article XX(a) exception on a limited basis, if at all. Other than the possibility of garnering revenues from an honest importer paying the duties, sometimes there is a rather surprising logic for this policy choice.

Consider Algeria, which applied to join the GATT in June 1987 (and as of 2013 was not a WTO Member).[1061] It maintains a government monopoly on the production, sale, and export of wine, and permits production of beer in both state-owned and private breweries. For alcoholic beverage imports, Algeria uses a system of reference prices. In 2003, the National People's Assembly sought enactment of an outright ban on these imports (via an amendment to the 2004 budget bill), despite the admonition of the Finance Minister that WTO accession negotiations would be jeopardized. In the Algerian context, the logic against the ban is it would be vulnerable to the charge of protectionism, *i.e.*, the real aim of the ban is to insulate the government monopoly on wine from foreign competitors, and preserve lucrative tax revenues on beer sales.

This logic does not apply to the Kingdom. From a strict Islamic perspective, with respect to alcohol, pork, and pork products, this resolution is not satisfying. A tariff, even one set at a very high rate, is not a ban. It remains technically lawful to import the product, so long as the importer pays the tariff. That being so, it would be difficult for the Kingdom to proclaim to the Muslim World it "bans" alcohol, pork, and pork products in accordance with the *Sharī'a*. Moreover, there might well be importers in the Kingdom willing to pay, for example, a duty of 2,000% (or more) on alcoholic beverages from abroad. In brief, the tariff is not "prohibitive," merely an expensive impediment. Worse yet, the more expensive an impediment is, *i.e.*, the higher a duty rate, the greater the incentive to avoid it by smuggling alcohol (or pork or pork products). Put differently, an extraordinary tariff creates an extraordinary customs enforcement headache.

1060 *See* Robin Allen, *Saudis Blame "Unique Status" for Delays in Joining WTO*, FINANCIAL TIMES, 14 June 2000, at 8 (*citing* WTO officials on this point).

1061 This discussion of the Algerian case is drawn from Lawrence Speer, *Algerian Parliament's Approval of Total Ban on Alcohol Imports May Threaten WTO Talks*, 20 International Trade Reporter (BNA) 1932, 1933 (20 November 2003). *See also* Daniel Pruzin, *WTO Members Discuss Accession of Algeria, Lebanon; Iraq Explores Membership Process*, 20 International Trade Reporter (BNA) 2079-2080 (18 December 2003) (reporting the ban was set to expire at the end of 2004).

One resolution is for the Kingdom to accept a distinction between banning importation entirely and forbidding consumption by Muslims. Notwithstanding the practical problem of encouraging a "black market," a "prohibitive" tariff would not alter the gist of the religious precept, which is not to consume alcohol, pork, or pork products. The problem with this resolution is it may not be persuasive from a strict Islamic perspective, particularly one advocated by the dominant *Wahhābī* School in the Kingdom. From a *Salafist* (in effect, puritanical or extreme) vantage, any liberality could lead to a proverbial "slippery slope," *i.e.*, the presence of foreign alcoholic beverages, pork, and pork products could encourage their consumption. Not surprisingly, different Islamic Members of the WTO have staked out different positions: Indonesia and Malaysia take a liberal view, permitting importation, while Brunei and Pakistan bar it. Brunei has a tiny exception for small amounts of beer or wine carried by individuals on their person when entering the Sultanate and declared to customs authorities, and such amounts must be consumed privately.

As a leading voice in the Islamic World, KSA chose the stricter line, and argued alcohol, pork, and pork products are immoral articles within the meaning of Article XX(a). In other words, the Kingdom analogized these products to pornography. Along with KSA, 3 other Arab Muslim countries – Jordan, Oman, and Yemen – have made Article XX(a) declarations in their WTO accession terms.[1062] So, while one of the few, the Kingdom is not the only Islamic country to draw the red line. Yemen, the accession terms of which were approved in December 2013 at the 9th WTO Ministerial Conference in Bali, Indonesia, invoked Article XX(a) on *ḥarām* products. But, the Jordanian and Omani declarations are of a rather different ilk (they did not pertain to alcohol or pork).

Further, invocation is not the only way to draw that line. Pakistan and Brunei use the strategy of not binding their MFN duty rates on alcohol and (in Pakistan's case) certain pork products. Leaving a tariff line unbound may have the same effect as invoking Article XX(a), because it means any prohibition may be applied to block or impede market access.

[1062] These declarations are contained in the *Reports of the Working Party on the WTO Accession* of each country, all of which are posted on the WTO website, www.wto.org or http://gatt.stanford.edu/bin/browse/docs.

(1) For Jordan, they are in the main body of the Report. *See* World Trade Organization, Working Party on the Accession of Jordan, *Report of the Working Party on the Accession of the Hashemite Kingdom of Jordan to the World Trade Organization*, WT/ACC/JOR/33, WT/MIN(99)/9, ¶ 80, Table 5 at pages 20-21 (3 December 1999).

(2) For Oman, they are in an Annex. *See* World Trade Organization, Working Party on the Accession of Oman, *Report of the Working Party on the Accession of Oman to the World Trade Organization*, WT/ACC/OMN/26, Annex 1, Table 1: List of Prohibited and Restricted Imports According to Schedule (1) of the Customs Law at page 33 (28 September 2000).

(3) For the Kingdom, they are in World Trade Organization, Working Party on the Accession of the Kingdom of Saudi Arabia, *Report of the Working Party on the Accession of the Kingdom of Saudi Arabia to the World Trade Organization*, WT/ACC/SAU/61, Annex F List of Banned Imports, pages 114-116 (1 November 2005).

For now, the point is not whether an analogy between *ḥarām* products like alcohol and pork, on the one hand, and *ḥarām* products like pornography, on the other hand, is objectively correct. Rather, the point is that in a world of roughly 1.5 billion followers of the Prophet Muhammad (Peace Be Upon Him (PBUH)) (570/571-632 A.D.), it is neither reasonable nor respectful to disregard the possible extension of Article XX(a) to religiously proscribed merchandise.[1063]

IV. Analytical Methodology

● Judgment Calls

Muslim countries take a diversity of approaches to importation of Islamically-proscribed products.[1064] "Muslim" countries are defined here as those holding membership

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[1063] The U.S. may have done so as early as October 2000. *See* Daniel Pruzin, *U.S., EU Push Saudis to Improve Market Access Offers for WTO Entry*, 17 International Trade Reporter (BNA) 1654 (26 October 2000) (reporting "[t]he Saudis have also *taken offense* at what they see as efforts by some WTO members to force them to make commitments on the import of alcohol and pork products…." (Emphasis added.)).

[1064] As referenced earlier, *Diversity within Unity* contains a Statistical Annex with five Tables.

Table 1 identifies OIC-WTO Muslim majority countries, showing their religious, economic, and educational make up and diversity. Tables 2, 3, and 4 contain tariff data readily available from the WTO Schedules of Concessions. These Tables also include average values for ODCs. Their final rows contain and analyze aggregate import measure statistics. All four Tables include Côte d'Ivoire, Guinea-Bissau, and Nigeria, the Muslim population of which respectively is 38.6%, 50%, and 50%. Technically, it might be more accurate to call them Muslim "predominant" countries, but for efficiency, they are dubbed "majority."

Table 2 summarizes the approaches of OIC-WTO Members with Muslim majority countries with respect to beer.

Table 3 does so with respect to wine and spirits. (Tables 2-3 do not include tariff data for ethyl alcohol, which is used for a variety of commercial as well as recreational purposes. That is because for use in drinking, it is not usually sold as such, but rather incorporated as an input into finished alcoholic beverage products, namely, distilled beverages such as whisky, vodka, and gin. Those beverages already are covered in these Tables. However, Table 5 includes data for ethyl alcohol. *See generally Ethanol*, Wikipedia, http://en.wikipedia.org/wiki/Ethanol_-_Alcoholic_beverages (concerning the chemical nature and uses of ethyl alcohol).)

A sufficiently large number of these countries distinguish between beer, on the one hand, and wine and spirits, on the other hand, in their tariff policy, to warrant separate Tables. At the same time, none of the countries differentiates among types of beer, for instance, based on alcohol volume content such as 4.5% versus 10%. *Connoisseurs* know that beer is not just beer, but for bound MFN duty rates among these countries, it is. That said, a handful of countries distinguish cider (and perry) from beer, wine, and spirits.

Anecdotally, as cider is more like beer than the other products, from the perspective of consumer tastes and preferences, it is included in Table 2 with beer. As for spirits, this rubric catches gin, geneva, rum, vermouth, vodka, whisky, and other hard liquors, as well as liqueurs. Most countries treat them along with wine, so Table 3 includes them. Of course, these Tables identify distinctions where appropriate.

Table 4 summarizes the trade rules of OIC-WTO Muslim majority countries on pork and pork products. As with alcoholic beverages, pork and pork products are a broad rubric, encompassing may tariff lines in the HS. So, like alcoholic beverages, two or even more Tables could have been constructed. For example, delineations could have been made among pig fat, live swine, ham and sausages, and other merchandise. While some OIC-WTO Members do make such distinctions, others do not, and for present purposes, aggregating all such items as "pork products" is sufficient to illustrate the diversity of approaches among the countries. So, Table 4 does not reveal each such product. Those detailed data are in Table 5.

Table 5 (published online at *The International Lawyer* website) contains all of the disaggregated data used to construct the first four Tables. The footnotes to Table 5 cite the data sources, which are accessible on the WTO website (www.wto.org).

in the OIC. There are 57 such countries. Essentially, they self-identify as such, and they tend to do so based on having a population that is over 50% Islamic. There are (as of March 2015) 34 countries that are WTO Members, are in the OIC, and have Muslim majority populations. These 34 OIC-WTO Members are diverse in the religious, economic, and educational make up of their population. Their WTO Schedules of Concessions lists the OCDs they bound under GATT Article II:1(b), first sentence, which are MFN tariff rates under Article I:1.

The context for examining these Schedules is accession to the WTO as a Member (after 1 January 1995), or in some instances, accession to GATT as a contracting party (before 1 January 1995). In this context, 3 questions are asked:

(1) Has the Muslim country invoked GATT Article XX(a) in its accession negotiations to ban importation of forbidden (*ḥarām*) products into its territory?
(2) If it invoked Article XX(a), then for what products did it do so, *i.e.*, what classes of merchandise did it define as "*ḥarām*."
(3) What patterns, if any, are evident from invocations of Article XX(a) across the Muslim world?

But, Tariff Schedules can be messy. So, judgment calls are necessary when working with them.[1065]

Table 5 organizes the OIC countries according to region. Table 5 contains the raw statistics for all OIC countries, whether or not they have acceded to the WTO (or even lodged an accession application), and whether or not they have Muslim-majority populations. Therefore, it includes the following countries, which Tables 1-4 exclude, which are not (as of March 2015) WTO Members: Afghanistan; Algeria, Azerbaijan, Comoros, Iran, Kazakhstan, Lebanon, Libya, Somalia, Sudan, Syria, Turkmenistan, Uzbekistan. Table 5 includes Benin, Cameroon, Gabon, Guyana, Mozambique, Suriname, Togo, Uganda, which Tables 1-4 exclude. These countries are in the OIC, but do not have Muslim majority populations.

[1065] To say a Schedule of Concessions (typically called a "Tariff Schedule," or simply "Schedule") is checked raises two problems. First, Schedules generally do not state the justification for an import barrier on a product. Thus, looking only at a Schedule is misleading, as it almost certainly would be erroneous to infer that the reason for every "P" in the Schedule was the country deemed the product "immoral." Only the *Protocol*, *Report*, or Annexes can provide the necessary guidance as to the justification.

Second, which "Schedule" should be checked? In reality, a country may have more than one bound Schedule posted on the WTO website. Invariably, firstly, it will have a Schedule of Concessions annexed to the Marrakesh Protocol, *i.e.*, its Uruguay Round Schedule, or if it acceded to the WTO after the Uruguay Round, a Schedule annexed to its *Protocol of Accession*. Secondly, it likely will have updated that Schedule, since the Uruguay Round, or since its accession. (The specific link to any updated bound Schedule is www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm#bhr, which is to a Table listing all WTO Members. The 8th and final column of the table referenced at that link contains updated its Schedule.) The updates include clarifications, additions of details, and the like. They would not normally include revisions to bound MFN rates, unless the country renegotiated those rates under GATT Article XXVIII. But, they are free to make a new, unilateral binding that is lower than what they previously conceded at the end of the Round or upon accession. (Such reductions occurred in a few cases.)

So, initially, data were gleaned by using documents in their chronological order. That is, when the empirical investigation began, data were collected (and input into Table 5) based on the "first," or "first in time," bound Schedule: the one submitted at the end of the Uruguay Round or upon accession. Those moments were significant, because they were when a country achieved the status of GATT contracting party

For example, first, how should a country be treated if it imposes on a *ḥarām* product an ODC pursuant to GATT Article II:1(b), second sentence, in addition to an OCD under Article II:1(a), first sentence? Should the categorization be based on the OCD, that is, the bound MFN rate, or the OCD plus the ODC?

On the one hand, if only the OCD is considered, then the protection may be understated, because OCDs can be considerable, even more than the ODC. On the other hand, if the OCD and ODC are used, then the protection may be overstated, because it is difficult to know if an ODC actually is imposed on every imported shipment. The risk of understatement was accepted, so the first method for categorization was used. In other

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or WTO Member (possibly by converting from the former to the latter), or acceding after the birth of the WTO on 1 January 1995.

However, in almost all instances, the Schedules associated with the Uruguay Round or Accession, provide insufficient information on *ḥarām* goods – in particular alcohol and pork products. Such "insufficiency" takes the form of incomplete data. For example, the Uruguay Round Schedule of Kuwait has many blank Excel sheets on which product descriptions, HS category codes, and numbers ought otherwise to appear.

As another example, the Uruguay Round Schedules of Benin and Bahrain provide a tariff rate for all agricultural products, with only the product exceptions delineated. As still another example, the Uruguay Round Schedule for Turkey lists large aggregate produce groupings among which it is not possible to discern where pork products fall.

Because of these data gaps, it was necessary to examine the "second," that is, "latest in time," Schedule. Doing so showed that the latest in time Schedule was the best source of data for almost all countries. Consequently, as the investigation progressed, the methodology changed from looking at the "first" Schedule first to looking at the "second" Schedule first. The result was use of 2002 Schedule data for all countries reflected in Tables 1-4. (The 2002 Schedules for all OIC-WTO Members are Excel spreadsheets, but data Accession Schedules, are sometimes Access databases.) That is, data for all countries are from 2002 Schedules (with the exception of Tajikistan, which acceded in 2013, and Saudi Arabia, which acceded in 2005). Simply put, the data are drawn from the 2002 Schedules, with any necessary supplementations and exceptions noted.

The sum and substance of the aforementioned points is that nailing down exactly which countries have invoked Article XX(a) to designate "P" items, and what those items are, is not a simple task based on full, transparent data. The *Protocol*, *Report*, Annexes, and Schedules need to be checked, and even then the results are less certain than ideal. But, the best ought not to be the enemy of the good, hence Tables 1-4, and conclusions drawn them, rely on what is, not what ought to be.

Finally, Table 5 eschews redundancy by not listing unchanged data from different Schedules for a particular country. For example, for Burkina Faso, Schedule XLVI (Uruguay Round) lists a bound MFN rate of 50 percent for products covered by Annex 1 of the WTO *Agreement on Agriculture*. This Annex covers HS Chapters 1 to 24. Thus, it covers alcohol (which is in Chapter 22), and pork products (which are scattered through the first 16 HS Chapters). The 2002 Schedule for Burkina-Faso lists precisely the same information. Therefore, it would be redundant to list the data from both the Uruguay Round and 2002 Schedules.

However, where such data changed, the change is listed. That is, examining Schedules for a particular country across time allowed for checking whether a country may have decreased or increased its protections against *ḥarām* goods. If there was no change across time, then no special notation exists, *i.e.*, stability in the trade policy of that country toward forbidden products logically can be inferred. But, where a country did so (as with Egypt and Turkey, discussed below), Table 5 sets out the pertinent information. Naturally, seeing either consistency or change is itself an interesting finding.

Over time, WTO Members update their Schedules of Concessions. Thus, a new time series analysis that highlights consistencies and changes in Schedules is always possible, assuming new data are readily available on a reliable website. For instance, for some OIC-WTO Members, 2007 bound tariff rate data may be available.

words, classification of countries is based on the headline figure of the bound MFN rate. But, so as to be transparent, any ODC is listed parenthetically under the bound rate.

It is important to recall a WTO Member need not impose its bound rate, *i.e.*, it may apply a duty at any level up to the binding.[1066] While not a complete justification, this risk perhaps is offset in part by reliance on bound MFN rates, not actually applied duties. Doing so might overstate the actual protection against *ḥarām* products in a country that does not set its applied rate at the ceiling level.

Second, how should a country be treated if it uses a specific duty, as distinct from an *ad valorem* tariff, on a *ḥarām* product? Ideally, an *Ad Valorem* Equivalent would be computed for the specific duty, and classification would follow easily. However, computing AVEs is beyond the present scope. So, countries imposing a specific duty were classified based on a reasonable estimate of the significance of that duty. There was only one such country, Malaysia. It uses a specific duty denominated in local currency.

Third, how should a country be treated if it has bound MFN tariffs on *ḥarām* products at different levels, depending on the product? Should it be classified based on its lowest bound rate, its highest one, or the average? Or, should the same country appear in multiple categories?

The latter approach is used here. Doing so is interesting, as it reveals the dispersion of tariffs on forbidden products within a particular country. Indeed, that dispersion suggests the country may be motivated less by Islamic Law than by value added steps in production when opting for different tariff bindings on different products – for example, live swine, fresh or frozen carcasses, and prepared or preserved ham, and sausages.

- **Status Categories and Unaddressed Questions**

Again, of the full data set of 57 OIC countries, 34 of them are WTO Members with Muslim majority populations. This subset may be organized according to three broad status categories:

(1) International Trade Law –
When did the country accede to the WTO?

(2) Religion –
To what extent is Islam the dominant (and indeed, state) religion of the country, are there different branches of Islam (in particular, what is the *Sunnite – Shī'īte* breakdown) and non-Islamic faiths?

(3) Socio-economy –

[1066] *See* RAJ BHALA, MODERN GATT LAW – A TREATISE ON THE LAW AND POLITICAL ECONOMY OF THE GENERAL AGREEMENT ON TARIFFS AND TRADE AND OTHER WORLD TRADE ORGANIZATION AGREEMENTS Volume 1, Chapters 22-23 (London, England: Thomson Sweet and Maxwell, 2nd ed., 2013). [Hereinafter, BHALA, MODERN GATT LAW.]

As a snapshot of economic growth and development, respectively, what is the *per capita* GDP and adult literacy rate of the country?

This categorization prompts fascinating linkage questions.

For example, what is the relationship among the status categories? Are OIC countries that have acceded to the WTO characterized by large Muslim majorities and modern, developed economies? Looking at the Gulf Arab states, that seems to be the pattern: all the GCC countries are WTO Members, whereas the poorer non-GCC countries, namely Iraq, are Observers. The membership of a non-GCC country, Yemen, was approved in December 2013. Does such a pattern suggest the diversity observed in import policies has more to do with regional culture than with religion? Perhaps it is the culture predominant among countries within the same region that affects their decisions about how to treat international trade in alcohol and pork.

Yet, such questions are not the focus here. Rather, the relationship between the status categories, on the one hand, and their trade laws and policies toward products forbidden under the Classical Theory of the *Sharī'a*, on the other hand, is considered. The key inquiry is: what are the characteristics of OIC countries that have joined the WTO, have majority Muslim populations, and also invoked GATT Article XX(a), and what is the nature of their invocations?

- **Seven Import Measure Classifications**

OIC-WTO Members with Muslim majority populations may be slotted into seven categories, which bespeak increasing degrees of protection:

(1) Very Low Tariff Policy

These OIC-WTO Members have a bound MFN tariff of 0% to 29% on alcohol or pork. Conventionally, a tariff of below 10% conventionally would be considered "low," especially among developed countries, and below 5%, essentially *de minimis*. However, a tariff of 11%-29%, while not insignificant, certainly is not prohibitive. It still permits imported alcohol or pork market access, especially if there is no meaningful domestic like product competition.

(2) Low Tariff Policy

These OIC-WTO Members have a bound MFN tariff of 30% to 49% on alcohol or pork. A tariff of 30%-49% is an impediment to the access of merchandise into the market of the importing country, as it is leads to a notable increase in the price of imported merchandise in the importing country (assuming the producer-exporter or importer do not absorb the tariff). But, it still permits market access for those imports, alcohol or pork, especially if there is no meaningful domestic like product competition.

(3) Medium Tariff Policy

OIC-WTO Members in this category have bound MFN duties on alcohol or pork between 50% and 99%. A tariff of this amount causes a noticeable retail price hike to imported merchandise, essentially, 1.5 times the non-tariffed price. It likely means average, middle class consumers would find alcohol or pork a luxury items, ones for special occasions. But, it does not dissuade them altogether from consumption, and perhaps is an unpleasant fact of consumption for wealthy buyers.

(4) High Tariff Policy

Any tariff over 100% is considered "High," simply because the retail price of the merchandise is at least doubled. OIC-WTO Members in this category may be sending either or both of two signals to prospective purchasers: consuming alcohol or pork is unlawful under the *Sharī'a* for Muslims in the country, so a High Tariff operates to discourage buying the merchandise; but if either they or non-Muslims insist on consuming it, then the government will collect a stiff "penalty." Those who can afford the High Tariff, defined here as between 100% and 299%, are either High Net Worth individuals, or consumers who have saved for the product, which they may do insofar as they regard it as a luxury good for special occasions.

(5) Prohibitive Tariff Policy

With a tariff of over 300%, it seems apparent a country is trying to deter importation of the product at issue. To be sure, HNW individuals can afford to consume goods on which duties such as 300% are levied. But, the vast majority of consumers are priced out of the market for that good. In other words, from a tariff over 300%, it may be inferred that the point of trebling the price of the good is to block its importation.

(6) Import Ban Policy

OIC-WTO Countries in this category have invoked GATT Article XX(a), banning importation of alcohol or pork as necessary to protect public morality as that morality is defined under Islamic Law. This position (as indicated above) comes closest to a pure, strict interpretation of Islamic principles on *ḥarām* products.

(7) Unbound Policy

OIC-WTO countries in this category have refused to bind their MFN duties on one or more on *ḥarām* products.

Via these categories, the diversity of import measures employed by the countries toward beer, wine and spirits, and pork, is apparent (as discussed below).

- **Preliminary Points**

Should the inquiry be limited to successful invocations by a Muslim-majority OIC country when it negotiated for WTO Membership? What about unsuccessful invocations during the accession process, that is, times when an applicant tired but failed to invoke the public morality exception? There is no publicly available documentation of such instances, insofar as the negotiations were and remain confidential.

Is WTO accession the only opportunity to invoke Article XX(a)? The answer is "no." There are 2 further contexts in which a country might try to use GATT Article XX(a). The first is in a litigation posture, namely, a case brought against it under the WTO *DSU*. China did so in the 2010 *Audiovisual Products* case, but lost. The second is under the TPRM, which is established by Annex 3 to the *WTO Agreement*. Possibly, a WTO Member criticized during the Review for a protectionist measure could claim an Article XX(a) justification. This interchange might be documented in the relevant TPRB Report. It would be necessary to check all such Reports for OIC countries that are in the WTO, a task for another time.

Might a Muslim-majority OIC-WTO Member country have invoked an itemized exception under GATT Article XX, other than Paragraph (a), to block or impede imports of merchandise that are religiously proscribed under the *Sharī'a*? That is, might a country limit importation of a *ḥarām* product like alcohol as necessary to protect human health under Article XX(b)? One such country, Tajikistan, subject alcohol to an import license and quota restriction.[1067] But, the general answer is no. The nature of *ḥarām* good – alcohol, pork products, and pornography – seems to make justification easier under Paragraph (a) than (b). Aside from pornography, whether the other products, when consumed in moderation, pose a threat to human health is dubious. But, whether any of them could be regarded as "immoral" by adherents to a particular faith is not in doubt, even if the faith-based justification is not shared by non-believers, and indeed some adherents.

- **Documentation**

Where, exactly, is invocation of GATT Article XX(a) documented? Ideally, any product for which an import ban or impediment is recorded should be listed in the *Protocol of Accession*, *Working Party Report*, or both, and presented in an Annex thereto. Then, such a product should be listed in the HS Schedule of Tariff Concessions, with a designation such as "P" for "Prohibited," *i.e.*, importation of the good is prohibited. Saudi Arabia represents this ideal case.

Accordingly, it ought not to be necessary to consult the HS Schedule to find out which products, if any, a country has declared an Article XX(a). Yet, in some instances,

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[1067] *See WTO Report of the Working Party on the Accession of the Republic of Tajikistan*, WT/ACC/TJK/30, 95 (6 November 2012).

the *Protocol*, *Report*, and Annexes thereto were silent as to invocation of Article XX(a). Indeed, they were rather cursory and uninformative documents. In those cases, the HS Schedule had to be checked to see if there were any "P" items, and if mention (in the Head Notes to the Schedule) was made of Article XX(a). So, documentation underlying Article XX(a) invocations reflects both types of sources, that is, the *Protocol*, *Report*, and Annexes were checked, and the Schedule was checked, too. Such Schedules are from the WTO website.[1068]

- **Services Exclusion**

Manifestly, an inquiry into morality and international trade ought to cover not only goods, but also services. There is a public morality exception in the *GATS*. Its language, in Article XIV(a), tracks that of the GATT Article XX(a) exception. Islamic countries may, and indeed some do, have concerns about financial services that entail excessive risk (*gharar*) or interest (*ribā*).[1069]

V. Analysis of Import Measures on *Ḥarām* Products

- **Article XX(a) Uncommonly Invoked**

What patterns emerge from as to the relationship for Muslim majority OIC-WTO Members and their invocations of GATT Article XX(a)? The first, and perhaps most surprising, finding is that only a minority of those Members expressly invoked GATT Article XX(a) to ban importation of *ḥarām* goods. That is evident from an oft-used indication such as: "Neither the *Protocol of Accession* nor *Working Party Report* states an invocation of Article XX(a)." Indeed, the only OIC-WTO Member countries that declared Article XX(a) exceptions in their *Protocols of Accession* were KSA, Jordan, Oman, and Yemen.

[1068] The specific link is www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm#bhr, which is to a Table listing all WTO Members. The 4th column of that Table concerns Goods Schedules annexed to the *Marrakesh Protocol* (*i.e.*, the Uruguay Round Schedule), or to the *Protocol of Accession*. Each cell in the column contains a hyperlink to the Schedule of each Member. In contrast, the 8th and final column contains applied MFN rates, as well as updated bound Schedules, if the Member updated its Schedule since the Uruguay Round or post-Round accession.

The discussion above (and the Tables referenced earlier) relies on bound MFN rates, not actual applied rates. Ideally, if a country prohibits importation under GATT Article XX(a) of an article, then it would indicate that bar in both its bound and applied rate data. If it permits importation, but under a tariff, then an actual or prospective exporter and importer would care about the applied rate, but would look to the bound rate as the "worst case" scenario, as it is the ceiling level.

For all countries that are both in the OIC and WTO, HS Schedules are in English, except: Burkina-Faso; Chad; Côte d'Ivoire; Djibouti; Gambia; Guinea; Guinea-Bissau; Mali; Mauritania; Morocco; Niger; Nigeria; Senegal; and Tunisia. Obviously, the same techniques for reading and interpreting the English language Schedules were used for the French Schedules, with translation. Fortunately, the 2002 Schedules of these Francophone countries are available in English, and the English version was used, with cross-checking to the French version.

[1069] The Footnotes to the Table 5 referenced earlier list such cases, but do not pursue them through a detailed examination of the Schedules of Services Concessions.

Put simply, as a matter of modern International Trade Law, the majority of Islamic countries treat these forbidden products like any other merchandise in global trade. Notwithstanding orthodox precepts of the *Sharī'a*, most OIC-WTO countries generally do not ban importation of alcohol or pork products. Rather, they impose the most conventional of protections against them: tariff barriers. Typically, the bound MFN duty rates are significant, sometimes quite stiff, and occasionally prohibitive.[1070]

It would be unfair, erroneous, and even slanderous, to infer from this legal fact that "some Muslims behave hypocritically." Like adherents to any other great faith, some Muslims are devout, others are secular, still others in between, and all are on a spiritual journey. Absolutely no inference whatsoever should be drawn from international trade rules of Islamic countries about the piety of Muslims as individuals, or the sincerity of Muslim communities in OIC-Member countries about the practice of Islam.

What can be said is that as a practical legal matter, most Islamic countries have not availed themselves of the GATT Article XX(a) exception so as to ban importation of alcohol or pork products. The obvious next question is, "Why?" That is, "Why do so many Islamic countries in their tariff schedules allow importation of *ḥarām* and non- *ḥarām* goods? Like the Islamic world itself, and like the theory and practice of the *Sharī'a*, there is no monolithic answer, no "one size fits all" explanation. Different OIC-WTO countries are different.

Consider five possibilities. First, some countries are less orthodox in their interpretation of Islamic legal precepts than others. Bangladesh and Saudi Arabia are cases in point. Second, some countries have large non-Muslim populations. For them, consumption of alcohol and pork is not prohibited. Third, some countries are interested in collecting tariff revenue from alcohol or pork imports, in preference to spending funds on customs and border patrol agents to deter smuggling of these items. Fourth, some countries have domestic breweries or pig farms of their own. Bali Hai and Bintan beer are brewed in Indonesia, as is Efes in Turkey, which also has pig farms. Invoking GATT Article XX(a) in such cases clearly would be hypocritical. Fourth, consciousness about these prohibitions is stronger in recent years, especially after September 11, 2001, than in past decades. Religious matters are more public today, so not drinking, and not eating pork, is not just a personal question, but also a trade issue. These answers are not mutually exclusive.

But, arguably the most likely answer is a sixth one: lack of legal capacity. Many trade negotiators for OIC-WTO Members might not have known of the existence of GATT Article XX(a). Or, if they did, then they might not have appreciated how they could deploy this provision to implement the *Sharī'a* prohibitions.

- **Patterns in Respect of Article XX(a) Invocation**

As to a second set of empirical findings, suppose invocation of GATT Article XX(a) is regarded as a dependent variable, and the (1) geographic region of a country, (2)

[1070] They also may impose NTBs, such as import licensing schemes, but those types of restrictions are not reflected in Tariff Schedules, and not discussed herein.

percentage of Muslim population (*i.e.*, religious pluralism), (3) *per capita* income, and (4) adult literacy rate as independent variables. Then, the following noteworthy patterns are apparent:

(1) *Frequency?*

Of all 34 OIC-WTO Member countries with Muslim-majority populations, only four expressly invoked Article XX(a): KSA; Jordan; Oman; and Yemen. Of these four countries, only two of them – Saudi Arabia and Yemen – did so for the traditional *ḥarām* products, alcohol and pork.

(2) *Gulf Arab Countries?*

This fact contrasts with an initial hypothesis, namely, OIC-WTO Member Gulf Arab countries easily would be the most conservative with respect to their trade policies toward these products, and thus the most aggressive in invoking Article XX(a). This hypothesis perhaps reflects more of a stereotype, or hidden assumption, that strict views on Islamic Law in most Gulf countries would translate directly into protectionist trade policies against *ḥarām* (*e.g.*, alcohol or pork) and *ḥarām*-related products (*e.g.*, distilling equipment or prepared ham sandwiches). Thus, it was anticipated Saudi Arabia would be the quintessential example, the lead that other Gulf countries would follow. And indeed, the newest Gulf Arab country to join the WTO, Yemen, has invoked Article XX(a) for many more products than Saudi Arabia.[1071]

However; in truth, the Kingdom, joined in 2014 by Yemen, are unique examples. The Yemeni and Saudi invocations of Article XX(a) extend to the broadest range of commodities of any OIC-WTO Member. An illustration is the treatment of distillation equipment by the Kingdom. Such equipment has dual use: as travellers to Saudi Arabia may have observed, some homes in the Kingdom have distillation equipment that may be used for the production of alcoholic beverages. But, such equipment also may be used for reasons other than making beer, wine, or spirits, for example, perhaps in a chemistry classroom or laboratory. Likewise, Yemen invoked Article XX(a) not only for alcohol and pork products, but also poppy seeds, cameras that show the human body naked, and gambling tables, machines, or tools.

(3) *Non-Gulf Arab Countries and Turkey?*

OIC-WTO Member non-Gulf Arab countries are unlike Gulf Arab countries with respect to invoking Article XX(a). Jordan is the only OIC-Member outside the Gulf to use Article XX(a), but it does not do so for *ḥarām* products.

Among non-Gulf Middle Eastern countries, those in the Levant are notably liberal in their trade policies toward these products. In particular, both Lebanon and Syria

[1071] Technically, Yemen does not have coastline on the Persian (Arabian) Gulf, hence calling it a "Gulf" Arab country is geographically erroneous.

– though not yet WTO Members – not only permit importation of alcohol and pork products, but also produce and export those products.[1072] Indeed, they have reasonably diversified alcoholic beverages industry, going beyond just beer and wine. Turkey, too, fits the pattern of producing and exporting such products.

(4) *Iran?*

The Islamic Republic of Iran is a fascinating *sui generis* case. It is not yet a WTO Member, and images and stereotypes emanating from the 1978-1979 Islamic Revolution suggest alcohol and pork products are strictly *ḥarām* under a fanatically puritanical regime. In fact, the truth is more nuanced. Data from Iran reported by the United Nations and mirror statistics (*i.e.*, data not obtained directly from Iran, but rather from partner countries with which Iran trades) suggest Iran produces and exports alcoholic beverages and pork.[1073] For example, Iran exported beer, wine, fermented beverages, spirits – nearly everything except vermouth – in 2012. As another example, while for 2010 and 2011, Iran did not appear to export pork, in 2012 it did.

One interesting cause for this surprising finding may be American trade sanctions on Iran. (Discussed in separate Chapters, these sanctions have become ever-tougher, especially since the 1996 *Iran and Libya Sanctions Act* and amendments to it in 2010 and 2012, targeting a larger number of sectors of the Iranian economy.) Starting with the petroleum industry, the U.S. extended them to refined gasoline, finance, instruments of human rights abuses and press censorship, and precious metals. Possibly, Iran may be seeking to make up for export revenues denied to it by the sanctions by making and shipping alcohol and pork.

However, the WTO accession terms of Iran, whenever they are finally agreed, will tell how scrupulously the Islamic Republic adheres in its trade policy, by invoking Article XX(a), to the *Sharī'a* prohibitions.

(5) *Indian Sub-Continent?*

Conversely, OIC-WTO Member countries on the Indian Sub-Continent and Far East tend to be more liberal in social and cultural morays than those in the Gulf. Their populations are, after all, relatively more diverse. Yet, their tariff rates on

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[1072] *See* International Trade Center, *Trade Map- Trade Competitiveness Map,* www.intracen.org/country/lebanon/ (expand "Trade and Investment Data;" then follow "Trade in Goods Statistics (HS)" hyperlink. Click "Product" drop down menu to view "02- Meat and edible meat offal," "15-Animal, vegetable fats and oils, cleavage products, etc," "16- Meat, fish and seafood food preparations nes," and "22-Beverages, spirits and vinegar"). *See also* International Trade Centre, *Trade Map- Trade Competitiveness Map,* www.intracen.org/country/syrian-arab-republic/.

[1073] *See* International Trade Center, *Trade Map- Trade Competitiveness Map,* www.intracen.org/country/iran/ (expand "Trade and Investment Data"; then follow "Trade in Goods Statistics (HS)" hyperlink. Click "Product" drop down menu to view "02- Meat and edible meat offal," "16-Meat, fish and seafood food preparations nes," and "22-Beverages, spirits and vinegar"). The Center relied on mirror statistics to obtain data for 2012.

alcohol and pork tend to be high, which may reflect more their protectionist trade policies than their desire to adhere to strict Islamic legal precepts.

(6) *Africa?*

In OIC-WTO Member countries in North and Sub-Saharan Africa, there is an alignment between their relatively cosmopolitan social and cultural attitudes toward alcohol and pork, on the hand, and their trade policies, on the other hand. Tariffs on these products tend to be lower than observed on the Indian Sub-Continent.

(7) *Religious Pluralism?*

The above patterns suggest that more religiously pluralistic (but still Muslim-majority) OIC-WTO Member countries not only abjure use of Article XX(a), but regard *ḥarām* products not so much as forbidden, but as any other kind of merchandise. Their importation is not to be banned, but to be regulated according to bound tariffs that reflect domestic political and economic concerns. Those concerns include protecting domestic producers of, and garnering tax revenues from, alcohol and pork. Simply put, Muslims in such countries interact daily with non-Muslims, and have for well over 1,000 years. Production, importation, and consumption of alcohol and pork are unsurprising behaviors to them.

(8) *Poverty and Education?*

It is tempting to believe OIC-WTO Member countries with a low *per capita* income, and/or a low literacy rate, invoke Article XX(a). Posed as an hypothesis, the idea is that poor, uneducated Islamic populations are more likely to follow strict interpretations of Islamic law than Muslim communities that are richer, literate, and interactive with non-Muslim groups. That certainly is reasonable, and borne out in other contexts, but it is not apparent from the trade policies of these countries toward *ḥarām* products.

Specifically, there is no clear negative correlation between income or education, on the one hand, and invocation of Article XX(a), on the other hand. Consider Saudi Arabia, Oman, Yemen, and Jordan, which invoked Article XX(a). Their populations, with the exception of Yemen, are relatively richer and better educated than their compatriots in other OIC-WTO Member countries: Saudi Arabia and Oman have relatively high *per capita* income (U.S. $25,700 and 28,500, respectively), and all 3 countries have relatively high literacy rates (81.4%-92.6%).

(9) *Sunni-Shī'īte Split?*

The *Sunni-Shī'īte* split seems to have no impact on invocation of Article XX(a). That is, setting aside the special case of Iran, the balance between these two

branches of Islam, or indeed an imbalance, within an OIC-WTO Member appears to have no bearing on how the Member treats imports of *ḥarām* products.

Accordingly, an initial hypothesis that countries with larger *Shī'īte* populations will be more likely to ban forbidden products, or put higher tariff barriers on them, is incorrect. Here again, such a starting point may be grounded on an unfair stereotype, to the effect that one branch of Islam tends more to extremism than another branch. The fact some extremist groups claim (erroneously) to be authentically *Sunni* (*e.g.*, *Al Qaeda*, *Islamic State*, and *Taliban*), while others claim to be "*Shī'īte*" (*e.g.*, *Hezbollah*) puts paid this stereotype.[1074] In any event, such groups have little effect, if even knowledge, of trade policy.

Each pattern could be re-tested with sophisticated (but problematic) statistical and econometric techniques, such as correlation coefficients and multivariable regression analysis.

For now, however, note the importance of considering WTO accession dates. Countries that joined the GATT as contracting parties, sometimes under the wing of their former colonial master (*e.g.*, Indonesia under the Dutch), joined in a pre-WTO era when religion was less of a public, trade-related issue. Put differently, the accession date itself may be an independent variable, with later-in-time dates corresponding to a period of greater "Islamic consciousness" in the public sphere.

- **Specific Findings**

In addition to the patterns noted above, several findings specific to one or a subset of Islamic countries are evident, as follows:

(1) *Former Communist Countries*

Three former Communist countries, all of which have sizeable Muslim majorities, and are at different stages of economic growth and development, did not invoke Article XX(a): Albania, Kyrgyz Republic, and Tajikistan. The reason may be exogenous, namely, historical and cultural. The legacy of Soviet influence included (*inter alia*) official Atheism and an environment in which drinking alcoholic beverages was acceptable.

(2) *Non-Invocation in GATT Era Accessions*

A large number of Muslim-majority OIC-WTO Members did not invoke GATT Article XX(a) during their accession negotiations. For some of them, especially ones that joined GATT as contracting parties before the birth of the WTO on 1 January 1995, they appear to have done so under Article XXXIII, under the auspices of their former Colonial masters. These countries essentially entered on

[1074] *See* BHALA, UNDERSTANDING ISLAMIC LAW Chapters 50-54 (explaining why Islamist extremist views advocated by terrorist organizations are not authentically Islamic).

the terms of those masters, which being European, would not have included public morality concerns under the *Sharī'a*.

(3) *Importation Allowed but Unbound Tariffs*

From the perspective of a producer-exporter or importer of merchandise, an unbound tariff rate poses the greatest uncertainty. That is because a country of importation is not committed to a ceiling rate under GATT Article II:1(b), hence it may apply any duty, no matter how high. Importation still may occur, but if the applied rate is substantial enough, the merchandise is effectively barred from the market. In such cases, there is a great incentive to smuggle the high-tariffed articles.

Some OIC-WTO Member countries deal with *ḥarām* products not by an express invocation of GATT Article XX(a) banning their importation as immoral, but rather via refusing to bind their tariffs on them. Pakistan and Brunei are examples with respect to alcohol. Their unbound, 2013 applied rates are 90% and 100% respectively.[1075] Similarly, for pork products, Pakistan has an unbound, applied rate of 90% and Brunei has an unbound, applied rate of 100%.

(3) *Importation Allowed but High Tariffs*

For a large number of Muslim-majority OIC-WTO Members that did not invoke GATT Article XX(a) during their accession negotiations, their HS Schedule of Tariff Concessions reveals they allow importation of *ḥarām* goods, namely, alcohol and pork products, but not pornography. Even a short stay as a tourist in such countries can confirm the point, as in countries like Indonesia and Malaysia, as well as Turkey, beer and wine are available (and, in Turkey, produced). The Tariff Schedules of these countries reveals importation of *ḥarām* goods may occur at bound MFN duty rates that are extraordinarily high (*e.g.*, 200%).

However, to characterize a tariff as "high" begs a question: "high" relative to what? That is, tariffs are meaningful in a relative sense, thus it is useful to begin with some benchmarks against which OIC-WTO Member duty rates can be gauged.

The simple mean bound tariff rate for all products of all countries (WTO and non-WTO Members) is 32.72%.[1076] For low-income economies, the simple mean bound tariff rate is 50.45%. These countries are defined as ones with a *per capita* GNP of $1,035 or less.[1077] Most LDCs are considered low-income or low-middle

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[1075] Data for tariffs applied by Pakistan on pork and alcohol products are based on the MFN Applied Tariff at the HS 6-Digit Sub-Heading Level, HS 2012 (updated 27 November 2013), which is based on notifications to the Integrated Database (IDB). Data for tariffs applied by Pakistan on pork and alcohol products are based on the MFN Applied Tariff at the HS 6-Digit Sub-Heading Level, HS 2007 (updated 27 November 2013), which is based on notifications to the IDB. This information is available at www.wto.org/english/tratop_e/schedules_e/goods_schedules_table_e.htm#top.

[1076] World Development Indicators Table 6.6, http://wdi.worldbank.org/table/6.6.

[1077] World Development Indicators Table 6.6, http://wdi.worldbank.org/table/6.6. Table 6.6 is based on 2012 data.

income.[1078] Among OIC-WTO Members, all but four LDCs are also classified as low-income economies. Yemen, Djibouti, Mauritania and Senegal are lower-middle-income economy countries.

In contrast, for high-income countries, the average tariff rate is 22.1%. These countries are defined as ones with a *per capita* GNP of $ 12,616 or greater. Among OIC-WTO Members, most of the Gulf Arab countries and Brunei would be included as "high-income."

Using these figures as benchmarks, it can be said with confidence that virtually all OIC-WTO Members have "high" tariffs on *ḥarām* goods. Only a handful of these Members have tariffs below or in the range of 22.1%, 32.7%, or 50.5%, namely: Bahrain (pork products), Brunei (pork products), Jordan (pork products), Morocco, Kyrgyz Republic, Djibouti (pork products), Côte d'Ivoire, Guinea, Guinea-Bissau, Mali, Senegal, Sierra Leone (pork products), Indonesia (pork products), and Albania.

Of course, a more targeted set of benchmarks would be tariff rates for specific *ḥarām* goods, namely, the product categories covering alcohol and pork. Finding average bound tariff rates on such merchandise is surprisingly difficult. One reason may be that many countries impose a specific duty on alcohol, pork, or both. So, for them it is necessary to computing an AVE figure.

There are several ways to calculate AVEs. Put most simply, AVE is the value of the tariff divided by the unit value. The unit value is "the value of a particular trade flow during a specified period divided by its volume."[1079] However, there are several ways to calculate the unit value, and an AVE assessment can vary depending on how the unit value is calculated. AVEs can also differ if the price of the product varies.

In lieu of, or in addition to, product-specific duty rate averages across countries, a possible benchmark is an average for a sector. Both alcoholic beverages and pork fall within the agricultural sector. The global average agricultural bound tariff was approximately 62% in 2001.[1080] That average was derived in part from AVEs, and does not take into account alcoholic beverages.

[1078] A list of LDCs is posted on the U.N. Development Policy and Analysis Division website, www.un.org/en/development/desa/policy/cdp/ldc/ldc_list.pdf. The World Bank has a list of low to high income economies, *posted at* http://data.worldbank.org/about/country-classifications/country-and-lending-groups#Low_income.

[1079] World Trade Organization, International Trade Center, and United Nations Conference on Trade and Development, *World Tariff Profiles 2012*, 197, www.wto.org/english/res_e/publications_e/world_tariff_profiles13_e.htm.

[1080] U.S. Department of Agriculture, *Agricultural Economic Report No. 796: Profiles of Tariffs in Global Agricultural Markets* (January 2001), www.ers.usda.gov/ersDownloadHandler.ashx?file=/media/919871/aer796.pdf.

With these points in mind, Egypt is a case in point. It has the highest *ad valorem* tariff on alcohol of any OIC-Muslim country: 3,000%. Maldives is another example. It has one of the highest bound rates for pork: 300%, plus an ODC of 1%.

Accordingly, most Muslim countries allow importation of *ḥarām* goods, namely, alcohol and pork products, but have scheduled fairly high bound MFN rates on them. However, the adverb "fairly" is important: "fairly" in relation to what other duty rates?

If the comparison is to bound duty rates among developed countries, then the numbers indeed are high. Rich countries have far lower bound rates on most items than poor countries. But, if the comparison is to bound levels set by the same country, then "fairly" might mean "pretty much average." Bangladesh is a case in point. Many Bangladeshi tariff lines for agricultural products are 200%, so a 200 percent duty on alcohol is in line with levies on other agricultural goods.

(4) *Ad Valorem versus Specific Duties and Maximization of Tariff Revenues*

Almost all Muslim countries that impose a bound MFN duty on *ḥarām* goods use an *ad valorem* rate. Kyrgyzstan and Malaysia are notable exceptions. Kyrgyzstan uses specific duties, and hybrid (compound) duties that are a mix of *ad valorem* and specific duties. Malaysia uses specific duties for all alcoholic beverages.

Use of a specific duty is economically imprudent. The duty does not adjust for inflation, as it is tied only to the volume of imported merchandise. So, for example, Malaysia levies a specific duty for beer imports of 150 *Ringgit Malaysia* (*RM*) per decaliter (dal). That means Malaysia collects the same revenue from a shipment of Bud Lite or Miller Lite as it does from a shipment of Sam Adams or Brooklyn Lager, assuming the shipments are of the same volume. Manifestly, the prices of Bud and Miller Lite are lower than those of the craft beers (presumably reflecting quality). Bluntly put, then, if Malaysia – as a Muslim country – is not going to ban importation of alcoholic beverages, then it might as well maximize the tariff revenue it collects from such beverages by using *ad valorem* instead of specific duty rates.

(5) *Lowering of Protections against Ḥarām Goods*

Checking the most recent Schedule of Concessions allows for the opportunity to see if a Member actually might have lowered its bound rate on a *ḥarām* good.[1081] The answer was "yes" in the case of Jordan. Its Schedule as of 2002 showed duty rates on pork and pork products ranging from an average of 15% to 30%. However, its Uruguay Round Schedule showed rates on these products around 200%. Jordan,

[1081] As referenced earlier, for OIC-WTO Members for which data in their Uruguay Round or Accession Protocol Schedule were insufficient, it was necessary to consult their most recently posted Schedule (if any), typically, the 2002 Schedule.

then, had lowered its bound *ad valorem* MFN tariffs on pork and pork products in the years following the conclusion of that Round.

The answer also was "yes" in the case of Turkey. It lowered from 120% and 100% on genever and gin, respectively, its bound rate to a maximum of 102%. Turkey also refined its product classification of various products, particularly pork.

(6) *Use of ODCs*

Several OIC-WTO Members, predominantly in Africa, impose not only OCDs, but also ODCs, on certain *ḥarām* goods. These 19 countries are Kuwait, Qatar,[1082]

[1082] The hosting by Qatar of the 2022 World Cup was controversial for several reasons, two of which were the alleged use of forced labor (discussed in a separate Chapter), and its peculiar arrangements for the service of alcohol:

> Budweiser beer stands at the eight World Cup stadiums are being moved aside to less prominent spots just days before the games start, Qatari organizers said….
>
> It's the latest late change in World Cup planning that started more than a decade ago in the majority-Muslim emirate where alcohol sales are strictly regulated.
>
> Qatar consented when launching its historic hosting bid in 2009 to respect FIFA's commercial partnerships, including the long-established Budweiser deal that was renewed 11 years ago with brewer AB InBev through the 2022 tournament.
>
> World Cup organizers finally confirmed a beer sales policy in September [2022] covering the stadiums and official FIFA-authorized fan sites.
>
> … [J]ust eight days before the first games, the agreement was tweaked to give Budweiser-branded sales tents less visibility for serving beer with alcohol within stadium perimeters.
>
> …
>
> The compromise on beer sales in Qatar was announced only in September [2022,] and allowed for beer with alcohol to be served before and after games in the stadium perimeter. Only alcohol-free Bud Zero can be served during games and within the stadium bowl.
>
> Champagne, wines, and spirits, as well as beer, will be served at stadium restaurants and lounges for corporate hospitality clients. Fans staying in most high-end hotels and three cruise ships hired by organizers as floating hotels for the tournament also can buy a range of alcoholic drinks.

Graham Dunbar, *Budweiser Stalls To Be Less Prominent at World Cup Stadiums*, THE WASHINGTON POST, 14 November 2022, www.washingtonpost.com/sports/soccer/budweiser-stalls-to-be-less-prominent-at-world-cup-stadiums/2022/11/14/adbcd7ec-6464-11ed-b08c-3ce222607059_story.html. *See also World Cup 2022: Alcohol Sales Banned at World Cup Stadiums in Qatar*, BBC NEWS, 18 November 2022, www.bbc.com/sport/football/63674631 (reporting: "Alcohol will not be sold to fans at the World Cup's eight stadiums in Qatar after Fifa changed its policy two days before the start of the tournament. Alcohol was set to be served 'in select areas within stadiums,' despite its sale being strictly controlled in the Muslim country. … Budweiser posted a message on Twitter … saying, 'Well, this is awkward,' before the post was later deleted. An AB InBev spokesperson said that they could not proceed with 'some of the planned stadium activations' because of 'circumstances beyond our control."). To what extent (if any) did Qatar's last-minute, and arguably procedurally non-transparent, NTBs on alcoholic beverage importation and distribution during the World Cup undermine its trade policy concerning alcohol?

Morocco, Djibouti, Burkina-Faso, Côte d'Ivoire, The Gambia, Guinea, Guinea-Bissau, Mali, Mauritania, Niger, Nigeria, Senegal, Sierra Leone, Bangladesh, Maldives, Indonesia, and Malaysia. The GATT Article II:1(b) tariff binding principle, in the first and second sentences, respectively, applies to both types of levies.

Unfortunately, the WTO *Accession Protocols* and Schedules of these countries do not chronicle in detail the nature of the ODCs. In other words, what they are, and why they are imposed, is unclear from those documents. However, three points are apparent from them.

First, many ODCs take the form of an *ad valorem* charge, and are listed as such, namely, "ODC AV," in the Schedules. Presumably, that means the ODC is a percentage of the value of the shipment of a *ḥarām* good. Second, some of the ODCs are imposed on a non-AV basis. Some of them appear to be minimum fees, such as per bottle, per volume, or per weight.

Third, the ODCs are not insignificant. They tend to add a material cost to the importer of *ḥarām* goods, and sometimes can be prohibitive. For example, for alcoholic beverages, Morocco imposes a 34% tariff, plus a 15% ODC AV. In Djibouti, for alcoholic beverages, the bound tariffs start at 150%, with considerable upward variation depending on the type of alcohol. On pork products, the bound tariffs are 40%. But, for both alcoholic beverages and pork, the average ODC AV is 100%. Thus, relative to Morocco, Djibouti imposes a whopping ODC on top of a stratospheric OCD, the combined effect of which is prohibitive.

(7) *Missing Data and Inferences Therefrom*

For some OIC-WTO Members, no pertinent data on GATT Article XX(a) invocation for *ḥarām* goods is listed in their *Protocol*, *Report*, Annexes, and Schedules.

That means nothing can be inferred from those WTO sources as to whether importation of such goods is, or is not, banned. However, credible evidence from other sources indicates alcohol and/or pork is available for lawful consumption under restricted circumstances. These sources include HS Schedules, International Trade Center, *Lonely Planet* travel guides, media reports, and the travel experiences of the authors. These countries include Kuwait, Tunisia, and Bangladesh.

The typical pattern in these countries is alcohol and/or pork is available in limited venues, such as luxury hotels and restaurants. This pattern suggests two possibilities: The first, and more likely, possibility is importation of alcohol and/or pork is lawful, *i.e.*, no Article XX(a) exception was taken. However, importation is restricted in some way, typically a high tariff, a quota, or a TRQ, coupled with licensing of permissible importers.

The second is importation is forbidden, so such products enter via smuggling, but their consumption is lawful. The second possibility would be a protectionist one, in support of one or more domestic producers, conferring on them a monopoly.

Malaysia and pork present a case in point. The Malaysian Schedule is confusing as to "Fresh or chilled meat of swine (excluding carcasses and half-carcasses, and hams, shoulders and cuts thereof, with bone in)," which is HS Code 020319. The Schedule contains no information, other than a dot, in the relevant Columns (5, 6, and 7). Do the dots mean "same as above HS Code," *i.e.*, the same tariff as the entry before HS Code 020319? No, because the Schedule contains columnar repetitions. Indeed, it does so immediately above and below HS Code 020319 (with a duty rate of 139% on the above and below Codes). Do the dots mean "Unbound"? No, because Column 2 states "B," for "Bound." Column 8 indicates the percentage of tariff lines under the HS Code 020319 that are duty free is 0, suggesting Malaysia does not give duty-free treatment for that Coded merchandise. But, no duty (whether *ad valorem*, specific, or hybrid) is listed in any other Column.

This example is important. Fresh and chilled pork is a common retail grocery item. Not knowing whether a tariff barrier exists, and if so, what it is, obviously is troubling to prospective producers, distributors, and consumers.

- **Patterns in Respect of Seven Import Measure Classifications**

If there is one obvious bottom line conclusion, then it is summarized by the phrase "diversity within unity" across Muslim-majority OIC-WTO Members. That is because the following points are clear from slotting these countries in the seven aforementioned import measure categories:

(1) *Very Low Tariff Policy (0-29%)*

With respect to alcoholic beverages, a sizeable number of countries are in this category: 11 out of 34 for beer (32.3%), and eight out of 34 (23.5%) for wine and spirits, collecting some revenues on *ḥarām* goods, but not deterring their importation or consumption.

As for pork products, there is a clear concentration of countries in the Very Low and Low Tariff Classifications – 44.1% and 23.5%, respectively.

(2) *Low Tariff Policy (30%-49%)*

Few countries fall in this category for alcoholic beverages, two with respect to beer and four with respect to wine and spirits. In contrast, they do populate this category as regards pork products.

(3) *Medium Tariff Policy (50%-99%)*

A small number of countries – four for beer, seven for wines and spirits, and two for pork products – are in this category. Presumably, they seek to collect significant revenue on this merchandise, but not stamp out its consumption.

(4) *High Tariff Policy (100%-299%)*

There is concentration of countries in this category, with 14 out of 34 (41.1%) in it for beer, and 17 out of 34 (50%) in it for wines and spirits. That also is true for pork products, with 14 out of 34 (or 41.1%), of them pursuing the High Tariff Policy. Apparently, they are sending either or both of two signals: discourage consumption or collect revenue.

(5) *Prohibitive Tariff Policy (over 300%)*

No country takes the purportedly Prohibitive Tariff approach to prevent importation of pork products, and almost none does so for alcohol. Egypt is the sole occupier of this category for all alcoholic beverages, though Djibouti uses it for wine and spirits. Interestingly, Egypt lowered modestly its ultra-high tariff following the Uruguay Round.

(6) *Import Ban Policy*

Only Saudi Arabia and Yemen invoke GATT Article XX(a) to ban importation of alcohol or pork as necessary to protect public morality as that morality is defined under Islamic Law. Whether that is or should be the metric for alignment of international trade law with *Sharī'a* is debatable, but plainly just two countries seem to think it is.

(7) *Unbound Policy*

Only Pakistan refuses to bind its MFN duty rates on all *ḥarām* products, and only Brunei does so on alcohol. Producer exporters thus lack certainty and predictability about what measures Pakistan or Brunei may impose on them.

In addition, there is dispersion among the countries in three respects.

First, and least importantly, some countries impose different levels of protection against wines and spirits within a particular category. That also occurs with respect to pig fat versus other pork products.

Second, some countries treat beer differently from cider or perry, and some of them distinguish among types of wines and spirits. They do so to the extent to warrant categorization in multiple Classifications, indicating dispersion across those Classifications. Here again, that occurs for pig fat.

Third, for beer, and for wines and spirits, every Classification is populated, and all but one is for pork products. That fact, in itself, adduces that OIC-WTO Members with Muslim majority populations are not all like-minded in whether and how they make consistent their import measures with *Sharī'a* precepts about *ḥarām* goods. What is interesting to see, and perhaps worthy of more research, is polarization within this dispersion, namely, the existence of concentrations in Very Low or Low Tariff Classifications at one end, and in the High Tariff Classification at the other end.

VI. Banning Pornographic Imports

Obviously, pornography is one *ḥarām* product. That is true not only under the *Sharī'a*, but also under United States trade law that pre-dates GATT, namely, the *Smoot-Hawley Tariff Act*.[1083] To ascertain which OIC-WTO Members have put an outright import ban on pornography in their Schedule of Tariff Concessions, the logical move is to check those Schedules. However, the HS does not list "pornography" as a specific product category with an attendant HS number. To rely on this methodology would yield an under-inclusive result of zero. But, it would be wrong to infer from the lack of an HS line item for pornography that no Muslim country bans the product.

So, the next logical move is to check those Schedules for product categories that embody pornography, *i.e.*, through which pornography is distributed: printed materials, audio-visual DVDs, and music CDs would be the prominent ones. However, this methodology is over-inclusive. No Muslim country bans all printed materials, DVDs, and CDs. Rather, some impose low or mid-range tariffs on these goods (*e.g.*, 10%-15%), which are below the tariffs they impose on alcoholic beverages. Others do not even list such items in their Schedules.

The safest course likely is to discount silence in Schedules and presume all Muslim countries, like many non-Muslim ones, ban importation of pornography. They do so under their own domestic legal instruments, for which GATT Article XX(a) doubtless would be a justification. However, pornographic items, like other unlawful goods, tend to enter such countries through smuggling.

VII. From How to Why?

The above discussion addresses the question how Muslim countries treat *ḥarām* goods. Empirical data analyzed above reveal Islamic countries tend to behave like non-Islamic ones, especially developing ones, as regards their trade rules on alcohol and pork products. They tend not to ban importation of these items, which would be the logical trade measure if they followed strictly the *Sharī'a*. Instead, Muslim countries tend to impose high, revenue-generating tariffs, and exhibit diversity in terms of the levels and features of those barriers.

1083 *See* 19 U.S.C. § 1305, as amended. This statute initially was enacted as part of the *Tariff Act of 1930*, and sometimes is called the "*Smoot-Hawley Tariff Act*." *See* June 17, 1930, ch. 497, title III, § 305, 46 Stat. 688.

The natural next question is why, that is, why do Muslim countries treat *ḥarām* goods the way they do? A full exploration of this issue is beyond the present scope, but three explanations are readily apparent: legal capacity; tolerance; moral relativism; and secularism. They are not mutually exclusive, and perhaps even complementary to some degree. Moreover, different explanations may attach better to different countries.

- **Legal Capacity?**

First, some Islamic countries simply may lack the legal capacity to appreciate they have the choice to ban alcohol and pork products under GATT Article XX(a). When they were negotiating accession to GATT or the WTO, they may have failed to realize invocation of Article XX(a) was possible. Once they acceded, they may have not understood that they could modify their Schedule of Concessions, albeit with payment of appropriate compensation to affected exporting countries, under Article XXVIII *bis*.

This explanation may be especially pertinent to Islamic countries that entered GATT under the auspices of their former European colonial masters, which almost certainly had a relaxed attitude toward "forbidden" merchandise. The North and Sub-Saharan African countries are examples.

- **Tolerance?**

Second, Islamic law historically has been tolerant of religious minorities and their practices. During the *Umayyad* and *Abbasid* Caliphates, and Ottoman and Mughal Eras, Islamic leaders governed vast territories encompassing Jews, Christians, Zoroastrians, pagans, and persons of other beliefs. Few of these non-Muslim populations abjured alcohol or pork; indeed, for some (such as Christians) wine was part of their sacred liturgy and culture. Today, many Muslim countries are religiously pluralistic. Despite the dastardly violent extremism against non-Muslims in a few countries perpetrated falsely in the name of Islam, the dominant narrative remains one of openness.

That narrative suggests a trade policy of acceptance toward products that, strictly speaking, are forbidden for Muslims to consume, but acceptance at a price – namely, a revenue-generating tariff. Indeed, the high tariff on alcohol and pork observed in so many Islamic countries might even be analogized loosely to the *jizyah* (religious tax) that used to be imposed by conquering Islamic forces on non-Muslim *dhimmis* who had signed a treaty of surrender. The *jizyah*, imposed on these non-Muslim conquered peoples in lieu of the *zakat*, was justified as protection afforded to them by the governing Islamic power, and with that protection they carried on their religious and cultural practices. In brief, a high tariff on alcohol and pork products, like a *jizyah*, ensures those goods remain *ḥarām* for Muslims, but allows non-Muslims to carry on.[1084]

- **Moral Relativism?**

[1084] *See* BHALA, UNDERSTANDING ISLAMIC LAW, 449 (listing objects generally considered *ḥarām* under *Sharī'a*) and 1237 (regarding alcohol consumption by non-Muslims in Brunei).

Perhaps the most interesting empirical pattern is there is no single one. The Islamic world is not monolithic. Few Muslim if any countries adhere exclusively to the *Sharī'a*. KSA, Yemen, and Iran would be the "purest," in the classical sense. In contrast, Malaysia and Turkey may look to the *Sharī'a* for inspiration in certain areas of law, but otherwise are largely secular countries.[1085] In between these two poles different Islamic countries fall at different points.

Consequently, each Muslim country defines "public morality" in its own way, in keeping with the insight about Islam that it has unity in diversity, but also diversity in unity. Does it mean Muslim countries have fallen victim to moral relativism?

It is worth contemplating what "moral relativism" means. On this topic, a particularly renowned writer, Pope Emeritus Benedict XVI, defines the term as:

> … the notion, widely held today, that there are no absolute truths to guide our lives. Relativism, by indiscriminately giving value to practically everything, has made "experience" all-important. Yet, experiences, detached from any consideration of what is good or true, can lead, not to genuine freedom, but to moral or intellectual confusion, to a lowering of standards, to a loss of self-respect, and even to despair.[1086]

and also:

> … relativism, that is, letting oneself be "tossed here and there, carried about by every wind of doctrine", seems the only attitude that can cope with modern times. We are building a dictatorship of relativism that does not recognize anything as definitive and whose ultimate goal consists solely of one's own ego and desires.[1087]

Whether moral relativism helps explain the empirical diversity depends in part on the timing of the invocation, *i.e.*, the question is dynamic (time series) but the Tabular data are static (cross-sectional). The answers also depend in part on the outcome of the Arab Spring revolutions, and analogous developments outside Arab region. Where Muslim countries lie on the spectrum defining the extent to which they adhere to the *Sharī'a* in its classical theory changes over time.

- **Secularism?**

A third explanation is secularism. Notwithstanding the diversity within the unity of the Islamic world, the considerable variations among Muslim countries as to their trade

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[1085] *See* BHALA, UNDERSTANDING ISLAMIC LAW, xxix-xxx, and Table I:1 at xxxi (differentiating among Muslim countries as to sphere of application of the *Sharī'a*).

[1086] Pope Benedict XVI, Welcoming Celebration by the Young People: Address of Benedict XVI (17 July 2008), www.vatican.va/holy_father/benedict_xvi/speeches/2008/july/documents/hf_ben-xvi_spe_20080717_barangaroo_en.html.

[1087] Cardinal Joseph Ratzinger, Homily (delivered 18 April 2005), www.vatican.va/gpII/documents/homily-pro-eligendo-pontifice_20050418_en.html.

policies on *ḥarām* goods might reflect a lack of interest in drafting and enforcing a "Muslim" trade policy. Even though political and religious leaders in these countries may profess formal adherence to the precepts of Islam, as a practical matter, many people in them are secular in outlook. That certainly is true in "Christian" America, "Buddhist" Korea, or "Hindu" India.

That is not to say people in these countries are not devout. Quite the contrary: sincere devotion knows no geopolitical boundaries. Rather, it is to say many people in Muslim (and non-Muslim) countries regard religion as a personal, private matter. So, the choice of consumption of alcohol or pork products is between the disciple and God (Allāh), not a matter for trade policy via an import ban.

If secularism is an explanation for the trade policy of Muslim countries toward alcohol and pork products, then perhaps it is wrong to think of them as "Muslim" in the first place. To typecast them as religious is unfair, because they do not try to inject strict Islamic precepts in their Tariff Schedules any more than Christian countries try to inject Gospel teachings in theirs. Both groups of countries are secular in their trade outlook; for all of them, setting and adjusting tariffs is a matter of political economy. They consider what is in their comparative advantage, in the context of domestic constituencies (especially producers of like products) that lobby for protection.

The term "secularism" requires definition. Among those who have thought about its meaning and effects are Pope Emeritus Benedict XVI and Pope Francis. Muslim clergy, too, worry about secularism undermining commitment to religious values.[1088] However, at least in the non-Muslim English-speaking world, these two leaders have garnered considerable attention for their work. In his 224-page November 2013 Apostolic Exhortation, *Evangelii Gaudium* (*The Joy of the Gospel*), Pope Francis (1936, 266th Pope, 2013-) explains that secularization has eroded ethical values, creating a sense of disorientation and superficiality. He states:

> … by completely rejecting the transcendent, [secularism] has produced a growing deterioration of ethics, a weakening of the sense of personal and collective sin, and a steady increase in relativism. These have led to a general sense of disorientation, especially in the periods of adolescence and young adulthood, which are so vulnerable to change. As the bishops of the United States of America have rightly pointed out, while the Church insists on the existence of objective moral norms, which are valid for everyone, "there are those in our culture who portray this teaching as unjust, that is, as opposed to basic human rights. Such claims usually follow from a form

[1088] *See* Mehmet Görmez, Religion and Secularism in the Modern World: A Turkish Perspective (March 2012), http://sam.gov.tr/religion-and-secularism-in-the-modern-world-a-turkish-perspective/ (. *See also* John Esposito, *Rethinking Islam and Secularism*, 10-13, 17 (2010) (concerning Mustafa Cerić) www.thearda.com/rrh/papers/guidingpapers/esposito.asp.

> of moral relativism that is joined, not without inconsistency, to a belief in the absolute rights of individuals. …".[1089]

In sum, the third explanation is that Muslim and non-Muslim countries alike are influenced by secular trends when forging their trade policies. The result is not a pure, single-minded dedication to writing and implementing religiously-based trade measures, but rather what might be dubbed a materialistic policy.

VIII. Future Options

● Recall GATT Articles XXVII-XXVIII

By no means is an OIC-WTO Member stuck with a binding to which it committed on a *ḥarām* good. Any WTO Member, with respect to any bound rate on any product category, has a legal right under GATT Articles XXVII and XXVIII to increase or otherwise alter that rate. But, these Articles contain requirements that must be followed.[1090]

Briefly, a Member seeking modification must negotiate or consult with other Members, particularly those with a principal supplying interest, or a substantial interest, in the product for which tariff alteration is sought. They are to seek agreement on compensatory adjustments, meaning that if the Member raises barriers on alcohol or pork, then it should lower barriers on another or other products. After all, the Member is withdrawing a concession it previously made on a *ḥarām* good, so it needs to "pay" with a new and different concession. If no agreement is reached, then the other Member or Members may retaliate against the modifying Member by withdrawing substantially equivalent concessions to their trade with it.

● Synopsis

Islam is a unifying force bringing together 57 countries in the OIC, 48 of which are demographically Muslim-majority, and 34 of which hold WTO Membership. Islam has unifying precepts: most essentially, monotheism, the belief in a Day of Judgment, and the view that God (Allāh) intervenes in human history; and most practically, the Five Pillars. That Muslim countries regard certain goods as forbidden under the *Sharī'a* bespeaks a unity. But, Islam and its legal system hardly are monolithic. That they have different import rules on *ḥarām* goods shows their rich diversity.

[1089] Pope Francis, Apostolic Exhortation, *Evangelii Guadium* (24 November 2013), at paragraph 64, www.vatican.va/holy_father/francesco/apost_exhortations/documents/papa-francesco_esortazione-ap_20131124_evangelii-gaudium_en.html.

[1090] For a detailed discussion of adjusting tariff schedules, see Raj Bhala, *Modern GATT Law*, Volume I, Chapter 25.

Chapter 27

GATT ARTICLE XX(a) MORALITY EXCEPTION (CONTINUED): ANIMAL RIGHTS AND MONEY LAUNDERING[1091]

I. Principal Object of Seal Regime in 2014 *Fur Seals* Case[1092]

Easily the most interesting discussion in the *Fur Seals* case concerned GATT Article XX. The Appellate Body applied precedent, namely, its Two Step Test for controversies under this provision. In Step One, it asked whether the EU Seals Regime was provisionally justified under one of the 10 itemized exceptions in Article XX, in particular, Paragraph (a), concerning public morality. Canada and Norway argued the Regime was not "necessary" to protect public morals, but they lost that argument at the Panel and Appellate Body stage. Hence, the Appellate Body proceeded to Step Two: did the Seals Regime meet the requirements of the *chapeau* to Article XX?

Here the complainants prevailed, *i.e.*, the EU failed to prove its Regime was not an arbitrary, unjustifiable, and non-discriminatory measure. Animal rights could come within the scope of public morality, thanks to the Step One ruling. But, thanks to the Step Two ruling, the respondent could not show its derogation from the "immediately and unconditionally" requirement of Article I:1 met the rigorous terms in the Article XX *chapeau*.

The Appellate Body commenced its Two Step Test with an examination of the objective of the Seal Regime. It did so not because it was setting a new precedent, such as transforming from Two to Three Steps its Test. Rather, the objective of any controversial measure bears on the application of the Two Steps. To answer whether a measure is necessary to protect public morality, and to answer whether that measure is not arbitrary, unjustifiable, or discriminatory, is to beg a question: what is the point of the measure? What is the measure designed to do? The answer to that question, following the 2012 *Tuna Dolphin* Appellate Body Report, demands study of the (1) text of the measure, (2) its legislative history, and (3) any other evidence as to its structure or operation.

The EU, Canada, and Norway all agreed the object of the Seal Regime was to address European public concerns about the welfare of seals. They disagreed, however, on two points about that objective. First, is seal welfare a "moral" concern for the European

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[1091] (1) *Havana (ITO) Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, XX, XXI, XXIV, and XXXV

[1092] This case is cited, and its facts summarized, in an earlier Chapter.
Is the public morality exception of GATT a "legitimate objective" under the *TBT Agreement*, even though that *Agreement* does not mention morality? The Panel noted that public morality concerns under GATT Article XX(a), which also are in *GATS* Article XIV(a), are incorporated into the *TBT Agreement* thanks to the *Preamble* of that *Agreement*. The *Preamble* (in the second recital) says an objective of the *Agreement* is to advance the goals of GATT. One goal of GATT is to protect public morality. Thus, public morality is a "legitimate objective" under Article 2:2 of the *TBT Agreement*. On this point, the Panel appears to have made new law.

public? Second, are the other interests the Regime addresses through its IC, MRM, and Travelers Exceptions part of that same objective about seal welfare, or are they a distinct set of concerns, *i.e.*, a separate objective? Predictably, Canada and Norway said seal welfare is not a "moral" concern, and the Exceptions constitute a separate objective. The EU took the opposite approach: seal welfare – in effect – animal rights are about public morality, and so are the Exceptions.

Based on the text of the Basic and Implementing Regulations, their legislative history, and extrinsic evidence (namely, a survey of European public opinion), the Panel held the Seal Regime was designed to address public concerns over the welfare of seals. It also said legislative history showed the EU took into account other interests, specifically, those of Inuit peoples, marine management, and the personal use by travelers of seal products, through its IC, MRM, and Travelers Exceptions, respectively. Certainly a measure can have multiple objectives, but not here: the text, legislative history, structure, and design of the Regime did not indicate the "aim," "target," or "goal" of the Regime was to protect the interests of Inuit, marine managers, or travelers.[1093] Grounded firmly on concerns of EU citizens, the seal welfare was its principal objective. It so happened that the EU added the Exceptions during the legislative process, and they embodied interests not predicated on the concerns of EU citizens.

So, while distinguishing those interests from seal welfare, the Panel found they did not constitute independent policy objectives. The entire GATT Article XX analysis could focus on seal welfare, and not worry that the interests in the IC, MRM, or Travelers Exceptions were a distinct objective from that welfare needing a separate inquiry into their connection to European public morality. With this finding, the Panel confined its morality, thereby making the European burden far lighter: had it held otherwise, the Europeans would have had to show that Europeans regarded as a matter of public morality the interests of Inuit, marine management, or travelers. Doubtless, the EU could not have shown they are "articulations of the same standard of morality."[1094]

The Appellate Body found no fault with the work of the Panel as to the objective of the EU Seal Regime. Rather, the problem with the Norwegian appellate argument: Norway mischaracterized the Panel finding as that the "sole objective" of the Regime was to address seal welfare. Norway said the reality of the Regime was it pursued other objectives, such as helping the Inuit, managing marine resources, or tolerating personal idiosyncrasies of travelers.

The Appellate Body agreed the characterization of a respondent as to the objective of its controversial measure need not be accepted by a Panel, or by the Appellate Body. The Appellate Body had said precisely that in its 2005 *Antigua Gambling* and 2012 *Tuna*

1093 *Fur Seals* Appellate Body Report, ¶ 5.136 (*quoting Fur Seals* Panel Report, ¶¶ 7.400-4.401).

1094 *Fur Seals* Appellate Body Report, ¶ 5.136 (*quoting Fur Seals* Panel Report, ¶ 7.404, in turn *quoting* EU opening statement at second Panel hearing).

Dolphin Reports, and cited them.[1095] Nevertheless, in this case, the EU got it right, and the Panel was correct in accepting the EU characterization.

The text of the Basic Regulation, its legislative history, and its structure and design adduced that the Regime "was adopted … to respond to EU public moral concerns with regard to the welfare of seals."[1096] If the main objective of the EU legislators had been to protect the Inuit, manage marine resources, or accommodate travelers, then they never would have adopted the Regime. As the EU said, the Regime "reflects a moral standard of 'animal welfarism,' pursuant to which 'humans ought not to inflict suffering upon animals without a sufficient justification."[1097]

As for the IC Exception, it did not embody a separate objective. Rather, EU legislators judged "the subsistence of Inuit and other indigenous communities and the preservation of their cultural identity 'provide benefits to humans which, from a moral point of view, outweigh the risk of suffering inflicted upon seals as a result of the hunts conducted by those communities.'"[1098] Neither the Panel nor the Appellate Body was willing to go that far, *i.e.*, neither accepted the EU characterization that the European public gave a "higher moral value" to protecting Inuit than to saving seals.[1099] Fortunately for the EU, opining on that moral balance was unnecessary, if not irrelevant.

What mattered was that based on its text, legislative history, and structure, design, and operation, the "principal" objective of the Seal Regime was to respond to the moral concerns of the European public about seal welfare. The IC, MRM, and Travelers Exceptions embodied accommodations for other interests within that Regime, but did not undermine its "main" objective." Their "relative significance" as policy interests was less than seal welfare – the key goal – but the EU addressed them so as to "mitigate the impact" of the rules protecting seals on those interests.[1100] That was good enough.

II. Animal Welfare as "Public Morality"

● Scope of Article XX(a)?

With its finding that the principal objective of the EU Seal Regime concerns public morality, the Panel moved to the first disputed point: was seal welfare (with the Exceptions and all) within the scope of "public morals"? That is, is seal welfare "*anchored in the morality* of *European* societies"?[1101] Yes, said the Panel.

1095 *See Fur Seals* Appellate Body Report, footnote 1108 at ¶ 5.144; *Tuna Dolphin*, ¶ 314; Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R, ¶ 304 (adopted 20 April 2005). Our *WTO Case Review 2005* discusses this Report.

1096 *Fur Seals* Appellate Body Report, ¶ 5.142.

1097 *Fur Seals* Appellate Body Report, ¶ 5.143 (*quoting* EU submissions).

1098 *Fur Seals* Appellate Body Report, ¶ 5.143 (*quoting* EU submissions).

1099 *Fur Seals* Appellate Body Report, ¶ 5.148.

1100 *Fur Seals* Appellate Body Report, ¶ 5.167.

1101 *Fur Seals* Appellate Body Report, ¶ 5.137 (*quoting Fur Seals* Panel Report, ¶ 7.404).

But, notice that in framing the question in this manner, the Panel showed its moral relativism. The question was not whether seal welfare is an objectively and universally shared moral concern. Rather, under the text of GATT Article XX(a), the question was a subjective one, specific to a particular society at a particular time. In turn, if public morality is context-specific, contingent on time and place, then it is susceptible to change. Seals can be clubbed to death for their fur in one country at one time, but not in that same country at another time, or in another country at the same or a different time.

How did the Panel determine the Europeans cared, in a moral sense, about seals? It looked to (1) the legislative history of the Seal Regime, (2) actions taken by the EU and individual EU states to protect animal welfare, and (3) domestic legislation and international conventions the EU adopted to protect animal welfare. It cannot be said the Panel used a "Totality of the circumstances Test," for such a Test was beyond its reach. Obviously, it could not conduct its own fact-finding, scouring the public squares of Old and New Europe to see what people thought. It was ill equipped to consider the extent to which the animal rights views of the famous philosopher, Peter Singer (1946-), were accepted in those squares.[1102] Yet, based on those sources, as the Appellate Body put it, the Panel found evidence of "*standards of right and wrong conduct* maintained by or on behalf of the *European Union* concerning seal welfare."[1103] Or, as the Panel said, the evidence "*as a whole sufficiently demonstrates* that animal welfare is an issue of *ethical or moral nature* in the *European Union*."[1104] Note the contextual nature of this finding, and by extension, the Panel avoiding a discussion of what "ethics" or "morality" is.

Logically, the next move in the analysis by the Panel was to ensure the objective of the EU Seal Regime was to address the moral concerns of the EU with respect to seal welfare. That is, having established that seal welfare is a matter of public morality under GATT Article XX(a), was the aim of the Seal Regime to advance that moral interest? The answer again was yes. The Panel looked at the design, structure, and operation of the Regime, focusing on its text and legislative history. From these sources, three points were clear. The Regime was designed, structured, and operated to: (1) decrease the incidence of inhumane killing of seals; (2) reduce the extent to which Europeans abetted inhumane seal hunting, individually and collectively as consumers, through their exposure to economic activity in a market that sustains inhumane hunting; and (3) tolerate to a limited extent certain non-commercially-hunted seal products.

The Appellate Body did not examine the work of the Panel on this matter. It left untouched the finding that animal morality comes within the ambit of the GATT Article XX(a) "public morality" exception.

- **Identification of "Risk" to "Public Morality"?**

Canada unsuccessfully argued it is illogical to say Sub-Paragraph (a) provisionally justifies the Seal Regime without identifying a specific "risk" to public morality against

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1102 *See* WIKIPEDIA, *Peter Singer*, http://en.wikipedia.org/wiki/Peter_Singer.

1103 *Fur Seals* Appellate Body Report, ¶ 5.138.

1104 *Fur Seals* Appellate Body Report, ¶ 5.138 (*quoting Fur Seals* Panel Report, ¶ 7.409).

which the Regime "protects."[1105] The Panel, said Canada, was wrong to eschew discussion of the content of the relevant public moral at stake, *i.e.*, to avoid this question: what is the risk to the European standard of right-versus-wrong conduct? If the Panel had examined this question, then it would have realized the hypocrisy in the EU position: the EU allows for animal suffering in the context of slaughterhouses. If Europeans do not regard the meat-producing industry as a risk to animal welfare, then how can they justify singling out the seal hunting business as a risk?

Moreover, urged Canada, when WTO adjudicators weigh GATT Article XX(b) cases, they examine the risk to human, animal, or plant life or health at stake. Panels and the Appellate Body seek to know the risk against which a controversial SPS measure is structured, designed, and operated. The Article XX(b) exception, like Article XX(a), uses the verb "protect." So, under Sub-Paragraph (a), surely it is essential to identify the risk to public morality?

If the Appellate Body sought seamless truth with capitals "S" and "T," then Canada would have prevailed on this argument. If animal welfare is the moral goal, then only strict vegetarianism is acceptable: allowing omnivorous behavior entails killing, and killing obviously is a risk to animal welfare. So, either all animal product imports should be banned, or the goal of animal welfare should be abandoned. That was Canada's underlying point: if the EU is serious about that welfare, then it should not be allowed to pick and choose among types of animals. Otherwise, any WTO Member will have free reign to behave in an economically opportunistic manner under the guise of its self-defined morality. The EU had not (yet) persuaded all Europeans to "go vegetarian."

But, what the Canadians wanted was too much and too hard. As the EU put it, if Canada succeeded, then there would be a new "Strict Consistency" Test under Article XX(a): respondents invoking this exception would have to prove "the relevant standard of morality is consistently applied by them in each and every situation involving similar risks."[1106] What the Canadians wanted also was ironic: here was the nation famed for environmentalism, splendid landscape, and thriving wildlife, the land of environmental novelist Farley Mowatt (1921-2014) and his *Never Cry Wolf* (1963), railing against a ban on seal products. However philosophically rigorous the Canadian argument might have been, its practical legal and economic repercussions undermined the symbol of the Maple Leaf. Arguably the best explanation for the incongruity was Canada thought it was helping a people it had previously harmed: the Inuit. Fighting for the Inuit Exception to help its IC was fighting an historical wrong done to Canadian Aboriginals.

The Appellate Body rejected the Canadian-backed "Strict Consistency" Test (dubbed as such by the EU).[1107] Lacking stylistic elegance in its pronouncement, the Appellate Body essentially said that just because animal welfare cannot be protected across all species does not mean it should not be protected for any of them. Under the 2005 *Antigua Gambling* decision, WTO Members have the sovereign right not only to define

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1105 *See Fur Seals* Appellate Body Report, ¶¶ 5.194-5.201.

1106 *Fur Seals* Appellate Body Report, ¶ 5.195 (*quoting* an EU submission).

1107 *Fur Seals* Appellate Body Report, ¶ 5.195.

their "public morality," but also the latitude to apply that definition in different ways. Nothing in Article XX(a) mandates that similar public moral concerns must be regulated in similar ways. The EU is free to regulate slaughterhouses and seal hunts differently, pursuing the latter, but not the former, with an import ban.

As to analogizing Sub-Paragraph (a) to (b) in GATT Article XX, Canada failed to appreciate the distinct nature of those exceptions. Reading an "identification of risk" standard into Article XX(b) made sense, but not into Article XX(a). The Appellate Body looked to the meaning of "protect" in the *OED*: "defend or guard against injury or danger; shield form attack or assault; support, assist …; keep safe, take care of…."[1108] From this lexicography, the Appellate Body did not infer an implicit notion of an identifiable risk. But, in certain contexts in which "protect" is used, this notion may be implied. One such context is Article XX(b), which is all about protection of human, animal, or plant life or health from disease or disease-bearing pests. Those dangers – or risks – are the subject of the *SPS Agreement*, which elaborates on the proper deployment of Article XX(b).

In contrast, said the Appellate Body, Article XX(a) has no implicit risk identification metric:

> 5.198. … [T]he notion of risk in the context of Article XX(b) is difficult to reconcile with the subject matter of protection under Article XX(a), namely, public morals. While the focus on the dangers or risks to human, animal, or plant life or health in the context of Article XX(b) may lend itself to scientific or other methods of inquiry, such risk-assessment methods do not appear to be of much assistance or relevance in identifying and assessing public morals. We therefore do not consider that the term "to protect," when used in relation to "public morals" under Article XX(a), required the Panel, as Canada contends, to identify the existence of a risk to EU public moral concerns regarding seal welfare.
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> 5.199. For this reason, we also have difficulty accepting Canada's argument that, for the purposes of an analysis under Article XX(a), a panel is required to identify the exact content of the public morals standard at issue. The Panel accepted the definition of "public morals" developed by the panel in *US – Gambling*, according to which "the term 'public morals' denotes 'standards of right and wrong conduct maintained by or on behalf of a community or nation.'" The Panel also referred to the reasoning developed by the panel in *U.S.-Gambling* that the content of public morals can be characterized by a degree of variation, and that, for this reason, Members should be given some scope to define and apply for themselves the concept of public morals according to their own systems and scales of values. …

[1108] *Fur Seals* Appellate Body Report, ¶ 5.197 (*quoting Shorter OED*, 6th ed., 2007, A. Stevenson ed.).

> 5.200 Finally, by suggesting that the European Union must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, Canada appears to argue that a responding Member must regulate similar public moral concerns in similar ways for the purposes of satisfying the requirement "to protect" public morals under Article XX(a). In this regard, we note that the panel in *U.S.-Gambling* underscored that Members have the right to determine the level of protection that they consider appropriate, which suggests that Members may set different levels of protection even when responding to similar interests of moral concern. Even if Canada were correct that the European Union has the same moral concerns regarding seal welfare and the welfare of other animals, and must recognize the same level of animal welfare risk in seal hunts as it does in its slaughterhouses and terrestrial wildlife hunts, we do not consider that the European Union was required by Article XX(a), as Canada suggests, to address such public moral concerns in the same way.
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> 5.201. … [W]e reject Canada's argument that the Panel was required to assess whether the seal welfare risks associated with seal hunts exceed the level of animal welfare risks accepted by the European Union in other situations such as terrestrial wildlife hunts. … Accordingly, we find that the Panel did not err in concluding that the objective of the EU Seal Regime falls within the scope of Article XX(a) of the GATT 1994.[1109]

Put undiplomatically, what the Appellate Body said was SPS measures are a matter of objective science, but moral legislation is "squishy, touchy feely, and subjective." All that matters is a WTO Member denotes a standard of right or wrong its community or society maintains, under its "own system[] and scale of value[]." That it does not apply that standard invariably, "set[ting] different levels of protection even when responding to similar interests of moral concern," is not in itself a violation of Article XX(a). Again, regulation of similar public morality concerns via similar levels of protection is not required.

Here again in its *Furs Seals* Report, the Appellate Body discussion is parlous. It seemed oblivious to the profundity of the point it was defending: "whether to imply risk identification as part of the meaning of "protect" depends on the context in which that verb is used. 'Yes' in Article XX(b), 'no' in Article XX(a)." In theory and practice, and in all contexts, "protection" has no meaning unless there is an actual or potential threat. No individual takes a vitamin pill, no community builds a retaining wall, and no country bans importation of a product, without reason. Each is free to set the level of protection, *i.e.*, to decide how many pills to take, how high to build the wall, or how extensively to enforce the ban. But, none takes the precaution simply for fun.

[1109] *Fur Seals* Appellate Body Report, ¶¶ 5.198-5.201. (Footnotes omitted, emphasis added.)

Put differently, protection is not purposeless, nor is it purely a matter of enjoyment. Just as with a risk to health the *SPS Agreement* and Article XX(b) cover, and just as with the risk to public morality from gambling services the *Antigua Gambling* case treats, for animal welfare concerns in the Seal Regime, there is a risk that gives rise to those concerns.

Consider a provocative example. Suppose a WTO Member implements a "Contraceptive Measure" under which it banned artificial birth control, such as condoms. It justifies the measure as necessary to protect public morality, which in its case is grounded on the 1968 Encyclical of Pope Paul VI, *Humane Vitae*. Why would the Member take this action? The answer surely is that it believes condoms to pose a risk to the dignity of the human person and sexual intimacy. The world – Catholic and non-Catholic – regards this answer as controversial. Should the Member be allowed to maintain its ban, without even having to identify the purported risk? If so, then is there a slippery slope in Article XX(a) jurisprudence, whereby any Member can define nearly any moral concern it wants, ban the relevant product, but not have to show the risk the product poses to that concern?

III. Two Step Article XX(a) Test

● General Article XX Two Step Test

The Appellate Body began its examination of the defense under GATT Article XX(a) the Europeans mounted to save their Seal Regime in light of its violation of the "immediacy and unconditionality" mandate in the Article I:1 MFN rule with a useful tutorial. Citing six of its precedents, explained that any Article XX defense must satisfy a Two Step Test:

> As established in WTO jurisprudence, the assessment of a claim of justification under Article XX involves a two-tiered analysis in which a measure must first be provisionally justified under one of the subparagraphs of Article XX, before it is subsequently appraised under the *chapeau* of Article XX. [Here the Appellate Body cited its 1996 *Reformulated Gas* and 1998 *Turtle-Shrimp* decisions.[1110]] As the Appellate Body has stated, provisional justification under one of the subparagraphs requires that a challenged measure "address the particular interest specified in that paragraph" and that "there be a sufficient nexus between the measure and the interest protected." [Here the Appellate Body cited its 2005 *Antigua Gambling* case, and restated that the Two Step Test applies equally to GATT Article XX(a), or – as in *Antigua Gambling – GATS* Article XIV(a).] In the context of Article XX(a), this means that a Member wishing to justify its measure must demonstrate that it has adopted or enforced a measure "to protect public morals," and that the measure is "necessary" to protect such public morals. [Here the Appellate Body again cited the *Antigua Gambling*

[1110] The *Reformulated Gas* Report is Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996), and the *Turtle Shrimp Report* is Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (adopted November 1998). These cases are discussed in separate Chapters.

> precedent.] As the Appellate Body has explained, a necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the objective, the contribution of the measure to that objective, and the trade-restrictiveness of the measure. [Here the Appellate Body pointed to its *Korea Beef* and *Brazil Retreaded Tires* Reports.[1111]] The Appellate Body has further explained that, in most cases, a comparison between the challenged measure and possible alternatives should then be undertaken. [Here the Appellate Body referred to its *Antigua Gambling* and *Tuna Dolphin* holdings.]

The burden was on the EU, as it is with any respondent, to prove its entitlement to the defense. But, the burden was on Canada and Norway, as it is on any complainant, to show the respondent had alternative measures the respondent could have deployed that would have been less trade restrictive than the disputed measure. The tutorial itself was of pedagogical value not only for tis substance, but also its methodology: indubitably, the Appellate Body regarded its prior jurisprudence as precedent binding on new parties.

- **Step One:**
  Provisionally Justified as "Necessary to Protect Public Morals" – Contribution Analysis?

In Step One, the Appellate Body focused on whether the Seal Regime was "necessary" to protect public morality in the EU.[1112] As it said in its 2007 *Brazil Retreaded Tires* case, "necessity" is not a yes-or-no, black-or-white matter. At issue is how "necessary" is a disputed measure? There are degrees of necessity, from "indispensable" to fulfilling an objective, at one end of a continuum, to "making a contribution to" that objective, at the other end. Two exercises are needed to discern where on the continuum a disputed measure lies: first, consideration of the extent the measure contributes (qualitatively or quantitatively) to its objective; and, second, weighing and balancing a variety of factors against alternative measures.

The first exercise – asking about the materiality of the contribution of the disputed measure to the objective – is a so-called "Contribution Analysis." Canada and Norway argued the Panel erred by looking only at the prohibitive aspect of the Seal Regime – that is, the ban – when determining that the Regime made a "material" contribution to its objective of protecting European public morality concerns about seal welfare.[1113] Supposedly, that was a mistake because the Panel said it was examining the Regime "as a whole" was necessary under Article XX(a). How could the Panel look only at the import ban, and not the Exceptions, if it was making a holistic analysis of "necessity"?

1111 The *Brazil Retreaded Tires* Report is Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tires*, WT/DS332/AB/R (adopted 17 December 2007), and discussed in our *WTO Case Review 2007*.

1112 *See Fur Seals* Appellate Body Report, ¶¶ 5.204-5.290.

1113 *Fur Seals* Appellate Body Report, ¶ 5.207.

The Appellate Body found that not to be the case: the Panel did examine the contribution of both the prohibitive and permissive aspects of the Regime. That is, the Appellate Body agreed the Panel rightly looked at both the prohibitive and permissive features of the Seal Regime (*i.e.*, the import ban on seal products and the IC, MRM, and Travelers Exceptions, respectively), together, when considering whether that Regime was "necessary" under Article XX(a).

Canada and Norway also argued the Panel was wrong to find that the Regime actually did make a "material" contribution to its objective. The EU countered by citing precedent, namely, the 2007 *Brazil Retreaded Tires* case. There the Appellate Body held in the Article XX context that "a contribution should be deemed 'material' provided that it is not 'marginal or insignificant.'" Surely, said the EU, the contribution of the Regime, though not quantifiable, is more than marginal or insignificant.

The Appellate Body agreed a quantitative or qualitative Contribution Analysis is required to assess the necessity of a measure under Article XX. It did not say so, but the underlying logic was that a measure could not be "necessary" to achieve an objective under Article XX if it did not contribute to that objective to some degree. The Appellate Body also accepted *Brazil Retreaded Tires* as the relevant precedent, as that case involved an import ban, namely, of retreaded tires so as to advance the objective of reducing the risk of adverse public health and environmental consequences of waste tires. In that case, the import ban did not have an immediately discernible impact on its objective, so the Appellate Body said the Contribution Analysis took the form of whether the ban was "apt to" achieve its objective. From this "apt to do so" methodology in the *Retreaded Tires* case, the Appellate Body inferred in the Seals Case that there was no pre-determined threshold of contribution.

The Appellate Body found Canada and Norway were mistaken in thinking "necessity" involved a generally applicable, pre-determined threshold of "materiality" in the Contribution Analysis. To the contrary, the threshold depended on a context-specific examination, and could differ from case to case. The Panel found the Seal Regime was capable of, and did make, some contribution to its stated objective of addressing public moral concerns. The prohibitive aspect of the Regime (*i.e.*, the import ban) contributed "'to a certain extent' to reducing global demand, and 'may have contributed' to reducing EU demand."[1114] In doing so, Canada and Norway thought the Panel did not offer clear, precise conclusions. Without a quantitative identification of the degree to which each aspect of the Regime contributed to its objective, the Panel analysis, they said, was nothing more than qualitative. The Panel failed to show how the positive and negative contributions of the different aspects of the Regime to resulted in a net positive contribution of the Regime to its objective, and wrongly took into account the capability (or possibility) a measure would contribute to that objective, rather than considering only the actual contribution of the measure.

Agreeing with the EU, the Appellate Body said the GATT-WTO texts do not prescribe a single way for assessing the contribution of a measure to its objective, nor do

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[1114] *Fur Seals* Appellate Body Report ¶ 5.225 (*quoting Fur Seals* Panel Report ¶ 7.459).

they explain how specific the assessment must be. Rather, they give wide latitude to Panels – a point the Appellate Body made in its 2007 *Brazil Retreaded Tires* Report. That is for good reason.

Assessment of the extent to which a measure contributes to its objective, and in turn qualifies for an exception under GATT Article XX, may be quantitative or qualitative, because it depends on the nature, quantity, and quality of available evidence. In *Fur Seals*, data on the actual operation of the Seal Regime – both the import ban and the exceptions to the ban – were uneven. So, the Appellate Body said the *Fur Seals* Panel acted properly by looking at qualitative evidence. Because of incomplete trade data, the Panel could not possibly discern the extent of the connection between the import ban on seal products and the reduction in the number of seals killed. The EU did not have statistics on seal products other than seal skins (*i.e.*, it had data only for categories of seal products for which tariff classification consisted exclusively of seal or seal-containing products, and after 2006, it did not have data on raw seal skins either). So, the Panel did its best to look at the design and expected operation of the measure.

That was fine, said the Appellate Body. Herein lay an irony: the EU had made the same argument in *Brazil Retreaded Tires* that Canada and Norway made in *Fur Seals*, namely, that in a GATT Article XX necessity analysis, to consider whether a challenged measure is "capable of making a contribution to the objective" is an erroneous legal standard.[1115] In truth, that is an appropriate standard in certain contexts: if the impact of the measure has not yet been realized, so there quantitative metrics are few, then focusing on whether the measure is "'apt to' induce changes over time in the behavior and practices of commercial actors" so as to contribute to the stated objective is appropriate.[1116] Put bluntly, the EU used a precedent that had been adverse to it (its losing argument in *Brazil Retreaded Tires*) with success in the case at bar.

Did the Seal Regime contribute to diminished global and European demand for seal products and, therefore, a lower incidence of inhumanely killed seals? Canada and Norway said there was no evidence to support the Panel's affirmative answer to this question. They also faulted the Panel for subtly changing the objective of the Seal Regime from reducing the number of inhumanely killed seals to reducing global and EU demand for seal products. Demand was not a proxy variable for inhumanity, so it was never proven that cutting demand leads to fewer inhumanely killed seals.

The EU disagreed, and the Appellate Body sided with it, and thus with the Panel. There data were sufficient to show the Seal Regime brought about a decline in EU demand, which contributed to a decline in global demand because European demand is an important component of world-wide demand. Moreover, the Panel was entitled to assume that reducing the number of seals killed, thanks to a decline in demand, necessarily would lead to a reduction in the number of seals killed inhumanely. Simply put, the causation nexus

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[1115] *Fur Seals* Appellate Body Report ¶ 5.224 (*quoting Brazil Retreaded Tires* Appellate Body Report, ¶ 154).

[1116] *Fur Seals* Appellate Body Report (*quoting Brazil Retreaded Tires* Appellate Body Report, ¶ 136, in turn *quoting Brazil Retreaded Tires* Panel Report, ¶ 7.148).

that the Regime made a "partial contribution to addressing the public moral concerns regarding seal welfare," through the variable of global demand for seal products from commercial hunts, was good enough.[1117]

Put bluntly, the Canadian and Norwegian point about causation was pedantic: common sense indicates cutting demand translates into reduced inhumane killing – unless the utterly implausible and uneconomic assumption is made that commercial hunters are bloodthirsty operators eager to kill and pile up seal carcasses in cold storage. The Appellate Body was not blunt. It opted to dilate its Report unnecessarily by another 11 paragraphs (or three and one-half pages), to reach the conclusion Canada and Norway were whining that the Panel did not give their arguments the attention they would have liked.[1118] Such whining – that is, in the words of the 1999 *Korea Alcoholic Beverages* Report, which the Appellate Body recalled, "to fail to accord the weight to the evidence that one of the parties believes should be accorded to it" – was not a violation of *DSU* Article 11.[1119]

Did the Seal Regime lead to worse seal welfare outcomes? Canada and Norway concocted an argument that economists would dub a "substitution effect." They alleged the ban on importation causes:

(1) the replacement of seal products from commercial hunting in Canada and Norway with seal products from Greenland or the EU under the IC and MRM Exceptions, and
(2) there is a higher rate of inhumane killing of seals in IC and MRM hunts than with commercial hunts.

On the first point, Canada and Norway said all seal products placed on the EU market come from hunts in Greenland and the EU under the IC and MRM Exceptions, not from Canada or Norway, as Canadian and Norwegian seal products do not meet the requirements of these Exceptions. Indeed, the only beneficiary under the IC Exception is Greenland, almost all seal products from Greenland qualify for this Exception, and Greenlandic supply easily could fulfill all EU demand.

On the second point, Canada and Norway pointed out the Seal Regime does not impose quantitative limits on the number of qualifying seal products that may be placed on the EU market, nor does it mandate that such products be derived from seals that were, in fact, killed humanely. Moreover, the Greenlandic Inuit use two inhumane methods of killing seals: (1) open-water hunting, or (2) trapping and netting. With the first method, seals are shot with rifles from a boat, which leads to many of them being struck and lost. The second method (specifically, the use of nets) actually is illegal in Canadian and Norwegian commercial hunts.

Rather shocking statistics backed both points: between 1993 and 2009, an annual average of 163,000 seals were killed in Greenland, of which about half – that is, 80,000

1117 *Fur Seals* Appellate Body Report ¶ 5.246.
1118 See *Fur Seals* Appellate Body Report ¶¶ 5.244-5.254.
1119 *Fur Seals* Appellate Body Report ¶ 5.254.

skins – were traded. In contrast, between 2002-2008, the combined total of Canadian and Norwegian exports of skins to the EU was 20,000. Worse yet, said Canada and Norway, once the EU introduced the Seal Regime, Greenland stored in inventory 300,000 skins. However, the EU had plausible rebuttals:

> 5.238. The European Union identifies other facts that, in the European Union's view, contradict the appellants' position: (i) the number of seals hunted in Canada and Norway has traditionally exceeded the number of catches in Greenland; (ii) unlike in Canada and Norway, a large part of the seal skins in Greenland are consumed domestically rather than traded internationally; (iii) a large part of the seal skins are exported from Greenland to markets outside the European Union; (iv) there are Inuit exceptions under other countries' bans that would absorb exports of seal skins traded by Greenland; (v) global demand for seal products may not remain unchanged at currently depressed levels; (vi) the IC exception is subject to conditions that constrain Greenland's ability to expand supply more than traditional levels; (vii) Greenland's supply capacity is declining; and (viii) Greenlandic export data shows stable or declining exports to the European Union.
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> 5.239. The European Union further contends that this evidence demonstrates that, due to depressed global demand and prices resulting in part from the EU Seal Regime, imports from Greenland "have not even returned to their usual level" before seal product bans were first introduced in the European Union in 2007. The European Union also maintains that Norway's assertion that Greenland's supply of 80,000 seal skins per year can easily supply the European Union's average imports of 20,000 skins is flawed. This [*sic*] data, the European Union argues, only covers tanned skins, whereas Canada's principal exports to the European Union consisted of raw skins. Noting that Canada exported more than 100,000 raw skins to the European Union in 2006, the European Union asserts that Norway's own estimates show that "Greenland could not supply that volume on its own, even if it were to discontinue its exports to all other countries."[1120]

In view of the EU's rebuttal, the Appellate Body opted not to disturb the findings of the Panel in respect of the Contribution Analysis. The record showed the Panel had reasonable grounds "for not concluding that: (i) IC and MRM hunts lead to poorer seal welfare outcomes than commercial hunts; and (ii) the EU Seal Regime resulted in the replacement of seal product imports from commercial hunts with such products from IC and MRM hunts."

- **Step One (Continued):**

[1120] *Fur Seals* Appellate Body Report, ¶¶ 5.238-5.239.

Provisionally Justified as "Necessary to Protect Public Morals" – Weighing and Balancing of Factors?

The second of the two exercises associated with any consideration of "necessity" complimented the flexible approach to materiality in the Contribution Analysis: a "weighing and balancing" of factors. Here again the Appellate Body cited its 2007 Report in *Brazil Retreaded Tires*, plus those in *Korea Beef* and *Antigua Gambling*.[1121] A series of factors must be weighted and balanced in a "holistic" manner, particularly the: (1) importance of the objective, (2) contribution of the measure to the objective, and (3) trade restrictiveness of the measure. It is in this setting that the challenged measure and possible, reasonably available, WTO-consistent alternatives are compared.

As with the Contribution Analysis, the weighing-and-balancing factors moved the Appellate Body to agree the Seals Regime was "necessary" to protect European public moral concerns about the inhumane killing of seals. First, the objective was indisputably important. That is, no one in the case contested the importance of protecting seals. Second, as above, the Seal Regime contributed to its objective. Third, while the Regime was trade restrictive, the Panel correctly analyzed reasonably available alternatives.

As to this third factor, the Appellate Body applied the legal standards it established in its 2001 *Korea Beef*, 2005 *Antigua Gambling*, and 2007 *Brazil Retreaded Tires* precedents:

> We recall the Appellate Body's view that the weighing and balancing exercise under the necessity analysis contemplates [quoting *Korea Beef* at ¶ 166] a determination as to "whether a WTO-consistent alternative measure which the Member concerned could 'reasonably be expected to employ' is available, or whether a less WTO-inconsistent measure is 'reasonably available.'" An alternative measure may be found not to be reasonably available where [quoting *Brazil Retreaded Tires* at ¶ 156] it is "merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties." Furthermore, in order to qualify as a "genuine alternative," the proposed measure must be not only less trade restrictive than the original measure at issue, but should also [under *Brazil Retreaded Tires* at ¶ 156 and *Antigua Gambling* at ¶ 308] "preserve for the responding Member its right to achieve its desired level of protection with respect to the objective pursued." The complaining Member bears the burden of identifying possible alternatives to the measure at issue that the responding Member could have taken [citing *Brazil Retreaded Tires* at ¶ 156 and *Antigua Gambling* at ¶ 311].[1122]

[1121] *See Fur Seals* Appellate Body Report, ¶ 5.169 (*citing Brazil Retreaded Tires* at ¶ 182, *Korea Beef* at ¶ 164, and *Antigua Gambling* at ¶ 306).

[1122] *Fur Seals* Appellate Body Report, ¶ 5.261.

Canada and Norway disagreed with the Panel conclusion that the EU had no reasonably available alternative to the Seal Regime.

Canada and Norway identified as a reasonably available alternative conditional market access for seal products. That is, the EU could allow importation of seal products on the conditions they: (1) are produced in a manner compliant with animal welfare standards; and (2) satisfy certification and labeling requirements. In effect, they proposed an alternative measure that would limit access to the EU market to products derived only from humanely killed seals. (Their alternative – indeed, most of the arguments on both sides – begged the question of whether killing seals ever is "humane.") Manifestly, conditional market access would be less trade restrictive than an import ban.

Moreover, they said, when the Panel examined this alternative, it asked whether the alternative would lead to "complete fulfillment" of the EU public morality objective. So, for instance, the Panel evaluated the alternative measure to stringent animal welfare standards such as seal-by-seal certification at the country or hunter level. That was both erroneous and unfair. When the Panel examined the Seal Regime, it used a lower threshold: whether the Regime "actual[ly] contribut[ed]" to the objective. Following the same example, that Regime did not meet a seal-by-seal certification metric. It was much easier to show a measure makes an actual contribution to a moral objective than to show an alternative measure completely fulfills that objective. Stated differently, the same yardstick must be used in the Contribution Analysis of a proposed alternative as was used in that Analysis for the disputed measure. If a more lenient yardstick is used for the disputed measure, then how can the alternative ever be said to be "reasonably available"?

The EU went to the heart of the Canadian and Norwegian argument by saying the reasonable alternative was insufficiently precise. Because it was vague, a "meaningful assessment of its contribution" to the objective was impossible.[1123]

Upholding the Panel assessment, the Appellate Body ruled in favor of the EU. Assessing the alternative Canada and Norway proposed was difficult, because they did not clearly define the contours of animal welfare in the measure. How strict did they believe the animal welfare requirements for permissible importation should be? Their alternative actually created many possibilities across a spectrum defined by "stringency" at one end and "leniency" at the other. Given the various permutations of the alternative, the Panel had good reasons to rule it was not reasonably available:

(1) Logistical problems:
Monitoring and compliance could be difficult and costly, depending on how accurately humanely versus inhumanely killed seals were differentiated. The greater the accuracy the proposed alternative certification system demanded, the greater the logistical aspects of assuring that accuracy.

(2) Compliance and Cost Problems:

[1123] *Fur Seals* Appellate Body Report, ¶ 5.262.

> The ability and willingness of seal hunters to fulfill monitoring and compliance requirements, and incur the costs of doing so, depended on the severity of those requirements. If obtaining certification under the alternative was too difficult, they might ignore or circumvent it, which hardly would lead to seal welfare protection. This problem also existed with respect to downstream stages of seal product production and sale. Operators subsequent to hunters might balk at enforcing burdensome, costly rules.
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> (3) Unintended Consequences:
> Even if the aforementioned problems were overcome, the desire of hunters and downstream operators to comply with the alternative certification system might increase the inhumane killing of seals. That could occur precisely because the hunters and operators knew they could comply, so in their rush to do so, they ramped up production. More seals would be killed humanely, but in the frenzy for profit-driven market access, more would be killed inhumanely, too.

With these uncertainties, it was difficult to say the alternative would achieve the EU objective of protecting public morality as regards seal welfare.

Further, the fact the hypothetical alternative was unclear, requiring the Panel to examine versions of it on the stringent – lenient spectrum, meant the Panel did not evaluate it against one unflagging benchmark that the alternative fulfill completely its objective. Complete fulfillment seemed to be associated with more stringent certification systems, and that would be hard to enforce. Conversely, more lenient stringent systems would be easier to enforce, as some of the uncertainties would be attenuated, but they would contribute weakly to the moral objective of protecting animal welfare. So, the Appellate Body said approvingly of the Panel:

> The fact that the Panel entertained, and compared, the possibility of stringent versus lenient versions of a certification system, in order to consider how a loosely defined alternative measure might contribute to the identified objective, confirms in our view that the Panel was undertaking considerable efforts to understand how such variations of the alternative measure might operate. We understand the Panel to have concluded that, irrespective of the level of stringency, a certification system would be beset by difficulties in addressing EU public moral concerns regarding seal welfare.[1124]

Succinctly put, Canada and Norway had misread, or mischaracterized, the Panel's methodology: the Panel did not use one yardstick different from that by which it measured the Seal Regime. In turn, the Panel was right: the alternative (or, better put, alternatives) was not reasonably available to the EU.

[1124] *Fur Seals* Appellate Body Report, ¶ 5.272.

Interestingly, Canada and Norway battled the EU over the meaning of a precedent set in the 2007 *Brazil Retreaded Tires* and 2005 *Antigua Gambling* cases. The key passage was:

> In *Brazil – Retreaded Tires*, the Appellate Body stated as follows:
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> > As the Appellate Body indicated in *U.S. – Gambling*, "[a]n alternative measure may be found not to be 'reasonably available' … where it is merely theoretical in nature, for instance, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties."[1125]

In deciding whether an alternative measure is reasonably available, based on the costs of that measure, what is the relevant party to examine as to assumption of those costs: the respondent WTO Member, or the adversely affected industry? Reading the above-quoted passage narrowly, Canada and Norway said the former, *i.e.*, what matters are the costs borne by the EU of the alternative they proposed. The EU said the above-quoted passage should be read broadly: it is permissible to examine the costs as borne by the affected industry.

The Panel sided with the EU, and evaluated costs as borne by seal hunters and downstream operators. The Appellate Body said that was fine: what matters is that the alternative not be merely theoretical, but if it is not, there is no foreclosure of possibilities as to examining what party bears the cost burden.

- **Step Two:**
  Satisfies *Chapeau*?

The Appellate Body upheld the EU Seals Regime as provisionally justified under GATT Article XX(a), *i.e.*, the Regime is "necessary to protect public morals." Unfortunately for the EU, it also found the Regime unacceptable under the *chapeau* to Article XX.[1126] The IC and MRM Exceptions were the problem. Thus, in both Steps of the Two Step Test, the Appellate Body agreed with the Panel.

The Panel held the Seal Regime was discriminatory under the MFN obligation of GATT Article I:1 (as well as the national treatment rule of Article III:4). The discrimination took the form of different regulatory treatment for seal products derived from (1) commercial hunts, as distinct from (2) IC hunts. Canadian and Norwegian seal hunting was primarily commercial in nature. Greenlandic seal hunting was primarily IC in nature. So, the Exceptions to the import ban – especially the IC Exception – favored Greenland over

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[1125] *Fur Seals* Appellate Body Report, ¶ 5.276 (*quoting Brazil Retreaded Tires*, ¶ 156, in turn *quoting Antigua Gambling*, ¶ 308).

[1126] *See Fur Seals* Appellate Body Report, ¶¶ 5.291-5.339.

Canada and Norway. Another way to put the point is the IC Exception favored indigenous communities in Greenland over those in Canada and Norway.

This favoritism was not *de jure*, *i.e.*, the Regime did not expressly say "only seal hunting by Inuit communities in Greenland qualifies as non-commercial and, therefore, products from such hunting may be imported into the EU. Rather, the discrimination was *de facto*. The design of the Exception was such that it was unlikely Canadian or Norwegian hunting would qualify, and thus in its operation, the Exception permitted Greenlandic, but not Canadian or Norwegian, seal products.

To use a stark analogy from contemporary American history, one criticism of voter identification laws enacted in certain States (including Kansas) is they are *de facto* discriminatory against minorities and the elderly. Such laws mandate the showing of an approved, government-issued ID (such as a passport or driver's license) before an individual is permitted to cast a ballot. Of course, the laws never target African-Americans, Hispanic-Americans, Native Americans, or the elderly. But, individuals in these diverse communities are less likely to have the required IDs, and thus more likely to be disenfranchised, than average Americans in the majority population.

As a legal matter under GATT Article XX, the key question was whether that "discrimination" either "arbitrary" or unjustifiable" under the *chapeau*? Only if the answer was "no" could the discrimination be excepted under the *chapeau*. The answer, however, was "yes." The problem was the EU did not design, nor did it apply, the IC (and MRM) Exceptions in an even-handed manner.

Naturally, the EU appealed the Panel finding, specially arguing against its conclusion that the IC Exception does not meet the requirements of the *chapeau*. Interestingly, Canada and Norway, while agreeing with this ultimate conclusion (and thus not contesting it), appealed the Panel rationale, saying that Penal wrongly used the same test for "arbitrary or unjustifiable discrimination" under the Article XX *chapeau* as it used for determining inconsistency with *TBT Agreement* Article 2:1. They said the "scope, content, and text" the Article XX *chapeau* and Article 2:1 are different.[1127] The Panel applied a so-called "three step test" under Article 2:1 to determine whether a "legitimate regulatory distinction" exists, which Canada and Norway said is incongruous with the *Brazil Retreaded Tires* test of whether the discrimination at issue is "rationally connected" to the objective of the controversial measure. In other words, the Panel substituted the Three-Step test for the "rational connection" test, importing the latter from the context of Article 2:1 into the context of the Article XX *chapeau*.

The EU replied that *Brazil Retreaded Tires* does not mandate that an adjudicator inquire whether the cause of underlying discrimination is "rationally connected" to the objective of the measure. The adjudicator may look into other factors. The Appellate Body agreed with Canada and Norway that the Panel ought to have explained more clearly why Article 2:1 was relevant to the chapeau. Certainly, the concepts of "arbitrary or unjustifiable discrimination between countries where the same conditions prevail" and

[1127] *Fur Seals* Appellate Body Report, ¶ 5.308.

"disguised restriction on trade" appear both in the *chapeau* and in the 6th recital of the *Preamble* to the *TBT Agreement*. Moreover, as under *Clove Cigarettes*, Article 2:1 allows for a detrimental impact on competitive opportunities for imports if that impact stems exclusively from a legitimate regulator distinction. Similarly, Article XX allows for discrimination if it is not arbitrary or unjustifiable.

But, said the Appellate Body, there are key differences between an Article 2:1 versus an Article XX *chapeau* analysis. First, their legal standards differ: at issue under the *TBT Agreement*, following *Clove Cigarettes*, is whether the detrimental impact of a measure on imports "stems exclusively from a legitimate regulatory distinction, rather than reflecting *discrimination* against" imports.[1128] Under the *chapeau*, at issue is whether an admittedly discriminatory measure is "applied in a manner that would constitute … *arbitrary or unjustifiable discrimination*…."[1129] Second, the purpose of the two provisions differs. Article 2:1 concerns non-discrimination in the context of regulatory distinctions, with a view to whether those distinctions are "legitimate." In contrast, the *chapeau* is a balance between the right of an importing Member to invoke an exception to its free trade obligations under GATT and the right of exporting Members to expect compliance with those obligations.

Therefore, the Appellate Body ruled in favor of Canada and Norway in this respect: it overturned the finding of the Panel that the EU failed to prove the discriminatory impact of the IC and MRM Exceptions was justified under Article XX(a). The Appellate Body did so because it said, as per the Canadian and Norwegian argument, that the Panel used the wrong legal test – the Panel erred in applying the legal test of Article 2:1 to the *chapeau*. With this conclusion, there was no need for the Appellate Body to address the EU appoint about the meaning of *Brazil Retreaded Tires* in respect of a rational relationship test.

However, this reversal did not mean the EU won the case. To the contrary, the EU still lost. Indeed, in *Fur Seals*, the more important part of the *chapeau* discussion was not about the successful Canadian and Norwegian appellate argument. It was the conclusion of the Article XX analysis by the Appellate Body. The Appellate Body held that even under a correct *chapeau* analysis, the EU could not justify its Seal Regime. The IC Exception in that regime was discriminatory in an arbitrary or unjustifiable way. Simply put, the Panel reached the right conclusion (the Regime could not stand under the *chapeau*), but for the wrong reason (the *TBT Agreement* Article 2:1 rationale). The Appellate Body filled in the right reason.

The essence of the *chapeau*, as the Appellate Body explained citing the 1996 *Reformulated Gas* and 1998 *Turtle Shrimp* precedents, is to "prevent the abuse or misuse" of the right each WTO Member has to invoke one of the 10 itemized exceptions in Article XX. In that sense, the *chapeau* is a jurisprudential "balance" to preserve an "equilibrium" between a protection-seeking respondent and a free-trade oriented complainant. Quoting the *Turtle Shrimp* decision, the Appellate Body said:

1128 *Fur Seals* Appellate Body Report, ¶ 5.311. (Emphasis original.)

1129 *Fur Seals* Appellate Body Report, ¶ 5.311. (Emphasis original.)

> [T]he *chapeau* operates to preserve the balance between a Member's right to invoke the exceptions of Article XX, and the rights of other Members to be protected from conduct proscribed under the GATT 1994. Achieving this equilibrium is called for [as in *Turtle-Shrimp*] "so that neither of the competing rights will cancel out the other and thereby distort and nullify or impair the balance of rights and obligations constructed by the Members themselves.[1130]

The burden of proof a measure satisfies the *chapeau* is on the respondent, and following the *Reformulated Gas* decision, this burden is a "heavier task" than showing an Article XX exception "encompasses the measure at issue," *i.e.*, than provisional justification. In sum, the *chapeau* is the check on whether a measure (*e.g.*, the EU Seal Regime) that violates GATT (*e.g.*, the MFN rule), but which is provisionally justified (*e.g.*, as "necessary to protect public morality"), is applied in a way that constitutes (1) "arbitrary or unjustifiable" discrimination between or among WTO Members where the "same conditions" exist in adversely affected Members, or (2) is a "disguised restriction on international trade."

The Appellate Body scrupulously noted that "applied" does not really mean just "applied." It also refers to the "design architecture, and revealing structure of a measure." That note was a reminder of a part of Appellate Body jurisprudence that ought to be revisited, and perhaps overturned. The *chapeau* expressly says "applied." In 1996, the Appellate Body defined in its *Japan Alcoholic Beverages* Report this term expansively to include non-application parameters, *i.e.*, factors other than how a measure is manifest in the world, reasoning that how a measure is applied "*can most often be discerned from* … its *design*, … *architecture*, and … *revealing structure*."[1131] Arguably, this definition of "applied" is over-expansive. It is at odds with the clear *Vienna Convention* methodology of the Appellate Body to interpret terms according to their ordinary meaning. If there is a difference between practice (application) and theory (design), then the Appellate Body fools only itself, and clings to a foolish consistency, when it says otherwise.

In any event, in the *Seals* case, attention was on discrimination caused by the IC Exception. The Appellate Body – again citing the *Turtle-Shrimp* case – said the nature and quality of discrimination that brings about the violation of a substantive GATT obligation is different from the nature and quality of the discrimination of which the *chapeau* speaks.[1132] Obviously, the measure is discriminatory under a rule such as Article I:1 or III:4. That is why the respondent needs to invoked Article XX. An adjudicator must find out whether among affected WTO Members where (1) the "same conditions" prevail the discrimination is (2) "arbitrary or unjustifiable."

1130 *Fur Seals* Appellate Body Report, ¶ 5.297.

Though Appellate Body Reports are anything but literary, much less whimsical, the Appellate Body might have analogized the balance to the Hindu *Trimurti*, in particular, Vishnu seeking to preserve free trade, and Shiva seeking to destroy it.

1131 *Fur Seals* Appellate Body Report, ¶ 5.302 (*citing Japan Alcoholic Beverages* at 120). (Emphasis added.)

1132 *See Fur Seals* Appellate Body Report, ¶ 5.298.

On the first inquiry, the Appellate Body reached to the online *Merriam-Webster Dictionary* to define "conditions," which (not surprisingly) means "A way of living or existing," or "the state of something," and thus which could comprise an array of circumstances in a country.[1133] But, noticing the word "conditions" appears in the context of the *chapeau*, the Appellate Body added – and, again, cited *Turtle Shrimp* – for the proposition that not all conditions matter. Only conditions relevant to the measure at issue, that is, for establishing whether "arbitrary or unjustifiable" discrimination exists, matter. Particular attention should be paid to "conditions" associated with (1) the policy objective under the applicable Paragraph of Article XX (*e.g.*, the "public morality" goal of the EU), and (2) the type or cause of underlying substantive violation.

There was no doubt "the same conditions" prevailed in Canada, Norway, and Greenland. The EU did not seriously contest the proposition that "the same animal welfare conditions prevail in all countries where seals are hunted," nor did it appeal the Panel finding that "the same animal welfare concerns as those arising from seal hunting in general also exist in IC hunts."[1134] Further, the EU accepted that differences in the identity of seal hunters, or in the purposes of seal hunting as between commercial and IC, did not mean the conditions in Canada and Norway, *vis-à-vis* Greenland, were distinct. The best point the EU could muster in favor of a claim to differential conditions was that the development of marketing structures achieved by Greenlandic versus Canadian Inuit. That was not enough for the Appellate Body.

With that clear, the Appellate Body turned to "discrimination" within the meaning of the *chapeau, i.e.*, when WTO Members in which the same relevant conditions exist are treated differently. Was that discrimination "arbitrary or unjustifiable"? In the language of *Turtle Shrimp*, the assessment is a "cumulative" one.

First, the answer depends on the cause of the discrimination. Is it possible to reconcile the policy objective pursued by the controversial measure, on the one hand, and the discrimination, on the other hand? Asked differently, as in *Turtle Shrimp* and *Brazil Retreaded Tires*, is there a rational relationship between the two – does the rationale for the discrimination support, or undermine, that goal?[1135] In *Fur Seals*, it was uncontested that the cause of the discrimination under the Article I:1 MFN obligation was the same as that under the Article XX *chapeau* – the Seal Regime, most notably the IC Exception.

Second, what is the rationale put forward for to explain the discrimination? In both *Reformulated Gasoline* and *Turtle Shrimp*, the Appellate Body considered and rejected the American justifications for the discriminatory measure at stake:

> 5.304. In *U.S.-Gasoline*, the Appellate Body assessed the two explanations provided by the United States for the discrimination resulting from the application of the baseline establishment rules at issue. The first

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1133 *Fur Seals* Appellate Body Report, ¶¶ 5.299-5.300.

1134 *Fur Seals* Appellate Body Report ¶ 5.317.

1135 *See Fur Seals* Appellate Body Report ¶ 5.306 (referencing *Turtle Shrimp*, ¶ 165, and *Brazil Tires*, ¶ 227).

> explanation provided by the United States for such discrimination was the impracticability of verification and enforcement of individual baselines for foreign refiners. While the Appellate Body accepted that the anticipated difficulties concerning verification and enforcement with respect to foreign refiners were "doubtless real to some degree," it noted that the United States "had not pursued the possibility of entering into cooperative arrangements with the governments of Venezuela and Brazil or, if it had, not to the point where it encountered governments that were unwilling to cooperate." Second, the United States explained that imposing the statutory baseline requirement on domestic refiners was not an option either, because it was not feasible to require domestic refiners to incur the physical and financial costs and burdens entailed by immediate compliance with a statutory baseline. The Appellate Body observed that, while the United States counted the costs for its domestic refiners, there was "nothing in the record to indicate that it did other than disregard that kind of consideration when it came to foreign refiners."

5.305. In *U.S.-Shrimp*, the Appellate Body relied on a number of factors in finding that the measure at issue resulted in arbitrary or unjustifiable discrimination. These factors included the fact that the discrimination resulted from: (i) a "rigid and unbending requirement" that countries exporting shrimp into the United States must adopt a regulatory program that is essentially the same as the United States' program; (ii) the fact that the discrimination resulted from the failure to take into account different circumstances that may occur in the territories of other WTO Members, in particular, specific policies and measures other than those applied by the United States that might have been adopted by an exporting country for the protection and conservation of sea turtles; and (iii) the fact that, while the United States negotiated seriously with some WTO Members exporting shrimp into the United States for the purpose of concluding international agreements for the protection and conservation of sea turtles, it did not do so with other WTO Members. As the Appellate Body stated in *Brazil-Retreaded Tires*, "[t]he assessment of these factors … was part of an analysis that was directed at the cause, or the rationale, of the discrimination."[1136]

Simply put, the respondent needs a cogent, sensible rationale to explain why the differential treatment among Members with similar conditions, caused by its controversial measure in pursuit of its policy goal.

[1136] *Fur Seals* Appellate Body Report ¶¶ 5.304-305.

Applying this jurisprudence, the Appellate Body found the EU failed to prove the IC Exception in the Seal Regime was not "arbitrary or justifiable" in the way it discriminated against WTO Members with similar relevant conditions:

> *First*, we found that the European Union did *not* show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to seal products derived from "commercial" hunts can be *reconciled with the objective* of addressing EU public moral concerns regarding seal welfare. *Second*, we found *considerable ambiguity* in the "subsistence" and "partial use" criteria of the IC Exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC Exception. We did not consider that the European Union has sufficiently explained how such instances can be prevented in the application of the IC exception. *Finally*, we were *not* persuaded that the European Union has made *"comparable efforts" to facilitate the access* of the Canadian Inuit to the IC Exception as it did with respect to the Greenlandic Inuit. We also noted that setting up a "recognized body" that fulfills all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.[1137]

As its summary indicates, the Appellate Body had three basic reasons for holding the Seal Regime flunked Step Two of the Two Step Test.

The Appellate Body could not find what Canada and Norway dubbed a "rational relationship" between the Seal Regime (1) objective, and (2) rules, particularly the IC Exception. As Canada and Norway argued, there was a "rational disconnect." The objective was to address European public moral concerns about seal welfare. But, the rules – while banning importation of seal products from commercial hunts – allowed importation of those products if they satisfied criteria concerning the identity of the hunter, purpose of the hunt, and use of by-products from the hunt. There was no relationship between the objective and the criteria.

Even the EU admitted there was no such relationship. The EU simply said the IC Exception to the import ban, whereby seal products from hunts conducted by the Inuit and other indigenous communities could be placed on the EU market, "*mitigate[d] the adverse effects on those communities resulting from the EU Seal Regime to the extent compatible with the main objective of addressing the public moral concerns with regard to seal welfare*."[1138]

That was not good enough. It hardly amounted to a sufficient explanation as to reconciling the treatment of commercial versus IC hunting with the policy goal of

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1137 *Fur Seals* Appellate Body Report ¶ 5.338. (Emphasis added.)

1138 *Fur Seals* Appellate Body Report, ¶ 5.319.

addressing public morality concerns about seal welfare. The IC Exception itself did not address those concerns, so it was not rationally related to the overall objective.

> the different regulatory treatment of IC hunts, as compared to "commercial" hunts, takes the form of a significant carve-out of the former from the measure's ban on seal products. The European Union has sought to explain why it decided not to impose the ban on the importation and placing on the market of seal products derived from IC hunts. Yet, the European Union has failed to demonstrate … how the discrimination resulting from the manner in which the EU Seal Regime treats IC hunts as compared to "commercial" hunts can be reconciled with, or is related to, the policy objective of addressing EU public moral concerns regarding seal welfare. … [T]he European Union has not established, for example, why the need to protect the economic and social interests of the Inuit and other indigenous peoples necessarily implies that the European Union cannot do anything further to ensure that the welfare of seals is addressed in the context of IC hunts, given that "IC hunts can cause the very pain and suffering for seals that the EU public is concerned about."[1139]

It is hard to fault the logic of the Appellate Body. If IC hunting causes the same pain and suffering to seals as does commercial hunting, and if the EU is sincere about its concern for seal welfare, then it should have banned seal products derived from both methodologies. Clearly, the import ban supported the objective, but how did the Exception advance the objective? As Canada and Norway suggested, the Exception actually undermined the objective.

Even still, the Appellate Body gave the EU another chance. The Appellate Body observed the relationship between the discrimination caused by a controversial measure, and the objective of that measure, was not the sole test as to whether the discrimination was "arbitrary or unjustifiable." The assessment was an overall one, a totality of circumstances, so additional factors should be checked. The Appellate Body asked whether the EU designed and applied the specific criteria of the IC Exception – that only subsistence hunting for Inuit and other indigenous communities could qualify – indicated the discrimination was neither arbitrary or unjustifiable.

The EU missed the chance. Article 3(1) of the Basic Regulation said that seal products could be placed on the market only if they came from hunting traditionally conducted by ICs, and contributed to their subsistence. Article 3(1) of the Implementing Regulation elaborated on this IC Exception with the three criteria that defined whether a seal product originated from IC hunting: hunter identity; partial use; and subsistence. First, the identity of the hunter had to be Inuit or other IC living in the geographic region and community with a tradition of seal hunting. Second, the IC had to consume at least partly the by-products from seal hunting according to its tradition. Third, seal hunting had to contribute to the subsistence of the IC.

[1139] *Fur Seals* Appellate Body Report, ¶ 5.320 (*quoting Fur Seals* Panel Report, ¶ 7.275).

But, in its design, two of the three criteria in the Implementing Regulation had ambiguities. "Partial use" was discernible as to a single hunt, and single hunting was typical in Greenland. But, what about multiple hunts? The Appellate Body wrote:

> [There are] … similar ambiguities with respect to the "partial use" criterion, pursuant to which seal products must be "at least partly used, consumed or processed within the communities according to their traditions." The assessment of whether this criterion is fulfilled may be straightforward when it comes to the products of a single hunt, or where there are relatively stable patterns in the use of seal products, as appears to be the case in Greenland, where skins are the only parts of the seal that are currently traded on a significant scale. However, the ambiguity in the notion of "partial use" arises when it is applied on an aggregate basis. … [T]he European Union *could not confirm whether the "partial use" criterion is administered and enforced with respect to each individual seal, with respect to each seal hunt, or with respect to the catch of an entire season*. It is therefore *not clear with respect to what benchmark the requirement that seal products be at least partly used, consumed, or processed in the community, is to be understood*. … [W]here conformity with the "partial use" criterion is not assessed with respect to individual seals but rather with respect to individual hunters over an extended period of time (*e.g.*, through licensing conditions), or with respect to all hunters active in a particular area or even all members of an Inuit community, *a substantial proportion of seal products that, when considered individually, might not conform to the "partial use" criterion* (either because the hunter has commercialized the entire seal or because the non-commercialized parts of the seal have been disposed of rather than used) *could potentially qualify for the IC Exception*. … [T]he ambiguity in the notion of "partial use" compounds the ambiguity of the "subsistence" criterion, with which it applies cumulatively, and thereby aggravates the overall vagueness of the IC requirements.[1140]

Perhaps worse, as to the third criteria, the EU failed to define the scope or meaning of "subsistence." Thus, there was a commercial dimension to IC hunting. Hence, the IC Exception overlapped with regular seal hunts:

> The Panel had earlier found that "the subsistence purpose of IC hunts encompasses not only direct use and consumption of by-products of the hunted seals as part of their culture and tradition, but also a *commercial component*, to the extent that *Inuit or indigenous communities also exchange some by-products of the hunted seals for economic gain*." The Panel further found this commercial aspect of IC hunts to be related more to the "need [of Inuit communities] to adjust to modern society rather than to continuing their cultural heritage of bartering." For the Panel, *the commercial aspect of IC hunts "resembles the purpose of commercial hunts, which is to earn income (and make profits) by selling by-products of*

[1140] *Fur Seals* Appellate Body Report, ¶ 5.325. (Emphasis added.)

> *the hunted seals.*" The Panel thus identified a degree of *overlap between the purposes of "commercial" and IC hunts*, while at the same time maintaining that "[t]he commercial aspect of IC hunts is … not the same in its extent as that associated with commercial hunts." The European Union has not contested that IC hunts also have a commercial aspect. … [T]he lack of a precise definition of the subsistence criterion introduces a degree of ambiguity into the requirements for the IC exception under the EU Seal Regime.[1141]

These "significant ambiguities," as the Appellate Body put it, meant the EU had "broad discretion" as to how to apply the IC Exception – even if it (or, more precisely, its "recognized bodies" to which it delegated authority) was acting in good faith.[1142] In brief, the design of the IC Exception criteria contained ambiguities that allowed for the possibility that discrimination in the application of the Exception against certain countries in which the same conditions prevailed could be arbitrary or unjustifiable.

Was that application itself discriminatory in an arbitrary or unjustifiable way? Was the manner in which the IC Exception affected Inuit and other indigenous communities in different countries arbitrarily or unjustifiably discriminatory? Yes.

The Appellate Body agreed with the Panel, and Canada and Norway, that the IC Exception "is available *de facto* exclusively to Greenland," and this discrimination was directly attributable to the Seal Regime, not to the behavior of relevant operators (such as seal hunters) in Canada and Norway.[1143] The EU argued any Inuit community in Canada, Norway, or any other WTO Member could meet the IC Exception criteria. The fact only ICs in Greenland had done so was because of their decisions and actions about seal hunting, not because of the Regime. The Regime had no inherent flaw or permanent defect that kept ICs outside of Greenland from benefitting from the IC Exception.

Indeed, the EU had reached out to ICs in Canada and Norway to help them navigate and satisfy the criteria, but they took no steps in response. In other words, the EU argument was that Canadian and Norwegian ICs were to blame: they were their own cause of failure to qualify for the Exception. For instance, in the Canadian context, the Inuit opted to focus on the development of their local market (in Nunavut), rather than export overseas.

The Appellate Body agreed that:

> if the current *de facto* exclusivity of the IC Exception could be attributed entirely to private choice, there would be no "genuine relationship" between this exclusivity and the EU Seal Regime. … [T]he non-discrimination obligations in the covered agreements are only concerned with [in the words of the *Korea Beef* Appellate Body Report] "governmental intervention that affects the conditions under which like goods, domestic and imported,

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1141 *Fur Seals* Appellate Body Report, ¶ 5.324. (Emphasis added.)

1142 *Fur Seals* Appellate Body Report, ¶ 5.326.

1143 *Fur Seals* Appellate Body Report, ¶ 5.320 (*quoting Fur Seals* Panel Report, ¶¶ 7.317-318).

> compete in the market within a Member's territory." [T]o the extent that the EU Seal Regime has an adverse effect on the Canadian Inuit by depressing the international market for seal products, this adverse effect would be experienced by the Greenlandic Inuit as well, and thus would not affect the conditions of competition between Canadian and Greenlandic Inuit.[1144]

Canada and Norway successfully replied the EU both designed and applied the IC Exception "in such a way that only large-scale, commercially oriented seal hunting operations possess the wherewithal to do so."[1145] In practice, seal hunts by Canadian and Norwegian Inuit were too small to generate market interest on an international scale, so – rationally – they saw "little point" in applying for the Exception.[1146] So, the IC Exception was *de facto* available only to Greenland. Greenland had been its only beneficiary. *De facto* exclusivity was due to the application and design of the IC Exception. That meant discrimination against Canada and Norway was arbitrary or unjustifiable.

Citing its compliance decision in *Turtle Shrimp*, the Appellate Body faulted the EU for not making "comparable efforts" to help the Canadian (and, by extension, Norwegian) Inuit gain access to the IC Exception as the EU did for the Greenlandic Inuit.[1147] The Appellate Body gave as an example the processing by Danish customs officials of certificates issued by Greenlandic authorities concerning eligibility of sealskin products for the IC Exception – even before the EU had formally accepted those authorities as "recognized bodies" under the Implementing Regulation to make such certifications. The EU had not sought cooperative arrangements with Canadian customs officials to facilitate access to the European market of Canadian Inuit products. Moreover, the EU had done nothing to reduce the burdens the Canadians (and Norwegians) faced in setting up "recognized bodies."

In sum, for three reasons the Appellate Body said the EU failed to prove under the GATT Article XX *chapeau* the IC Exception was not arbitrary or unjustifiable:

> In sum, we have identified several features of the EU Seal Regime that indicate that the regime is applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination between countries where the same conditions prevail, in particular with respect to the IC Exception. First, we found that the European Union did not show that the manner in which the EU Seal Regime treats seal products derived from IC hunts as compared to

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1144 *Fur Seals* Appellate Body Report, ¶ 5.336. To this Paragraph, the Appellate Body tacked on a final sentence: This sentence is one of many examples where the Appellate Body could have shortened its Report. The thought the sentence expresses is not fully explained. It is unconnected to the preceding sentences of the same Paragraph, and fails to serve as a transition sentence to the subsequent paragraph.

1145 *Fur Seals* Appellate Body Report, ¶ 5.331.

1146 See *Fur Seals* Appellate Body Report, ¶ 5.331. The Appellate Body covers this point with respect to Canada, and recounts Norway's *sui generis* arguments in the next paragraph. However, the point seems equally pertinent to both.

1147 *Fur Seals* Appellate Body Report, ¶ 5.337 (*quoting* Appellate Body Report, *United States – Import Prohibition of Certain Shrimp and Shrimp Products – Recourse to Article 21:5 of the DSU by Malaysia*, WT/DS58/AB/RW ¶ 122 (adopted 21 November 2001)).

> seal products derived from "commercial" hunts can be reconciled with the objective of addressing EU public moral concerns regarding seal welfare. Second, we found considerable ambiguity in the "subsistence" and "partial use" criteria of the IC Exception. Given the ambiguity of these criteria and the broad discretion that the recognized bodies consequently enjoy in applying them, seal products derived from what should in fact be properly characterized as "commercial" hunts could potentially enter the EU market under the IC Exception. … Finally, we were not persuaded that the European Union has made "comparable efforts" to facilitate the access of the Canadian Inuit to the IC exception as it did with respect to the Greenlandic Inuit. We also noted that setting up a "recognized body" that fulfills all the requirements of Article 6 of the Implementing Regulation may entail significant burdens in some instances.[1148]

The Appellate Body would have done well to finish off with the point that the second Step of the Two Step Test had matured fully into a "totality of factors," but perhaps that was clear enough from its above-quoted list.

- **Another Precedent: Animal Rights and FTAs**

In July 2021, the EU made history by writing into one of its trade agreements an animal rights obligation. The context was its FTA with *MERCOSUR*:

> The documents published by the European Commission on 15 July 2021 confirm that, for the first time, the EU set an animal welfare-based condition in a trade agreement: EU-related standards must be applied to preferential imports of shelled eggs from *MERCOSUR*. …
>
> On 15 July 2021, the European Commission published the market access provisions agreed in its unprecedented … with Mercosur. The texts confirm the first animal welfare-based condition in a trade agreement, in relation with the trade in shelled eggs. This means that to benefit from the duty-free access to the EU market, *MERCOSUR* egg producers will have to certify they respect EU-equivalent rules for laying hen welfare.[1149]

Why did the EU do so? That is, did the 2014 *Fur Seals* case experience and outcome possibly encourage the EU to incorporate animal rights into its FTAs? Perhaps the EU did not want to re-visit its litigation experience of having to argue for such rights *post hoc*, and instead opted to include them *a priori* in its deals?

> Animal rights groups criticized the EU initiative as not going far enough:

1148 *Fur Seals* Appellate Body Report, ¶ 5.338.

1149 *The EU Sets Precedent with the First Animal Welfare-based Condition in a Trade Agreement*, EUROGROUP FOR ANIMALS, 20 July 2021, https://bilaterals.org/?the-eu-sets-precedent-with-the. [Hereinafter, *The EU Sets Precedent*.]

… [W]hile this is a significant precedent in trade policy, it is not sufficient to save the EU-*MERCOSUR* agreement as it stands.

> …
> "Eurogroup for Animals welcomes this significant precedent in EU trade policy. Yet, the published schedules also clarified that the EU will not impose similar measures to other animal products, which means that it will grant more market access to most animal products from the *MERCOSUR*, without any conditions related to animal welfare or sustainability …" [, said] Stephanie Ghislain, Trade & Animal Welfare Program Leader, Eurogroup for Animals.
>
> This will further fuel the intensification of animal farming in *MERCOSUR* countries, especially in the beef and chicken meat sectors, and this intensification, in addition to be detrimental to animals, also fuels global challenges we are facing today such as antimicrobial resistance, the spread of zoonoses, biodiversity loss, and climate change.
>
> The cooperation mechanisms included in the agreement at the moment - on animal welfare and Trade and Sustainable Development – are too weak to mitigate this negative impact. Overall, the deal remains thus a bad one for animals, people, and the planet.
>
> "The agreement must be renegotiated in order to integrate strong and enforceable provisions on animal welfare. Concerns raised by the civil society, the European Parliament and various Member States cannot be solved by simply adding a protocol to the agreement."[1150]

Was this criticism justified? Asked differently, was the EU imposing an SPS measure specific to eggs and hens, and dressing it up as an animal rights provision? Or, was the EU revolutionizing FTAs with *bona fide* animal rights provisions?

IV. "Three Step Moral Necessity Test" and 2016 *Colombia Money Laundering* Case[1151]

● Appellate Body Methodology

Colombia likely anticipated the weaknesses of its GATT Article II:1 contentions (discussed in a separate Chapter). So, Colombia put up the defense of GATT Article XX(a) and (d) in the event the Panel found the Compound Tariff violated Article II:1(a) or (b). Article XX(a) and (d) are the general exceptions for Public Morality and Administrative Necessity, respectively. (The Panel and Appellate Body findings on these defenses are discussed in a separate Chapter.)

1150 *The EU Sets Precedent*.

1151 This case is cited, and its facts summarized, in an earlier Chapter.

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

> 5:102. … [A] necessity analysis involves a process of "weighing and balancing" a series of factors, including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure. [The Appellate Body cited its case law in 2001 *Korea Beef* (at Paragraph 164),[1152] 2005 *Antigua Gambling* (at Paragraph 306),[1153] 2007 *Brazil Retreaded Tires* (Paragraph 182),[1154] and 2014 *Fur Seals* (at Paragraph 5:169).[1155] … [E]ach of these factors must be demonstrated with sufficient clarity in order to conduct a proper weighing and balancing exercise that may yield a conclusion that the measure is "necessary." In most cases, a comparison between the challenged measure and possible alternatives should subsequently be undertaken. [Here the Appellate Body cited *Fur Seals* (at Paragraph 5:169), which in turn cited *Antigua Gambling* (at Paragraph 307), and *Korea Beef* (at Paragraph 166)].
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> 5:103. The weighing and balancing process begins "with an assessment of the 'relative importance' of the interests or values furthered by the challenged measure." The more vital or important the interests or values that are reflected in the objective of the measure, the easier it would be to accept a measure as "necessary." [Here the Appellate Body cited its case law in 2001 *Korea Beef* (at Paragraph 162).] Turning to the contribution of the measure to the objectives pursued by it, we recall that "[t]he greater the contribution, the more easily a measure might be considered to be 'necessary.'" [Here the Appellate Body again cited *Korea Beef* (at Paragraph 163).] For this reason, the Appellate Body has emphasized that "in an analysis of 'necessity,' a Panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued,

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1152 *See Korea Beef* Report is WTO Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, WT/DS161/AB/R (adopted 10 January 2001), analyzed in the *WTO Case Review 2001*.

1153 *See United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WTR/DS285/AB/R (adopted 20 April 2005), analyzed in the *WTO Case Review 2005*.

1154 *See* WTO Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tires*, WT/DS332/AB/R (adopted 17 December 2007), analyzed in the *WTO Case Review 2007*.

1155 *See* WTO Appellate Body Reports, *European Communities – Measures Prohibiting the Importation and Marketing of Seal Products*, WT/DS400/AB/R, WT/DS401/AB/R (adopted 18 June 2014), analyzed in the *WTO Case Review 2014*.

> rather than merely ascertaining whether or not the measure makes any contribution." [Here the Appellate Body cited its 2016 *Argentina Financial Service*s Report, discussed in this *Review*.] The nature of the analysis for ascertaining a measure's contribution to the objective pursued by it can be contrasted with the type of analysis that a Panel must undertake in the context of assessing the "design" of the measure under Article XX(a). Indeed, whereas an assessment of whether the measure is "designed" to protect public morals focuses on determining whether the measure is or is not incapable of protecting public morals, an examination of the measure's contribution to the protection of public morals focuses on determining the degree of such contribution, in a qualitative or quantitative manner.
>
> 5.104. Turning to an assessment of the restrictive impact of the measure on international commerce, the Appellate Body has stated [in 2001 *Korea Beef* (at Paragraph 163)] that "[a] measure with a relatively slight impact upon imported products might more easily be considered as 'necessary' than a measure with intense or broader restrictive effects." Consequently, [as per 2016 *Argentina Financial Services* (at Paragraph 6:234)] in assessing a measure's trade-restrictiveness "a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade."[1156]

As the above quote indicates, there are three parts, or steps, in the "necessity" test for the Article XX(a) Public Morality exception.

The Appellate Body calls this test an exercise in "weighing and balancing," which is accurate in terms of the process in which it engages. However, the exercise might be dubbed the "Three Step Moral Necessity Test," to make clear the issue to which this process is applied.

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

(1) Weighing and Balancing

> The Test is a process of "weighing and balancing." Panels and the Appellate Body must evaluate a series of non-exclusive factors, just like any Common Law adjudicator. The Appellate Body has identified three such factors,

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[1156] *Colombia Money Laundering* Appellate Body Report, ¶¶ 5:102-104. (Emphasis added.)

hence the rubric "Three Step Moral Necessity Test." But, future cases could add additional factors, and thereby steps.

(2) Step One: Importance

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

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

(3) Step Two, Part One: Design

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

(4) Step Two, Part Two: Contribution

In the second sub-part of the Second Step, the importing Member must prove that the disputed measure contributes to the moral objective at stake. The greater the contribution, the more likely the measure is "necessary." Proving that some contribution exists, without greater certainty, is insufficient. Qualitative and quantitative metrics that point to the degree of contribution are needed. In other words, in the second sub-part, proof is needed not about "whether?" a contribution is made, but about "how much?" it contributes to the moral end at stake. In the hypothetical, the import restriction probably does not make much of a contribution to keeping

women from taking the steering wheel. Other, far stronger, laws and penalties, achieve that goal.

(5) Step Three: Trade Restrictiveness

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

It cannot be overstated that this Test evolved through the jurisprudence of (at least) five cases spanning 15 years (2001-16).

Unfortunately for Colombia, it flunked all but Step One of the Test.[1157] The Appellate Body held that a proper weighing and balancing of factors was impossible, because there was insufficient clarity as to the degree to which the Compound tariff contributed to the objective of combatting money laundering (Step Two, second sub-part), and as to the trade restrictiveness of the Tariff (Step Three). Without a proper weighing and balancing, the Tariff could not be held "necessary" to protect Colombian public morality.

To be clear, the Appellate Body reversed the Panel holding that Colombia failed to demonstrate the Compound Tariff was designed to combat money laundering, *i.e.*, that Colombia flunked Step One, and thus that the Tariff was unnecessary to fight money laundering. The Appellate Body took the Panel to task for failing to engage in the weighing and balancing process, and instead prematurely ceasing its analysis at Step One, without going through Steps Two and Three.[1158] At Colombia's request, but with an outcome to its chagrin, the Appellate Body completed the legal analysis, by re-doing Step One, and carrying through on Steps Two and Three.

- **Holding and Rationale on Article XX(a) Public Morality Exception: Designed? Yes. Necessary? No.**[1159]

No party in the case doubted – not even Panama – that combatting money laundering was an important policy objective for Colombia. Money laundering is criminal conduct under Article 323 of its *Criminal Code*. Moreover, money laundering is linked to drug trafficking, other criminal activities, and Colombia's internal armed conflicts. Not

1157 *See Colombia Money Laundering* Appellate Body Report, ¶¶ 6:6-7.
1158 *See Colombia Money Laundering* Appellate Body Report, ¶¶ 6:4-7.
1159 *See Colombia Money Laundering* Appellate Body Report, ¶ 4:1(b), ¶¶ 5:48-117, ¶¶ 6:4-7.

even Panama contested that point, before the Panel or on appeal. So, Colombia passed Step One: money laundering is a moral interest to Colombian society that is "vital and important in the highest degree."[1160]

On Step Two, however, Colombia only fulfilled the first sub-part, concerning the design, architecture, and structure of its Compound Tariff. Colombia showed the Tariff was "not incapable" of fighting money laundering, *i.e.*, it showed that there was a "relationship" between this measure and protecting public morality, specifically, the anti-money laundering objective.[1161] That was because importing T&A and footwear at prices below the thresholds of the Compound Tariff – artificially low prices that do not reflect market conditions – could facilitate money laundering. Money launderers do, in fact, undervalue imports, so they might price some of this merchandise at artificially low prices to conceal the illicit origin and extent of their revenue.

But, showing that "there may be *at least some* contribution" of a disputed measure to its moral objective is not enough.[1162] In the second sub-part, "the *degree* of such contribution" must be proven, and here Colombia came up short. Colombia gave no indication about the amount or proportion of T&A and footwear imported at prices at or below the Compound Tariff thresholds (was it low, high, or in between?), nor any suggestion about the frequency or scope of undervaluation of this merchandise for money laundering (was it just one of various methods they used, along with smuggling, and were other illegalities at stake, such as tax evasion?).[1163] Indeed, the Tariff was a poor weapon to fight money laundering. On the one hand, the Tariff was under-inclusive, because it targeted only T&A and footwear. Other merchandise can be, and is, used to launder funds. On the other hand, it was over-inclusive, because it was not limited to direct targeting of under-valued imports. Any import at below-threshold prices, regardless of under-valuation, and regardless of the purpose of the transaction, was covered.

It In brief, Step Two, sub-part two, was clouded by ambiguity. There was insufficient clarity about the amount or proportion of T&A and footwear imports that actually are used to launder money. There was insufficient clarity about the efficacy of the disincentive of the Compound Tariff to combat money laundering. But, in agreeing with the Panel that Colombia failed to provide sufficient clarity about the degree of contribution of its Tariff to its anti-money laundering goal, the Appellate Body passed up an opportunity at humor. The Appellate Body resisted the ironic humor that those imports themselves – T&A and footwear – typically get cleaned.

As for Step Three, here again Colombia did not provide sufficient clarity. Sure, the Compound Tariff was less restrictive on cross-border trade in T&A and clothing than an import ban, but the degree of trade-restrictiveness was uncertain. How much less restrictive

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1160 *Colombia Money Laundering* Appellate Body Report, ¶ 5:105.
1161 *Colombia Money Laundering* Appellate Body Report, ¶ 5:106.
1162 *Colombia Money Laundering* Appellate Body Report, ¶ 5:107. (Emphasis original.)
1163 *Colombia Money Laundering* Appellate Body Report, ¶ 5:107. (Emphasis original.)

was the Tariff than a ban? Colombia's answer was non-responsive: Colombia said that the trade-restrictiveness was "modest," which in any event the Panel rightly doubted.

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

> despite acknowledging that the measure is less restrictive than an import ban, the Panel also raised the possibility that the compound tariff can be highly trade restrictive, and *in some circumstances as restrictive as a ban*. Indeed, the Panel stated that, "[b]y its very nature, a tariff can reduce the capacity of imports to compete in the domestic market of the country of importation, by increasing the price of the products. *If the tariffs are too high, they can have a very restrictive, even prohibitive effect*." The fact that the Panel did not or could not determine whether the higher specific duty had such a prohibitive effect further supports our view that the Panel was unable to determine the degree of trade-restrictiveness of the measure.[1164]

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

V. Comparing and Contrasting "Necessity" under Article XX(a) and XX(d)

● Tabular Summary

The Appellate Body agreed with Panama that Colombia failed to prove under GATT Article XX(d) its Compound Tariff was a measure "necessary to secure compliance" with its GATT-consistent laws, namely, Article 323 of its *Criminal Code*. In other words, the Appellate Body said Colombia flunked Step One of the standard Two Step Test used to justify (or not) a disputed measure under Article XX. With this finding, the Appellate Body said there was no need to consider Step Two, and thus exercised judicial economy as to whether Colombia met the Article XX *chapeau* requirements.[1165]

The Appellate Body's analysis under GATT Article XX(d) paralleled its approach to Article XX(a). The "necessity" test under both is the same, except for an additional step under Article XX(d). Their sameness is logical, because the operative term ("necessity") is the same, and it is set in the same provision (Article XX) of the same treaty (GATT). Textual and contextual sameness demands interpretative sameness (absent some

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1164 *Colombia Money Laundering* Appellate Body Report, ¶ 5:112. (Emphasis added.)

1165 *See Colombia Money Laundering* Appellate Body Report, ¶ 4:1(d), ¶¶ 5:151-5:153, ¶ 6:11.

extraordinary reason or situation, perhaps). Their difference (the extra Step) reflects the specific language of one provision versus the other.

Table 27-1 summarizes the Tests under both provisions.[1166] Note the list of precedents on which the Tests are based is nearly identical, which again is unsurprising.

[1166] The Appellate Body provided no such Table, but did discuss the similarities at Paragraphs 5:131-132.

Table 27-1
Synopsis of GATT Article XX(a) and (d) "Necessity" Tests

Three Step Moral Necessity Test for Article XX(a)	**Four Step Administrative Necessity Test for Article XX(d)**
Issue: Is the disputed measure ***"necessary to protect public morals"***?	***Issue***: Is the disputed measure ***"necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of this Agreement"***?

General Answer: Process of ***"weighing and balancing"*** a series of factors (non-exclusive), namely Steps One, Two, and Three …		***General Answer:*** Process of ***"weighing and balancing"*** a series of factors (non-exclusive), namely Steps Two, Three, and Four …	
Step One	***How important is the societal interest or value at stake?*** This inquiry is a relative one, weighing and balancing the interest or value against others. The more vital the interest or value, the more likely the measure is "necessary."	**Step One**	***Is the underlying law or regulation of the importing WTO Member (i.e., the respondent whose measure is disputed) consistent with GATT?***

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

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

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

- **Holding and Rationale on Article XX(d) Administrative Necessity Exception: Necessary? No**[1167]

The Appellate Body said the Panel failed to assess "necessity" with a proper weighing and balancing exercise. The Panel prematurely ended its inquiry, without considering the degree of contribution of the Compound Tariff to its objective, securing compliance with Article 323 of the *Criminal Code*, and without assessing other "necessity" factors. The Panel simply said the Tariff was "not incapable of securing compliance" with this Article, "such that there is a relationship between" the Tariff and securing compliance – hence, the Tariff passed muster under Article XX(d).[1168]

That reasoning was too thin to justify the Tariff as administratively "necessary," said the Appellate Body. In effect, the Panel committed the same blunder under Step One of the Two Step Article XX Test with respect to Paragraph (d) as it did for Paragraph (a). So, the Appellate Body reversed the Panel's holding that the Tariff was "designed" to secure compliance with the *Criminal Code*, and its follow-on holding that the Tariff was "necessary" to secure compliance with that *Code*.

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

> … [O]ur assessment of the Panel's findings reveals the Panel's consideration that there was a lack of sufficient clarity with respect to several key aspects of the "necessity" analysis concerning the defense that Colombia presented to the Panel under Article XX(d). In particular, *there was a lack of sufficient clarity regarding the degree of contribution of the measure at issue to securing compliance with Article 323 of Colombia's Criminal Code, and the degree of trade-restrictiveness of the measure*. *Without sufficient clarity in respect of these factors, a proper weighing and balancing that could yield a conclusion that the measure is "necessary" could not be conducted*. In the light of these considerations, the Panel's findings support the conclusion that Colombia has not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is "necessary" to secure compliance with Article 323 of Colombia's *Criminal Code*.[1169]

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

First, the specific provision of Colombian law with which the Compound Tariff sought to secure compliance was the criminal prohibition on money laundering in Article 323 of the *Criminal Code*. This provision is consistent with GATT-WTO rules. To be sure,

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1167 *See Colombia Money Laundering* Appellate Body Report, ¶ 4:1(c), ¶¶ 5:118-5:150, ¶¶ 6:8-10.

1168 *Colombia Money Laundering* Appellate Body Report, ¶ 6:8.

1169 *Colombia Money Laundering* Appellate Body Report, ¶ 6:10 (Emphasis added).

its consistency was agreed by the Panel, and not challenged on appeal. Hence it was understandable for Colombia to invoke Article XX(d) to justify the Compound Tariff as necessary to secure compliance with the *Code*.

Second, it is true that the Compound Tariff was "not incapable of securing compliance with Article 323 … such that there is a relationship between that measure and securing such compliance." Some T&A and footwear priced at or below the thresholds of the Tariff might be imported at artificially low prices for money laundering purposes. They would be subject to the disincentive of the higher specific duties imposed on that merchandise. So, Colombia constructed the Tariff, which was "designed" to secure compliance with the GATT-consistent Article 323.

This finding was not akin to that of Step One under the Three Step Public Morality Necessity Test: instead of inquiring about the value pursued by the challenged measure, the Appellate Body asked about the consistency with GATT of the importing Member's law. The GATT-consistency inquiry is a Step in itself, which logically makes sense: if the underlying law is illegal under GATT, then trying to justify a disputed measure as administratively necessary to facilitate enforcement of that law would be nonsense.

Third, turning to the heart of the Article XX(d) necessity analysis, the Appellate Body weighed and balanced a series of factors, "including the importance of the societal interest or value at stake, the contribution of the measure to the objective it pursues, and the trade-restrictiveness of the measure." The Appellate Body repeated what it has said with respect to Article XX(a), namely, the fight against money laundering is of vital importance "in the highest degree."[1170] Indeed, again the point was uncontested.

But, the degree to which the Compound Tariff contributed to securing compliance with the anti-money laundering law of Article 323 of the *Criminal Code* was indeterminate. There was uncertainty as to what volume or value of T&A and footwear imported at prices below the Tariff thresholds entails money laundering. Likewise, there was a lack of clarity as to the trade-restrictiveness of the Tariff. It was less restrictive than an outright import ban, but how much less – the degree – was uncertain. Without such clarity, it was impossible to consider the Tariff against other possible, reasonably available alternatives.

Finally, as implicit from the above four points, the Appellate Body used a similar but not identical Three Step Test under GATT Article XX(d) as it did under Article XX(a). Step One under Article XX(d) concerns the GATT-consistency of the underlying law in the importing Member's legal system – not the moral value at stake. Thereafter, the Appellate Body follows the same three Steps. So, this Test can be called the "Four Step Administrative Necessity Test." In other words, there is one additional hurdle under Article XX(d) *vis-à-vis* Article XX(a), as the above Table indicates.

[1170] *Colombia Money Laundering* Appellate Body Report, ¶ 5:144.

Chapter 28

GATT ARTICLE XX(a) MORALITY EXCEPTION (CONTINUED): CENSORSHIP[1171]

I. Collaborating with Nazis?

The interests of the American government and traders are not always aligned. That is apparent from many episodes in American history, including the pre-Civil War conflict over tariffs between Southern slave-holding agrarian exporters and the Federal government. It also is apparent from the behavior of Hollywood film studios in the 1930s *vis-à-vis* the Administration of President Franklin Delano Roosevelt (1882-1945, President, 1933-1945). These episodes, while pre-dating GATT and its Article XX(a) exception, illustrate the proposition that moral issues and International Trade Law always have, and always will be, inextricably linked.

As Adolf Hitler (1889-1945) consolidated his grip over Germany following his election as Chancellor in 1933, the Administration came to view Nazism, and Fascism generally, as not only a strategic threat, but indeed a moral one. In this view they were strongly encouraged by Britain and Prime Minister Winston S. Churchill (1874-1965, PM, 1940-1945, 1951-1955), for whom the battle against Nazi tyranny was nothing short of a fight to preserve Western Civilization.

Yet, the American film industry exported movies to Germany, hence the clash: Hollywood sought to preserve market access in Germany, despite increasing concerns about the spreading influence of Nazism in that country and around Europe. In the First World War, the Kaiser's Germany banned American movies, and Hollywood lost revenues. Hollywood did not want a rerun in the 1930s. So, according to Ben Urwand[1172] and Thomas Doherty,[1173] it took a soft line on Nazism.

The 1930s are remembered as the Golden Age of the American film industry and its glamorous heart, Hollywood. The various concessions several Hollywood film studios made to the German government in the early 1930s is less well remembered, even buried. Those studios, some led by Jewish filmmakers, continued to acquiesce on subject matter content to ensure market access for their movies abroad. When Hitler came to power as Chancellor of Germany in 1933, the studios dealt directly with the representatives of the *Führer* to ensure their productions played on screens under Nazi control or influence.

[1171] (1) *Havana (ITO) Charter* Articles 15-16, 43-45, and 98-99
(2) GATT Articles I, XX, XXI, XXIV, and XXXV

[1172] This discussion draws on BEN URWAND, THE COLLABORATION: HOLLYWOOD'S PACT WITH HITLER (2013). [Hereinafter, URWAND.]

[1173] This discussion draws on THOMAS DOHERTY, HOLLYWOOD AND HITLER (2013). [Hereinafter, DOHERTY.]

Studios and producers feared the kind import restrictions they had faced throughout and following the First World War (1914-1918). The German government was adamant about restricting what media entered the Kaiser's Germany and enacted a wartime embargo on foreign films that lasted until May 1920, after the War ended and into the early Weimar Republic (1919-1933).[1174] Even though the Republic lifted the embargo, it continued to regulate heavily what films could be imported into Germany. Beginning 1 January 1925, Germany instituted a 2-step regime. First, under its quota system, it allowed only one foreign film to be imported for every German film that had been produced the preceding year.[1175] (Modern day International Trade Lawyers know this rule as a "trade balancing requirement," and it is generally illegal under GATT Article XI.) Second, no movie could be imported into the Weimar Republic without a permit. In 1928, the Weimar Republic further complicated the quota-permit regime by adding 3 different types of import licenses.[1176]

The embargo during the First World War, followed by the post-War German regulations, left Hollywood reeling: prior to the War, Germany had been the second largest export market for American movies.[1177] These trade restrictions eroded Hollywood's bottom line. Consequently, studios were keen not only to get export more movies to Germany without having to see a trade-balancing requirement met, but also to ensure that once in Germany, American movies were shown in theaters.

On 5 December 1930 at a movie theater in Berlin, a group of Nazis rioted against the Universal Pictures film *All Quiet on the Western Front* (1930). The rioters thought it contained anti-war, anti-German messages. One week later, Germany banned the film, and it would not return to that country in its entirety until after the conclusion of the Second World War (1939-1945).[1178] The movie is based on the novel written by Erich Maria Remarque, a German veteran of the First World War. It is a realistic and harrowing account of warfare, and still is considered one of the best American films ever produced. The movie was the first to win the Academy Award for both "Outstanding Production" (now known as "Best Picture") and "Best Director."

As a result of these riots and growing support for the national socialism of the Nazi Party, the German government of the Weimar Republic gave Hollywood an ultimatum: American films would only be shown in Germany if those films did not harm German reputation and prestige in any way. In response, Carl Laemmle, Jr. (1908-1979), one of the producers of *All Quiet on the Western Front*, agreed to make significant cuts to the film to make it more palatable to German audiences. This concession was the beginning of a relationship that lasted well past the infamous November 1938 *Kristallnacht*, an essential turning point in Nazi Germany's anti-Semitic policies and persecution of European Jews, which was front-page news around the world.

1174 *See* URWAND, 47.
1175 *See* URWAND, 47.
1176 *See* URWAND, 47.
1177 *See* URWAND, 47.
1178 *See* URWAND, 45.

When Hitler took power as Chancellor of the Third Reich, and made Joseph Goebbels (1897-1945) as Reich Minister of Propaganda, this ultimatum meant Hollywood studios could not make films that undermined any core Nazi principles.[1179] Goebbels was a chief organizer of the *Kristallnacht* horror, and consolidated censorship of foreign films into a quintessential governmental top-down bureaucracy. In addition to the pre-Nazi requirement that each foreign film imported into Germany obtain a license, Goebbels added a second one: the Reich Ministry of Popular Enlightenment and Propaganda had to issue a certificate before it would grant an import permit.[1180] That was his Ministry, so that typically meant him personally. After receipt of the Ministry certificate, there was yet another step: a Home Censor (a group, headed by a Chief Censor, within the Ministry) screened the film for "moral, political, and eugenic purity."[1181]

A foreign production could fail to cross any of these 3 hurdles and, therefore, be banned from German theaters. Even a film that jumped the hurdles still was be subject to censorship and editing to Nazi specifications, before being deemed sufficient for the German public to view. As Propaganda Minister, Goebbels in Germany and associates of his Ministry at German Consulates in the U.S. (especially Los Angeles) ensured Hollywood films did not threaten Nazi principles. The intention of Goebbels and the Ministry was to discourage, severely limit, and eventually cut off importation of American films into Germany. The Nazis were obsessed with national honor: it felt Hollywood had systemically destroyed Germany's reputation with the production of various post-First World War films.

On the other side of the bargaining table, the Americans were concerned with their economic interests: they felt Germany placed unfair restrictions on trade. Even after the First World War, American film studios still fared much better than most foreign studios in Germany.[1182] American movies were more popular in Germany than British and French productions. Hollywood studios sought to safeguard their export success in the German market, and preserve strategic relationships with German film distributors. Some studios even had FDIs in Germany, with German offices and employees, to protect.

So, to avoid a dramatic loss of revenue that would have resulted from an outright ban on American films, Hollywood capitulated with Nazi government mandates affecting their trade and business interests. From Louis B. Mayer (1884-1957) of MGM to leaders of Fox and Paramount, heavy hitters of Hollywood's Golden Age met with the German Consul regularly in Los Angeles throughout the 1930s.[1183] They either changed or cancelled movies outright according to the wishes of the Consul.[1184]

A proposed movie titled *The Mad Dog of Europe* is a case in point. Mr. Mayer is quoted as telling Al Rosen that no picture would be made:

1179 *See* URWAND, 94.
1180 *See* DOHERTY, 25.
1181 *See* DOHERTY, 25.
1182 *See* URWAND, 59.
1183 *See* URWAND, 74-76.
1184 *See* URWAND, 74-76.

> because we [MGM] have interests in Germany; I represent the picture industry here in Hollywood; we have exchanges there; we have terrific income in Germany, and, as far as I am concerned, this picture will never be made.[1185]

So, *The Mad Dog of Europe* – a play written by screenwriter Herman J. Mankiewicz (1897-1953), who later wrote *Citizen Kane* (1941), which Orson Wells (1915-1985) directed – never was produced as a film. His play was about the persecution of Jews in Germany. Hitler, who watched a movie before going to bed every night, surely would have disapproved of the script.

Nazi sensibilities were offended by less direct assaults: in 1933, the German distribution company for *King Kong* changed the title (after 7 tries) to *The Fable of King Kong, An American Trick-and-Sensation Film*. Why? At issue in the debates of the Home Censor was whether a blonde woman kidnapped and screaming in the hands of an ape might damage the health of German spectators or even undermine racial sentiments. Changing the title, plus personal editing out by the Chief Censor of close ups of *King Kong* holding Fay Wray (1907-2004), facilitated approval. *King Kong* aside, the result of Nazi censorship was that among the "few foreign pictures" allowed to German audiences, most were what William S. Shirer calls in his *The Rise and Fall of the Third Reich* (arguably the most spectacular history of Nazi Germany): "mostly B-Grade Hollywood."[1186]

Some executives in the studios during this period were Jewish immigrants.[1187] Films were cut scene-by-scene, frame-by-frame, according to directives from German officials. So dissected were many of the films that the Nazi government was able to incorporate them seamlessly into its propaganda productions. In the years leading up to the Second World War, major Hollywood movie plots were distinctly lacking in Nazis and Jews.

Thankfully, the collaboration – if it rightly be dubbed that – ended. As the 1930s progressed, the evil agenda and actions of Nazi Germany came into clearer focus in ways that today would have occurred instantaneously thanks to contemporary IT and the Internet. By the late 1930s, Hollywood's largest studios began to break off their business deals. Fundamental human rights violations by the Nazis presented studios with offices and employees in Germany with delicate human resources problem. The studios had to preserve their relationship with the Nazis long enough to withdraw their own employees living and working in Germany. By September 1939, the deteriorating political landscape turned violent, as the Nazi attack on Poland launched the Second World War.

Does history repeat itself, not exactly, but in broad patterns and themes? Is censorship a problem for exporters of goods and services to certain countries? Is China

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1185 *Quoted in* URWAND, 74.

1186 WILLIAM S. SHIRER, THE RISE AND FALL OF THE THIRD REICH (New York, New York: Simon & Schuster, 1959).

1187 *See* DOHERTY, 4-8.

under the CCP an example? Are non-state actors, like *Al Qaeda*, *Islamic State*, the *Taliban*, and *Boko Haram*, also examples? Is it a recurring theme of capitalist free trade that exporters focus on market access abroad at the expense of non-monetary values?

II. "Asian" Values?

● Historic Differences in Political Economy

Some post-Second World War Asian leaders are fond of proclaiming certain virtues to be "Asian values." They attribute both successes and failures to their peoples embodying such values. Consider the following observations:

> The holistic approach [to values] is traditional in Asia and it is a very different philosophy from that of the West. … There is no distinction between value, religion, way of thinking, belief, purpose or custom as in Western languages and no distinction between religious and secular values. … A holistic approach will never prefer the economic [values]; it will put the social, the environmental, on equal footing with the economic. However, the reality is that the economic occupies the predominant and decisive place in any decision-making process.
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> …
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> …In the Western mind, good is good, bad is bad. It is an "either or." You must make your choice. The good must win over the bad. In fact, it is an absolutionist position. In the Chinese mind, there is a dynamic balance between good and bad [redolent of *yin* and *yang*]. Although they are conflictual, each is relatively good and relatively bad. There is no such thing as a victory of good over bad otherwise there would not be a dynamic interplay of opposites.[1188]

This holism of values has been a blessing and curse. Over much of the past 500 years, Asian countries have lagged by economic and political metrics their Western counterparts, and since the turn of the 19th century, desired to catch-up.[1189]

With the exceptions of China and Japan, and more recently Korea, no Asian country is seen as an economic or political counterpart to Western countries. Militarily, not until the 1905 Russo-Japanese War did an Asian country defeat a Western one. Certainly, many individual Westerners appreciate the cultural, moral, and spiritual heritage of the Far East and Indian Sub-Continent. Nevertheless, many Western governments privately, and sometimes publicly, lack a full, sincere respect for Asia.

1188 *See* Josiane Chauquelin, Pauline Lim & Birgit Mayer-König, *Understanding Asian Values*, *in* ASIAN VALUES: ENCOUNTER WITH DIVERSITY 15, 17 (Josiane Cauquelin, Paul Lim & Birgit Mayer-Konig, eds., Surrey, U.K.: Curzon Press Surrey, 1998).

1189 *See generally* KISHORE MAHBUBANI, CAN ASIANS THINK? (Singapore: Times Books International, 2nd ed., 2002) (arguing, *inter alia*, that catching up with the West philosophically, socially, and politically will be harder than doing so economically).

- **Do "Asian" Values Explain Historic Differences?**

What accounts for this long historical chasm, *i.e.*, the difference across centuries in political economy between Asia and the West? Some Asian leaders assert it is caused by the difference in values between Asian countries and the West. Asians unwilling to put profit above all else in the way selfishly-driven Western capitalists were, with the result being a material, and materialistic, gap.

- **What Are "Asian" Values?**

Addressing the above issues begs a fundamental question: what are "Asian" values? The list includes social harmony, community, family, hard work, integrity, respect for the elderly, obedience to authority, pursuit of practical educational achievement, and care for the environment.

Are these values uniquely "Asian?" Students of American history recognize them as those of Horatio Alger. Students of modern Asian history point out that as the Far East develops, it increasingly shows the same dysfunctions as plague American society: lack of ambition, instant gratification, disrespect for the elderly, divorce and family fracturing, social schisms, and violence. Many Asian leaders worry about a loss of these traditional values, and call for re-assertion of them, along with integration of the best from the West. After all, as any visitor to innumerable Asian cities knows, materialism no longer is the province of the West, if it ever was. The proclamation, or myth, of Asian values underlies some trade policies of Asian governments. That is evident from the 2010 *China Audio Visual Products* case (discussed below).

- **Convergence of Values?**

Is convergence in values – a globalized harmonization of them – occurring? Are Asians assimilating more of their priorities from the West, while the West is re-learning the values of family-style entertainment like *The Waltons*, *Little House on the Prairie*, and comedies like *I Love Lucy*, *Leave it to Beaver*, *The Andy Griffith Show*, and *Green Acres*. Do certain "Western" values, like individual achievement, political and economic freedom, and respect for rule of law, blend well with traditional Asian values? Would they reinforce the desire of Asian countries in to be treated as equals? Would a deeper infusion of both sets of values help rid some Asian countries of nepotism, so that more citizens could flourish based on ability, not birth or family connections?

III. Mahbubani Argument on Decline of West and Rise of Asia

Connected to the discussion of values and the extent to which they explain long-run performance differences between the Western and Non-Western world is the matter of relative rise and decline. Former Singaporean Ambassador to the U.S., Kishore Mahbubani (1948-) is one among several prominent voices asking whether the West in decline relative to Asia. The West, he says, is a major source of, not simply the key solution to, the

problems facing the world.[1190] For example, it has made a mess of the Israeli-Palestinian conflict, with the U.S. particularly to blame, because "[m]any extremists voices in Tel Aviv and Washington believe that time will always be on Israel's side, "the pro-Israel[] lobby [has a] stranglehold on the U.S. Congress, and American politicians are guilty of "political cowardice … when it comes to creating a Palestinian state."[1191]

The West, again especially America, also has made a mess of nuclear non-proliferation: it championed the 1968 *Nuclear Non-Proliferation Treaty*, a "social contract" whereby the 5 acknowledged nuclear weapons states (China, France, Russia, U.S., and U.K.) eventually would give up their weapons in exchange for sharing peaceful nuclear energy technology and working to avoid increases in the number or sophistication of nuclear weaponry.[1192] But, the *NPT* "is legally alive but spiritually dead," as "the world has lost trust in the five nuclear weapons states, and now sees them as the *NPT's* primary violators," as well as tolerating the double-standard of silence about Israel's nuclear weapons program and condemnation of such programs in any Muslim country.[1193] Small wonder, then, why India declined to join the *NPT*.

Likewise, the West no longer leads in growth-promoting, poverty-alleviating free trade, but instead fears foreign competition: "[m]any Europeans have lost confidence in their ability to compete with the Asians. And, many Americans have lost confidence in the virtues of competition."[1194] Perceiving themselves to be losers from free trade, Western leaders have backed off pushing for broader, deeper trade liberalization. That helps explain the death of the Doha Round, and a litany of unimpressive FTAs or failed FTA negotiations. A similar collapse of Western leadership has occurred with respect to the combatting global warming.

"[O]n social justice, Western nations have slackened, [even though it] is the cornerstone of order and stability in modern Western societies an the rest of the world."[1195] Note the irony of this illustration: despite the 2,000 year old tradition of Catholic Social Justice Theory, the social safety nets of Asia, which combine family, community, and government intervention, are more reliable than those of the West. Among the reasons the West is "increasingly incompetent in its handling of key global problems" are "hijacking" of Western democracies by "competitive populism and structural short-termism."[1196]

Of course, like any civilization, the West is reluctant to cede power and influence, and accept "the era of its domination is ending and … the Asian century has come."[1197] In

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1190 *See* KISHORE MAHBUBANI, THE NEW ASIAN HEMISPHERE: THE IRRESISTIBLE SHIFT OF GLOBAL POWER TO THE EAST (Washington, D.C.: Public Affairs, 2008); Kishore Mahbubani, *The Case Against the West – America and Europe in the Asian Century*, 87 FOREIGN AFFAIRS 111-124 (May-June 2008) [hereinafter, Mahbubani, *The Case Against the West*].

1191 Mahbubani, *The Case Against the West*, 115.

1192 Mahbubani, *The Case Against the West*, 117.

1193 Mahbubani, *The Case Against the West*, 117, 118.

1194 Mahbubani, *The Case Against the West*, 119.

1195 Mahbubani, *The Case Against the West*, at 123.

1196 Mahbubani, *The Case Against the West*, at 111, 113.

1197 Mahbubani, *The Case Against the West*, at 111.

contrast, some Asian countries are energetic in their role as responsible custodians. Demographics, perhaps along with values, are on their side. As Mahbubani explains: "It was always unnatural for the 12% of the world population that lived in the West to enjoy so much global power. Understandably, the other 88% of the world population increasingly wants also to drive the bus of world history."[1198]

IV. 2010 *China Audio Visual Products* Case and Censorship

● Facts and Issues

The 2010 *China Audiovisual Products* case,[1199] launched by the U.S. in April 2007, arose because China imposed restrictions on the sale and distribution of four categories of what are considered cultural products, or more specifically, copyright-intensive products.[1200] These products were broadly categorized as reading materials, sound recordings distributed electronically, films, and audiovisual home entertainment products. The Chinese restrictions limited the rights of foreign companies to import and distribute these copyright-intensive products.

America inveighed against three categories of Chinese import barriers, that is, limitations on market access and national treatment:

(1) *Trading Rights Restrictions*
Measures that restrict importation and exportation of copyright-intensive products.

1198 Mahbubani, *The Case Against the West*, at 121.

1199 *See China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/AB/R (adopted 19 January 2010).

This discussion draws on WTO Appellate Body Report, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/AB/R (adopted 19 January 2010) ¶¶ 1-13, 125-165 [hereinafter, *Audiovisual Products* Appellate Body Report]; *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products*, WT/DS/363/R (adopted as modified by the Appellate Body 19 January 2010) ¶¶ 8.1-8.2 [hereinafter, *Audiovisual Products* Panel Report]; World Trade Organization, Dispute Settlement: DS 363, *China – Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products (Summary of Dispute)*, www.wto.org [hereinafter, *Summary of Dispute*]; Daniel Pruzin, *China Says It Will Comply with WTO Audiovisual Ruling*, 28 International Trade Reporter (BNA) 86 (20 January 2011); Daniel Pruzin, *U.S., China Reach Agreement on Deadline for Compliance with WTO Audiovisual Ruling*, 27 International Trade Reporter (BNA) 1117 (22 July 2010); Amy Tsui & Kathleen E. McLaughlin, *Kirk Claims Victory for United States Over China in WTO Case on Film, Music*, 26 International Trade Reporter (BNA) 1129 (20 August 2009); Daniel Pruzin, *U.S. Initiates Challenge Against Chinese Film Distribution, Download Restrictions*, 24 International Trade Reporter (BNA) 1075 (26 July 2007).

Australia, the EU, Japan, Korea, and Taiwan participated as third parties in the Panel proceedings, and at the Appellate stage. Taiwan attended the oral hearing, but provided no written submission. Among the third-party participants at the Appellate stage, only the EU, Japan, and Korea made oral statements. *See Audiovisual Products* Appellate Body Report, p. 1 and ¶¶ 11-12, *Audiovisual Products* Panel Report, ¶ 1.8. There is no coverage in the Appellate Body Report of what Taiwan thought about the case, though given its lively, open culture, it might well have been sympathetic with many of the American arguments.

1200 *See Audiovisual Products* Appellate Body Report, ¶ 131 and fns. 214-216 to the Chart at ¶ 131.

(2) *Distribution Services Restrictions*
Measures that prohibit or circumscribe foreign firms from distributing these products.

(3) *Market Access Restrictions*
Measures that deny market access to foreign suppliers of copyright-intensive services.

The U.S. claimed 17 Chinese measures violated the GATT, *GATS*, and *Protocol on the Accession of the People's Republic of China to the World Trade Organization (Protocol)* and associated *Report of the Working Party on the Accession of China to the World Trade Organization*, which is incorporated into the *Protocol.*

The legal concepts at stake were promises made to the WTO and its Members by China when it joined the WTO on 11 December 2001 concerning market access for foreign printed matter, music, and movies, and its obligations to provide market access and non-discriminatory (specifically, national) treatment under GATT and *GATS*. Overall, the WTO Panel found 15 Chinese measures illegal, 11 of which were contested on appeal, and which the Appellate Body found illegal, too.[1201] Table 28-1 summarizes the restrictions and adjudicatory findings that concern the invocation of Article XX(a) as a Chinese defense.[1202]

The Panel held China could invoke GATT Article XX(a) as a defense to violations of its trading rights and national treatment commitments under its *Protocol*, by virtue of the introductory clause of Paragraph 5:1 of the *Protocol*. The Panel further held China could not justify its measures as "necessary" to protect public morality under Article XX(a). These findings concerned Chinese measures that:

(1) Forbid foreign-invested enterprises from importing copyright-intensive products, pursuant to the *Catalogue* (Articles X:2-3), *Foreign Investment Regulation* (Articles 3-4), *Several Opinions* (Article 4), *2001 Audiovisual Products Regulation* (Article 27), *Audiovisual Products Importation Rule* (Article 8), and *Audiovisual Sub-Distribution Rule* (Article 21).

(2) Require conformity with the *Publications Regulation*, which is an administrative regulation of GAPP.[1203] In particular:

(a) Articles 41-42(2) of the *Publications Requirement* state that only an approved publication import entity, one designated by GAPP, can

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1201 *See Audiovisual Products* Appellate Body Report, ¶¶ 129, 130, footnote 212 at 130, 131, and footnote 213 at 131. Technically, the U.S. challenged 19 Chinese legal instruments, but the Panel held 2 of them (the *Film Distribution Rule* and *Exhibition Rule*) were not "measures" under Article 3:3 of the WTO *Understanding on Rules and Procedures Governing the Settlement of Disputes*, and were not within the terms of reference of the Panel. *See id*., footnote 209 at ¶ 129.

1202 This Table is an elaboration of *Audiovisual Products* Appellate Body Report, "Abbreviations of China's Measures Used in This Report," at vii and the Chart at ¶ 131 of the Report.

1203 *See Audiovisual Products* Appellate Body Report, ¶ 147.

import reading materials. In effect, they mandate satisfaction of the State Ownership Requirement, *i.e.*, be a wholly SOE in order to be eligible for approval as a publications import entity,

(b) Article 42 lists eight criteria, all of which must be met, to receive this approval. Two of the criteria are:

-- Suitable Organization and Qualified Personnel Requirement –

The entity must be a wholly SOE. And, the officials of the SOE be qualified personnel.[1204]

-- State Plan Requirement –

The entity conforms to China's state plan for imported publications *i.e.*, satisfy the State Plan of the Chinese government concerning the number, structure, and geographical coverage of publication import entities, pursuant to the *Publications Regulation* (Article 42).

Additionally, the Panel found a less-restrictive alternative than the aforementioned measures exists, one that is reasonably available to China. In doing so, the Panel considered the restrictive effect that the measures have on entities seeking to import copyright-intensive products.

Notably, China did not appeal Panel holdings in respect of imported reading materials. Rather, it fell back on the Article XX(a) public morality defense. The Panel assumed this provision could be invoked to justify a violation of a commitment stemming from a legal text other than GATT, and that importing a product with content disfavored by Chinese censors could negatively impact Chinese public morality, thereby giving China the proverbial "benefit of the doubt" on both counts.[1205] But, the Panel said China failed to prove its trade measures – the strictures in Article 41 of the *Publications Regulation*, and criteria in Article 42 of the *Publications Regulation* (especially the Suitable Organization and Qualified Personnel Requirement and State Plan Requirement) – were "necessary" within the meaning of Article XX(a).[1206] The Panel also said China has reasonably available to those measures a less trade restrictive alternative.

[1204] This Requirement appears to contain two separate criteria, one concerning the SOE, and the other concerning officials of the SOE. But, it is treated as a single measure. *See, e.g.*, *Audiovisual Products* Appellate Body Report, ¶¶ 245-246.

[1205] *See Audiovisual Products* Appellate Body Report, ¶¶ 148, 209-210.

The Appellate Body, while acknowledging that reliance on an assumption *arguendo* is a legal technique sometimes used by an adjudicator to render a decision, looked askance at the Panel doing so. Assuming the Article XX(a) defense was available to China, without ruling on that question, detracted from the purposes of WTO dispute settlement, namely, to resolve trade disputes so as to preserve the rights and duties of WTO Members, clarify the meanings of terms in covered agreements, and bolster security and predictability of international trade law. *See id*., ¶¶ 213-215.

[1206] *See Audiovisual Products* Appellate Body Report, ¶ 149.

Table 28-1
Synopsis of Selected Controversial Chinese Measures in *China – Audiovisual Products* Case

Chinese Measure: Shorthand Name	**Chinese Measure: Formal Name**	**Reading Materials**	**Audiovisual and Home Entertainment Products**	**Films for Theatrical Release**	**Sound Recordings Distributed Electronically**
Foreign Investment Regulation	State Council, Order No. 346 (2002) – *Regulations Guiding the Orientation of Foreign Investment*	Panel:[1207] Violations of *Protocol* Trading Rights commitments and *GATS* Article XVII national treatment obligations Appellate Body: Appeal of GATT Article XX(a) public morality "necessity" defense	Panel:[1208] Violations of *Protocol* Trading Rights commitments and *GATS* Article XVI market access obligations Appellate Body: Not appealed	Panel:[1209] Violations of *Protocol* Trading Rights commitments. Appellate Body: Not appealed	Panel:[1210] Violation of *GATS* Article XVII national treatment obligations Appellate Body: Appeal of scope of "Sound Recording Distribution Services" Sub-Sector in *GATS* Schedule
Publications Regulation	State Council, Order No. 343 (2001) – *Regulations on the Management of Publications*	Panel:[1211] Violations of *Protocol* Trading Rights commitments and *GATS* Article XVII national treatment obligations			

1207 *See Audiovisual Products* Panel Report, ¶¶ 8.1.2(a)(i)-(ii), 8.2, 8.2.3(a)(iii).
1208 *See Audiovisual Products* Panel Report, ¶¶ 8.1.2(a)(i)-(ii), 8.2, 8.2.3(c)(i).
1209 *See Audiovisual Products* Panel Report, ¶¶ 8.1.2(a)(i)-(ii), 8.2.
1210 *See Audiovisual Products* Panel Report, ¶¶ 8.2.3(b)(i).
1211 *See Audiovisual Products* Panel Report, ¶¶ 8.1.2(b)(ii), (viii), 8.2, 8.2.3(a)(i)-(ii).

		Appellate Body: Appeal of GATT Article XX(a) public morality "necessity" defense			
2001 Audiovisual Products Regulation	State Council, Order No. 341 (2001) – *Regulations on the Management of Audiovisual Products*		Panel:[1212] Violation of *Protocol* trading rights commitments. Appellate Body: Appeal concerning scope of *Protocol*, Appeal of GATT Article XX(a) public morality "necessity" defense		
Audiovisual Products Importation Rule	Ministry of Culture and General Administration of Customs, Order No. 23 (2002) – *Rules for the Management of the Import of Audiovisual Products*		Panel:[1213] Violation of *Protocol* trading rights commitments. Appellate Body: Appeal concerning scope of *Protocol*, Appeal of GATT Article XX(a)		

[1212] *See Audiovisual Products* Panel Report, ¶ 8.1.2(d)(i)-(ii).
[1213] *See Audiovisual Products* Panel Report, ¶ 8.1.2(d)(v)-(vi).

			public morality "necessity" defense		
Audiovisual Product Sub-Distribution Rule	Ministry of Culture and Ministry of Commerce, Order No. 28 (2004) – *Rules for the Management of Chinese-Foreign Contractual Joint Ventures for the Sub-Distribution of Audiovisual Products*		Panel:[1214] Violations of *Protocol* Trading Rights commitments and *GATS* Article XVI market access and Article XVII national treatment obligations Appellate Body: Appeal of GATT Article XX(a) public morality "necessity" defense		

[1214] *See Audiovisual Products* Panel Report, ¶¶ 8.1.2(d)(x), 8.2, 8.2.3(c)(i), (iii).

On appeal, China challenged the adverse Panel ruling under GATT Article XX(a). Interestingly, the U.S. challenged the Panel's holding that the State Plan Requirement of Article 42 of the *Publications Regulation*, in the absence of a reasonably available alternative, could be characterized as "necessary" to protect public morality.[1215]

- **Holdings**

The Appellate Body reached six key findings about the invocation by China of GATT Article XX(a) to justify its regulation of copyright-intensive products:[1216]

(1) China can invoke Article XX(a) to defend measures inconsistent with legal obligations arising not from GATT, but from another text, namely, the *Protocol*.
(2) The Panel was correct that the State Ownership Requirement in Articles 41 and 42(2) of China's *Publications Regulation* is not necessary to protect public morals in China.
(3) The Panel was correct that Chinese measures – in the *Catalogue* (Articles X:2-3), *Foreign Investment Regulation* (Articles 3-4), *Several Opinions* (Article 4), and *Audiovisual Sub-Distribution Rule* (Article 21) – excluding foreign-invested enterprises from importing copyright-intensive products are not necessary to protect public morals in China.
(4) The Panel was wrong to hold that the State Plan Requirement in Article 42 of the *Publications Regulation* is likely to contribute materially to protecting public morality in China and that, absent a reasonably available alternative, is necessary to that protection.
(5) In considering the restrictive effect of the Chinese measures that violated its trading rights commitments, the Panel rightly evaluated the restrictive effect those measures have on entities wishing to engage in importing.
(6) The Panel was correct that at least one of the measures proposed by the U.S. – namely, centralized censorship by the Chinese government – was reasonably available to China.

Thus, China succeeded in invoking GATT Article XX(a) for violations of Paragraph 5:1 of its *Protocol*. But, the Chinese argument under the public morality exception roundly failed, as the Appellate Body declined to reverse the finding of the Panel that its controversial measures were "necessary" within that Article to protect public morality.

- **Invocation of GATT Article XX(a)?**

What logic supported invocation by China of Article XX(a) to justify measures inconsistent with legal obligations arising not from GATT, but from another text? This issue specifically concerned Paragraph 5:1 of the *Protocol*. China relied on the introductory clause to Paragraph 5:1, which states: "Without prejudice to China's right to regulate trade in a manner consistent with the *WTO Agreement*…."

1215 *See Audiovisual Products* Appellate Body Report, ¶ 150.
1216 *See Audiovisual Products* Appellate Body Report, ¶ 234, fns. 439 and 441, ¶ 336.

China said this reference to the "*WTO Agreement*" includes not only the *Agreement Establishing the World Trade Organization*, but also all the accords in the Annexes to that *Agreement*, one of which is GATT. China did not assert that introductory clause meant it could violate its trading rights commitments, but rather that it could exclude products from the scope of those commitments, or circumscribe trading rights in them, if such an exclusion or limitation is consistent with GATT. In other words, China argued the explicit reference to GATT meant GATT Article XX(a) is available as a defense against violations of its *Protocol*.

The Appellate Body accepted the Chinese argument. In doing so, the Appellate Body rejected the American rebuttal to it: GATT Article XX(a) can be invoked as a defense only to a breach of a GATT obligation. The U.S. said Paragraph 5:1 of the *Protocol* is specific, self-contained, and complete. Annexes 2A and 2B of the *Protocol*, referenced in that Paragraph, are the exclusive list of products China excepted from its obligation to grant trading rights. Were that not so, then China could exempt a vast array of other products from trading rights commitments, and thus render the *Protocol* Annexes superfluous. Moreover, the U.S. contended China could not use a *WTO Agreement*, such as GATT, to cut back on its *Protocol* commitments. Rather, the *Agreement* is supposed to supplement, not detract from, those promises. Examples of such supplementation include the *TBT* and *SPS Agreements*.

- **"Necessity" and Two Step Test?**

Why did the Appellate Body uphold the Panel finding that China failed to prove any of its controversial measures are necessary to protect public morals under *GATT* Article XX(a)? The Appellate Body applied the Two Step Test, common for Article XX defenses to breaches of GATT obligations like national treatment under Article III:4. Those Steps were:

(1) Did China have a *prima facie* case that its measures are "necessary" under Article XX(a)?; and
(2) Did China have a reasonably available alternative that is consistent with multilateral trade disciplines?

The Appellate Body explained a "necessity" analysis under GATT Article XX(b) (as in the 2007 *Brazil Retreaded Tires* case),[1217] GATT Article XX(d) (as in the 2001 *Korea Beef* case),[1218] or *GATS* Article XIV(a) (as in the 2005 *Antigua Gambling* case),[1219] involves "weighing and balancing" several factors concerning the controversial measure of the

[1217] *See* Appellate Body Report, *Brazil – Measures Affecting Imports of Retreaded Tires*, WT/DS332/AB/R (adopted 17 December 2007).
[1218] *See* Appellate Body Report, *Korea – Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, WT/DS161/AB/R, WT/DS169/AB/R (adopted 10 January 2001)
[1219] *See* Appellate Body Report, *United States – Measures Affecting the Cross-Border Supply of Gambling and Betting Services*, WT/DS285/AB/R (adopted 20 April 2005).

respondent Member and possible reasonably available alternatives to that measure to achieve the policy objective desired by the respondent.[1220]

Such factors include, as in the *Gambling* case, the:

(1) contribution of the measure to the realization of the goal it pursues, and
(2) restrictive effect of the measure on international commerce.[1221]

In addition to these factors, they may concern, as in the *Retreaded Tires* case, the:

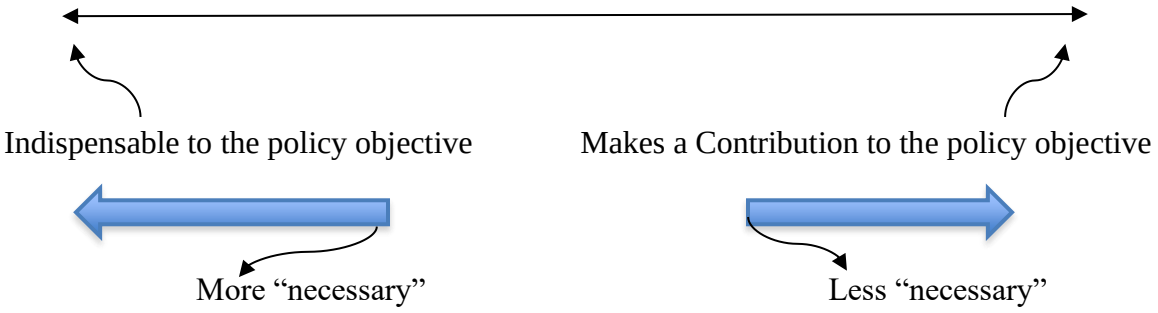
(3) importance of the interests or values at stake.

To be "necessary," a measure should be at or closer to the left than the right end of the range. In turn, to decide where the measure lies on the continuum, there is a need to weigh and balance factors such as the:

(1) contribution of the measure to secure compliance with the law at issue,
(2) importance of the common interests or values protected by the law, and
(3) impact of the measure on imports or exports.[1222]

Diagram 28-1 shows this continuum. The greater the contribution a measure makes to the objective (factor (1)), then the more likely the measure is "necessary."

Diagram 28-1
"Necessity" Test Under *GATT* Article XX(a) –
Range of Degrees of Necessity Based on WTO Appellate Body Jurisprudence



The Appellate Body reiterated its holding in *Brazil Retreaded Tires*, that analysis of the contribution of a measure to a stated objective should be through evidence or data concerning the past or present. Other types of proof that do not involve immediately

1220 *See Audiovisual Products* Appellate Body Report, ¶¶ 239-249.
1221 *See Audiovisual Products* Appellate Body Report, ¶ 240.
1222 *See Audiovisual Products* Appellate Body Report, ¶¶ 252.

observable evidence may be offered.[1223] They are particularly appropriate if in the short-term it is difficult to prove the contribution made by one specific measure as distinct from another, and thereby avoid the risk of misattribution.

So, then, was it truly necessary to exclude all entities except wholly SOEs from eligibility to import publications?[1224] In short, "no." China "did not establish a *connection* between" exclusive ownership by the government of the equity of an import entity, on the one hand, and the contribution of that entity to protecting public morals in China, on the other hand. Consequently, China could not meet this aspect of the Article XX(a) defense the "necessity" test.[1225] Similarly, the Appellate Body held Chinese measures excluding foreign-invested enterprises from being approved or designated import entities for books, newspapers, periodicals, electronic publications, and AVHE products (including sound recordings and films for theatrical release) were not necessary under Article XX(a).[1226]

Another donnybrook in the *Audiovisual Products* case was whether the Panel was right to hold that China's State Plan Requirement (set forth in Article 42 of its *Publications Regulation*) was "necessary" under Article XX(a) to protect Chinese public morality. This measure mandated conformity with China's State plan for the total number, structure, and distribution of publication import entities. Here, too, at issue was applying the Article XX(a) term "necessary" to the facts.

China never provided the Panel or Appellate Body with the State Plan, saying such Plans are not available in writing.[1227] The U.S. relied heavily on the lack of transparency surrounding the State Plan.[1228] How could the Panel reach a preliminary conclusion that the Plan can help protect Chinese public morality when it never was presented with the Plan? Making such a finding, with scarcely an evidentiary record, contravened *DSU* Article 11. Of course, the truth, but one not the U.S. articulated expressly, was that the State Plan Requirement, like the other controversial measures, was all about CCP control:

> China further asserted that limiting the number of importation entities "enables the administrative authorities to have *efficient control over whether those entities comply with the rules and procedures on inappropriate content*."[1229]

The Plan was not transparent, and certainly not a matter for public debate or comment by domestic or foreign entities. To China's credit, the above-quoted admission is remarkably candid. Still, the Appellate Body agreed with the U.S. The Panel erred in its preliminary finding the State Plan Requirement, specifically limiting the number of import entities

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1223 *See Audiovisual Products* Appellate Body Report, ¶¶ 252-253. The similarity between this identification-and-attribution analysis, and that analysis in the context of causal factors to prove injury in AD, CVD, and safeguard cases, is evident.

1224 *See Audiovisual Products* Appellate Body Report, ¶ 255.

1225 *See Audiovisual Products* Appellate Body Report, ¶ 268. (Emphasis added.)

1226 *See Audiovisual Products* Appellate Body Report, ¶¶ 275-278.

1227 *See Audiovisual Products* Appellate Body Report, ¶¶ 282, 287.

1228 *See Audiovisual Products* Appellate Body Report, ¶¶ 285-286.

1229 *Audiovisual Products* Appellate Body Report, ¶ 282. (Emphasis added.)

approved to import copyright-intensive products, "can make a material contribution" to the protection of public morals, or "is apt to" do so, in the absence of a reasonably available alternative and, therefore, was "necessary" to that protection.[1230]

- **"Necessity" and Restrictive Effects of Chinese Measures?**

Weighing and balancing a measure put forth as "necessary" to protect public morals in an importing country requires not only an examination of the actual contribution that measure makes to such protection, but also consideration of the restrictive effect the measure has on trade. Simply put, the less restrictive the effects of an illegal measure, the more likely that measure is to be characterized as "necessary" and, therefore, justified by an applicable exception.[1231]

Thus, if a measure is highly restrictive, then that measure should be carefully designed so that its other features, when taken into account in the weighing and balancing process, will outweigh its restrictive effects.[1232] The Panel looked both at the restrictive effect of Chinese measures on imports of copyright-intensive goods, and on entities wishing to engage in such importing.[1233] In other words, the Panel checked the trade-restrictive effects on trade in goods (what is traded) and on traders (who trades, or the right to trade). The Appellate Body essentially accepted the Panel's approach.

First, the Appellate Body said Article XX(a) does not restrict an adjudicator to taking into account only the restrictive effect of a measure on imports of relevant products.[1234] The treaty language does not refer specifically to "imports" or "importers," or to "products" or "traders." The *chapeau* of Article XX also eschews such terminology, and speaks of restrictions on international "trade."

Second, the 2001 *Korea Beef* precedent showed examining the restrictive effect on who can engage in importing relevant products, as well as the effect on the products themselves, sometimes is required under the applicable covered agreement.[1235] In that case, the accord was GATT, specifically Article III:4. This provision not only mandates treatment no less favorable for imports *vis-à-vis* like domestic products in respect of laws, regulations, and requirements, but also in respect of any measure affecting the internal sale, offer for sale, purchase, transportation, distribution, or use of imported and like domestic goods. Reference to such measures implicates anyone who sells, offers for sale, purchases, transports, distributes, or uses an imported or like domestic product.

Therefore, in mounting an Article XX defense that has a "necessity" test to an Article III:4 challenge, an adjudicator rightly considers traders as well as goods. Otherwise,

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1230 *See Audiovisual Products* Appellate Body Report, ¶ 297. The Appellate Body found it unnecessary to rule on whether the Panel contravened *DSU* Article 11 by reaching a finding with no evidentiary basis. *See id*., ¶¶ 298-299.

1231 *See Audiovisual Products* Appellate Body Report, ¶ 310.

1232 *See Audiovisual Products* Appellate Body Report, ¶ 310.

1233 *See Audiovisual Products* Appellate Body Report, ¶ 300.

1234 *See Audiovisual Products* Appellate Body Report, ¶ 303.

1235 *See Audiovisual Products* Appellate Body Report, ¶¶ 304-307.

there could be an equality of competitive opportunities for imported and like domestic products, but not for importers versus domestic producers, and this second inequality would undermine the first equality. In brief, if the covered agreement at issue calls for or suggests it is appropriate to look at who as well as what is traded, then so be it. In the case at bar, the covered agreement, as it were, is Paragraph 5:1 of the *Protocol*, which grants a right to trade to all enterprises with respect to goods. That grant is explicit – it applies to who is trading, not just what is traded. Therefore, when engaging in a weighing and balancing of factors under the Article XX(a) "necessity" defense to a violation of Paragraph 5:1, it is only proper to consider traders.

Third, as to considering the restrictive effects of a measure (whether on goods traded or on traders) in two contexts (a possible violation and a possible exception to a violation), the Appellate Body said nothing in GATT or any of the other *WTO Agreements* precludes analysis of restrictive effects in both contexts. Careful scrutiny of these contexts reveals the analysis is different in each of them:[1236]

(1) First, in considering whether a measure violates an obligation under GATT or the other *WTO Agreements*, as in connection with Paragraph 5:1 of China's *Protocol*, the question is whether there is any restrictive effect at all caused by the controversial measure.
(2) Second, in considering whether a measure that is inconsistent with an obligation under GATT or the other *WTO Agreements* is justified under an applicable exception, there are 2 questions, which differ from each other and from the analysis in the first context: To what extent does the inconsistent measure restrict imports? And, how the restrictive effect should be weighted and balanced against the contribution it achieves to a legitimate policy objective it purportedly serves, and the societal importance of that objective.

In brief, the reasoning is not circular, but sequential. It does not result in an absurd conclusion, but rather embodies logical, distinct inquiries.

- **Reasonably Available Alternative?**

Did the CCP have at its disposal a reasonably available alternative means to realize its objective of protecting public morality that was less trade restrictive than its actual measures? The question arose in the context of the State Plan Requirement and Suitable

[1236] *See Audiovisual Products* Appellate Body Report, ¶ 308. The Appellate Body also cast aside the Chinese argument that the *Audiovisual Products* Panel committed the same mistake as the Panel in *United States – Gasoline*. *See* Appellate Body Report, *United States – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (adopted 20 May 1996). This case is discussed in a separate Chapter. Briefly, in the *Gasoline* case, the Appellate Body faulted the Panel for examining whether less favorable treatment of imported gasoline (the GATT Article III:4 violation) was related to the conservation of exhaustible natural resources (under GATT XX(g)). The correct inquiry was to examine whether the controversial American measure was related to conservation. In the *Audiovisual Products* case, the Panel examined the relationship not between China's national treatment violation and Article XX(a), but between its unlawful measure and that Article – as the Panel was supposed to do. *See id*., ¶ 309.

Organization and Qualified Personnel Requirement, both of which the Panel found as a preliminary matter were "necessary" on the assumption no reasonable alternative existed. The answer, said the U.S., with which the Panel agreed, was "yes."

The alternative was for the government of China to assume sole responsibility for conducting content review.[1237] That way, there would be no restriction on who could import copyright-intensive products into China, and the importing entities would be free from conducing content review. Instead, they would submit their proposed imports to the Chinese government, which would check their content for immoral tidbits, before taking a final decision on allowing the merchandise to clear customs.

Surely if the Chinese government itself and alone reviewed the content of prospective imports of cultural products for immoral content, then the effect on trade would be significantly less restrictive than mandating conformity with a central plan for imported publications as to number, structure, and distribution, and with rules about and organizational structure and personnel. Indeed, there would be no impact on trade, that is, on traders, in that any entity – foreign or Chinese, public or private – could import copyright-intensive products. Surely, too, the government could contribute to the protection of Chinese morality through its content review at least as well as any SOE.

The Chinese appellate argument may have marked a first in the annals of the history of Communism: a Communist Party in power publicly declared censorship would impose an undue burden on the government:

> 313. China appeals this finding and submits that the proposed alternative – that the Chinese Government be given sole responsibility for conducting content review – is not "reasonably available," *because it is merely theoretical in nature and would impose an undue and excessive burden on China*. China alleges that the Panel erred in law and failed to properly address arguments it presented for purposes of demonstrating that the proposed alternative is not "reasonably available."
>
> 314. The United States contends that China failed to submit evidence in support of its position that adopting the United States' proposal would impose an undue burden on China. Instead, the evidence before the Panel established that *the Chinese Government does have the capacity to carry out content review, because Chinese authorities already carry out content review of films imported for theatrical release, electronic publications, and audiovisual products*.
>
> 322. China's main arguments on appeal allege that the Panel erred in law and failed to properly address arguments presented by China in finding that the proposed alternative – that the Chinese Government

[1237] *See Audiovisual Products* Appellate Body Report, ¶¶ 315-316.

be given sole responsibility for conducting content review – is reasonably available to China. China contends that this proposed alternative would *impose an undue financial and administrative burden on China*. China emphasizes that, in the current system, importation entities participate in the content review process, and that, in particular with respect to reading materials, these importation entities carry most of the burden of content review. *The alternative considered by the Panel would require China to engage in "tremendous restructuring" and create a new, multi-level structure for content review within the Government*. China points, in addition, to the large quantities of imported reading materials and to *time constraints*, especially for newspapers and periodicals, which mean that the content review mechanism must have a wide geographic coverage, sufficient manpower, and a capacity to respond quickly. To expect the Chinese Government to assume sole responsibility for the conduct of content review would require the *training and assignment of a large number of qualified content reviewers to numerous locations*. China adds that the Panel erred in failing to find that *"substantial technical difficulties"* demonstrate that the proposed alternative is not reasonably available to China. The Panel simply assumed that time-sensitive publications could be submitted electronically to the Chinese Government for content review, when in fact the Government would have to *implement a completely upgraded electronic communications system* to perform efficiently such an electronic review. China also contends that, if content review were performed at a single central location, according to the proposed alternative, this would make it impossible to "double check" content at the customs level, as is done under the current system.

323. The United States responds that, because China failed to submit evidence substantiating its position that adopting the United States' proposal would impose an undue burden on China, the Panel rightly found that China had failed to establish that content review under the sole responsibility of the Chinese Government is not reasonably available to it. Instead, the evidence before the Panel suggested that the Chinese Government does have the capacity to carry out content review, because *Chinese authorities already carry out content review of films imported for theatrical release, electronic publications, and audiovisual products*. In addition, the United States asserts, China has not responded to the Panel's observation that *China could charge fees to defray additional expense involved in its performance of content review* and that, in fact, Article 44 of the *Publications Regulation* already provides for that option. *The United States adds that, because the Chinese Government owns 100 per cent of the equity in the importation entities, the*

> *Government is in effect already financing content review of imported publications*.[1238]

The U.S. could have called the Chinese argument laughable, which it was.

For instance, "tremendous restructuring" is exactly what the Communist Party proclaims it has been doing since Deng Xiaoping catalyzed reforms in the 1970s. "Time constraints" are hardly an issue for government bureaucrats, let alone those in China. Indeed, on a different dispute (under-valuation of the Chinese currency, the *yuan*, relative to the dollar), China has proudly proclaimed (*inter alia*) it is an ancient civilization and will not succumb to foreign pressure to act quickly. Regarding "training and assigning a large number" of staff is precisely the kind of job-creation program the Communist Party might seek to bolster employment – why not hire and train more censors?

WTO adjudicatory hearings are not open to the public unless the parties agree, and then only on closed circuit screening for individuals who can afford the time, expense, and trouble to be in Geneva, Switzerland. The Chinese argument helps explain why some WTO Members fear transparency: behind the closed door of a hearing room at the Appellate Division, they can make arguments that, if made in "open court," might provoke chuckles, gasps, or heckles. (To be sure, some such arguments seep out, as did this one, through Panel or Appellate Body Reports. But, only a few trade law specialists actually read these Reports!)

Instead, the U.S. was polite – at least from the available written materials, namely, the Appellate Body Report. The U.S. was content to highlight that China exaggerated what was at stake: some change associated with implementing the alternative would not rise to the level of an undue burden. And, the U.S. was content to state, albeit implicitly, the Chinese argument was hypocritical: because content review under the existing controversial measures is via SOEs, a change to government review would not be a change in ownership at all. Not surprisingly, the Appellate Body agreed with the U.S. and underlying Panel findings.

Citing again its 2001 precedent in *Korea Beef*, as well as its decisions in *EC Asbestos* and *Antigua Gambling*,[1239] it reiterated the test for whether an alternative measure is "reasonably available" to a respondent importing country invoking a GATT Article XX or *GATS* Article XIV defense. The answer is a proposed alternative measure is not "reasonably available" if:

(1) *Undue Burden*

[1238] *See Audiovisual Products* Appellate Body Report, ¶¶ 312-313, 322-323. (Emphasis added.)

China also argued the Panel should not have evaluated the restrictive effect of the proposed alternative on traders, but only on goods. That was the same argument China made in respect of its controversial measures, and the Appellate Body rejected it for the same reasons. *See id*., ¶¶ 320-321.

[1239] *See* Appellate Body Report, *European Communities – Measures Affecting Asbestos and Asbestos-Containing Products*, WT/DS135/AB/R (adopted 5 April 2001).

The alternative is "merely theoretical in nature," as would be the case if the importing country is incapable of implementing it, or if it "imposes an undue burden …, such as 'prohibitive costs of substantial technical difficulties,'" or

(2) *Inadequate Protection*
The alternative does not achieve the level of protection desired by the importing country with respect to a legitimate policy objective of the respondent.[1240]

The Appellate Body further explained, as per the *Antigua Gambling* case, that the respondent need not show it has absolutely no alternatives at its disposal to achieve its objectives. That, too, would be too high a burden of proof. Likewise, the respondent need not prove that no cheaper alternative exists, *i.e.*, that its controversial measure is the cheapest one available, because implementing an alternative may impose some cost.[1241] That, too, would be too high a burden of proof. Rather, the respondent need only react to an alternative proposed by the complainant, and show that alternative is not a genuine one owing to either or both of the aforementioned two reasons.

The Appellate Body agreed with the Panel that while China might have to allocate some additional human and financial resources to censorship authorities, especially to review the content of reading materials, tow other points offset that possibility.[1242] First, the Chinese government already makes final content review decisions on electronic publications, AVHE products, and films for theatrical release. Second, China failed to adduce evidence that the cost of implementing the American proposal (having non-incorporated government offices do content review) would be substantially higher than its current regime (of having incorporated SOEs do the review). Third, a single, central location for content review, as the U.S. proposed, would replace the current system of review in numerous locations, thus facilitating the goals of the Chinese government concerning organizational nature and personnel caliber.

V. Ethics and Chinese Argumentation

In its GATT Article XX(a) discussion, the Appellate Body did not focus on the word "morality" in that provision. Rather, it left to China to self-judge what is "immoral" for Chinese people. Surely it is far easier for the adjudicators in Geneva to write a legalistic opinion on "necessity" than offer even a bit of *dicta* on "morality." They are, after all, lawyers, supposedly schooled in dictionaries but untrained in moral philosophy or moral theology.

1240 *See Audiovisual Products* Appellate Body Report, ¶ 318 (*quoting* as to the first item *U.S. – Gambling*, ¶ 308).
1241 *See Audiovisual Products* Appellate Body Report, ¶¶ 319, 327.
1242 *See Audiovisual Products* Appellate Body Report, ¶¶ 325-329, 331-332.

Yet, lawyers do practice according to a canon of ethics, embodied in documents such as the U.S. *Model Rules of Professional Conduct*.[1243] These rules (*inter alia*) constrain lawyers from making arguments to a court that are not based on good faith, and from misleading or lying to a court. Concerning advocacy, *Model Rule* 3:1, entitled "Meritorious Claims and Contentions," states:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Also concerning advocacy, *Model Rule* 3:3, entitled "Candor Toward the Tribunal," states:

> (a) A lawyer shall not knowingly:
> (1) make a false statement of fact or law to a tribunal or fail to correct a false statement of material fact or law previously made to the tribunal by the lawyer;
> (2) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
> (3) offer evidence that the lawyer knows to be false. If a lawyer, the lawyer's client, or a witness called by the lawyer, has offered material evidence and the lawyer comes to know of its falsity, the lawyer shall take reasonable remedial measures, including, if necessary, disclosure to the tribunal. A lawyer may refuse to offer evidence, other than the testimony of a defendant in a criminal matter, that the lawyer reasonably believes is false.

Finally, concerning transactions with persons other than clients, *Model Rule* 4:1, which is entitled "Truthfulness in Statements to Others," says:

> In the course of representing a client a lawyer shall not knowingly:
> (a) make a false statement of material fact or law to a third person; or
> (b) fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6 [concerning confidentiality of information].

[1243] *See* American Bar Association, *Model Rules of Professional Conduct*, www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_table_of_contents.html. The *Rules* quoted are from this source.

To be sure, many of the attorneys acting for China are not American, and the Appellate Body is not an American court. Still, it behooves the ethically inclined lawyer interested in the integrity of *DSU* argumentation to probe the ethics of China's arguments.

One matter, already mentioned, is whether China has a colorable claim to protecting public "morality." Pornography? Absolutely, *i.e.*, all or nearly all WTO Members would agree that banning pornographic materials is justified under GATT Article XX(a). Suppression of Liu Xiaobo (1955-) and Charter '08? Absolutely not, *i.e.*, not too many Members (if they are candid) would agree public "morality" needs protection from the content of that Charter or its author, who (after all) won the 2010 Nobel Peace Prize. In other words, Chinese motives seem to have been mixed, because both kinds of content run afoul of Communist Party censors.

Another matter concerns the cost of censorship. In response to the American proposal that China has available to it a reasonable, less trade restrictive alternative – centralized content control – the key Chinese argument was that it could not afford this alternative. Implementing it would be an undue and excessive burden, in terms of financial and administrative costs, and China lacked the requisite capacity. This argument was laughable, and insulting to the intelligence of the U.S.

Worse yet, query whether it was made in good faith. This query is prompted by the fact the Beijing municipal government monitored all cell phone traffic:

> The Beijing municipal government announced plans this week [in March 2011] to roll out a global positioning system for all mobile phones. Although the authorities say it is for smart traffic management, the platform is expected to help security forces close gaps in their surveillance of people considered a risk.
>
> A network expert at a state-backed telecom research institution said the planned system would also help people predict "hot spots." "Once it works property, it can create alerts about an imminent concentration of people in certain areas," said the researcher, who asked not to be named.[1244]

It would seem this high-technology monitoring system relies on content review. How else can officials know whether a group of people might gather in the street and begin a protest? It also would seem this system, if in the hands of a local government, could be put in the hands of a central government. Admittedly, the system was implemented after the arguments in the *Audiovisual Products* case were over. But, it suggests the capacity to perform centralized content review does exist, and unlikely could have been developed overnight. It also suggests at least some Chinese officials were willing to state there is one innocuous purpose for a technology (*e.g.*, minimizing traffic congestion), when in fact there the technology was dual-use (preventing public demonstrations, too).

[1244] Geoff Dyer & Kathrin Hille, *China Security Chief Exerts Growing Influence*, FINANCIAL TIMES, 4 March 2011, at 3.

Even more strongly, the query as to whether Chinese arguments about the reasonable availability of alternative measures were made in good faith is prompted by the reality of what the Communist Party spends on internal security. Consider the *Financial Times* report on the matter:

> *China's spending on internal security overtook national defense* for the first time last year [2010], underlining Beijing's growing concern about public unrest.
>
> … [S]pending on public security grew 15.6 percent to *Rmb* [*Renminbi*, meaning "People's money"] 549 bn [billion] ($84 bn) last year, compared with defense spending that grew 7.8 percent to Rmb 533.4 bn. Public security spending was *Rmb* 34.6 bn., or 6.7 percent, over budget.
>
> Security spending, budgeted at *Rmb* 624 bn [or $94.9 billion, at the 15 March 2011 exchange rate of 6.578 *Rmb* per dollar], is this year [2011] scheduled to outpace defense, at *Rmb* 602 bn., and will be more than the combined budgets for healthcare, diplomacy, and financial oversight.
>
> This reprioritization underscores Beijing's nervousness at escalating public unrest. Violent riots in Xinjiang and Tibet in recent years have prompted more spending on public security forces, including paramilitary forces known as the people's armed police.
>
> It comes as calls for a Middle East inspired "Jasmine revolution" have gone largely unanswered in China.
>
> …
>
> … [T]he calls for protests in China have sent security forces into overdrive. Dissidents have been rounded up or placed under heightened surveillance, and several foreign journalists were beaten by security officers as they visited potential protest sites last Sunday.
>
> …
>
> *China's internal security apparatus has grown more powerful in recent years*, with the rise of Zhou Yongkan, security chief, a member of the politburo standing committee.
>
> In one reminder of the scale of the internal security apparatus, official media reported that 739,000 security guards were dispatched to ensure order and direct traffic as China's annual congresses began in Beijing over the weekend.
>
> …
>
> China's security budget includes funding for courts, jails, police, paramilitary, and even *internet monitoring*. Analysts say spending on both public security and national defense is *higher* than reported.[1245]

[1245] Leslie Hook, *Nervous Beijing Raises Security Spending*, FINANCIAL TIMES, 7 March 2011, at 5. (Emphasis added.) Hours before the first planned Jasmine revolution protest, Mr. Zhou Yongkang, referenced

To be sure, the case was adopted by the DSB in January 2010. The security budgets discussed in the *Financial Times* article cover 2010 and 2011.

There is, then, a timing problem: it cannot be said with certainty that, on the one hand, China knew its National People's Congress (NPC) was going to approve a massive hike in the security budget and, on the other hand, put forth its WTO arguments. There also is an agency problem. In any government, few officials have a complete, bird's eye picture of official operations. Whether security and trade officials in China conversed with one another to ensure that trade officials did not mislead the WTO is an open question. Even if they did, it is difficult if not impossible to ascertain whether the security officials were entirely candid with them. In any government, for a variety of reasons (often related to power jockeying), some officials keep secrets from other officials.

Nevertheless, the point is clear enough: China made an argument about the unaffordability of the alternative proposed by the U.S. roughly contemporaneously when it was boosting its internal security budget, which includes internet censorship, to a level higher than its military forces. That level is astounding, even on a *per capita* basis.[1246] In 2010, China spent U.S. $62.84 to monitor each Chinese person.[1247] In 2011, it spent $70.99 to keep its citizens in line.[1248] And, China made this argument while sitting atop the largest pool of foreign exchange reserves in the world – $2.6 trillion, dwarfing the number two country, Japan, which holds about $1.1 trillion.[1249]

In turn, the point about honesty in argumentation before the WTO should be clear enough. The WTO dispute settlement system relies on the integrity of the lawyers who

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above, told his colleagues in the security services to "[s]trive to defuse conflicts and disputes while they are embryonic." *Quoted in* Geoff Dyer & Kathrin Hille, *China Security Chief Exerts Growing Influence*, FINANCIAL TIMES, 4 March 2011, at 3. *See also* Kathrin Hille & Patti Waldmeir, *China's Twin Strategy Keeps Lid on Protests*, FINANCIAL TIMES, 28 February 2011, at 4; Geoff Dyer, *Nervous China Puts Security Apparatus into Overdrive*, FINANCIAL TIMES, 24 February 2011 (discussing the crackdown on the Jasmine Revolution and other such incidents).

At the same time, there are signs of possible shifts by, or at least differing opinions within, the Chinese government. As Bill Emmott, former editor of *The Economist* wrote, "China has just voted [on 26 February at the United Nations Security Council on Resolution 1970] to refer [Libyan] Colonel Gaddafi to the ICC [International Criminal Court] for having acted against his opponents in pretty much the same way as it did in 1989 with the Tiananmen Square revolt." *Quoted in* David Pilling, *Lying Low is No Longer an Option for Beijing*, FINANCIAL TIMES, 3 March 2011, at 9. *See also* Hu Ping, *China's Paradoxical Vote to Sanction the Gadhafi Regime*, THE EPOCH TIMES, 3 March 2011, www.theepochtimes.com/n2/opinion/chinas-paradoxical-un-vote-to-sanction-the-gadhafi-regime-52329.html.

[1246] The Central Intelligence Agency estimates China's population as of July 2011 at 1,336,718,015. *See* CIA WORLD FACTBOOK, *East and Southeast Asia: China*, www.cia.gov/library/publications/the-world-factbook/geos/ch.html.

[1247] This result is obtained by dividing the 2010 security budget of $84 billion into the CIA estimate of the Chinese population of July 2011. As China's population would have grown between 2010 and 2011, using the July 2011 actually understates the true 2010 *per capita* result.

[1248] This result is obtained by dividing the 2011 security budget of $94.9 billion into the CIA estimate of the Chinese population of July 2011.

[1249] *See List of Countries by Foreign Exchange Reserves*, WIKIPEDIA, http://en.wikipedia.org/wiki/List_of_countries_by_foreign_exchange_reserves.

participate in it. In discussing the ethical dimensions of Chinese legal argumentation at the WTO in the case at bar, four points should be made clear. First, the high levels of professionalism expected of advocates for China should apply on an MFN basis. That is, China should not be singled out for criticism. Similarly, to criticize is not to render a final judgment. This *E-Textbook* hardly embodies findings of a legal ethics board. Second, applying this ethical MFN principle, for example, the nearly endless American appeals of zeroing defeats, the essential pointlessness of most of those appeals, and the consequent wasting of precious Appellate Body resources. That also is true of over-argued complaints by India, in which the India raises far too many issues.

Third, ethically questionable behavior can be contagious. If, for example, China observes the U.S. making frivolous arguments in a zeroing case, then it might well draw the inference that it is free to skirt the line of professional legal ethics. Wrong-headed as that inference is (on the simple, common sense ground that "2 wrongs do not make a right"), the risk that it might be drawn indicates that each Member has a responsibility to the WTO dispute settlement system to be on its best professional behavior when making oral and written representations to panels or the Appellate Body. Fourth, as uncomfortable as it may be to probe the nexus between trade and ethics, it is the fundamental role of scholars "to speak the truth to power."[1250] This point, made by Professor Edward Said (1935-2003), is amplified by his statement that "[n]othing disfigures the intellectual's public performance as much as trimming, careful silence, patriotic bluster, and retrospective and self-dramatizing apostasy."[1251]

VI. Censorship and IP Piracy

Underlying the American legal arguments in the *China – Audiovisual Products* case is a profound commercial concern: Chinese restrictions inhibit market access for and distribution of legitimate American entertainment products, creating a void into which IP pirates rush and fill the Chinese market with their fake substitutes. In February 2011, the USTR published its "Notorious Markets List," which identifies where the most egregious violations of IP rights occur.[1252] At the top of the list were several internet web sites and physical markets in China:[1253]

(1) The Chinese websites –

(i) Baidu, which is the most visited website in China, and which had deep links to IP infringing materials, some of which are on third-party host sites.

1250 *See* EDWARD W. SAID, REPRESENTATIONS OF THE INTELLECTUAL xvi (1994). [Hereinafter, SAID.]

1251 SAID, at xii-xiii.

1252 *See* Amy Tsui, *USTR Releases List of "Notorious Markets" with 17 Internet, 17 Physical Sites Described*, 28 International Trade Reporter (BNA) 356 (3 March 2011). This List used to be part of the annual Section 301 Report, but now is published separately in an effort by the Obama Administration to prioritize international IP enforcement.

1253 *See* Amy Tsui, *USTR Releases List of "Notorious Markets" with 17 Internet, 17 Physical Sites Described*, 28 International Trade Reporter (BNA) 356 (3 March 2011). In addition to Chinese web sites and physical markets, Russian ones figured prominently on the List.

(ii) Taobao, which is for business-to-business but through which infringing goods may be obtained.
(iii) TV Ants, a peer-to-peer service that specializes in live sports telecast piracy, *i.e.*, it takes protected broadcasts and makes them available freely on the internet.

(2) The Chinese physical markets –
(i) Silk Market, in Beijing.
(ii) PC Malls, in Beijing, Shanghai, and elsewhere in China.
(iii) Luowu Market, in Shenzhen.
(iv) China Small Commodities Market, in Yiwu.
(v) Ladies Market, in Mongkok, Hong Kong.

Indeed, the tremendous financial loss borne by the American IP industry because of Chinese piracy is what impelled the USTR to litigate the case at the WTO.[1254]

The U.S. had good reason for concern. In 2008, the total global economic and social costs of counterfeiting and piracy were $775 billion, taking the form of lost tax revenue, higher government spending on law enforcement and health care.[1255] The ICC estimated these costs would double, to $1.7 trillion annually, by 2015. That is because counterfeiting and piracy was getting easier, with increased global access to the internet and mobile technologies. As is widely known, a sizeable portion of counterfeiting and piracy goes on in China.

Therefore, the Chinese policy concerns – that its cultural industries are infants that needed protection, and that unique Chinese cultural and historical traditions need preservation – miss the mark. In truth, the CCP manufactured a two-tiered reality.

The legal reality was the Party strictly censored the content of books, films, and music for content, and limits via screen quotas the number of foreign entertainment offerings broadcast on television or displayed in theaters. Its seven-year old policy at issue in the case was to keep the number of foreign movies to a maximum of 20 per year. Party censorship attempted to ensure no anti-Party line content was aired, particularly in respect of the "3Ts."[1256]

1254 *See* Len Bracken, *Report Finds IPR, Other Violations in China; Baucus, Grassley Call on China to Improve*, 27 International Trade Reporter (BNA) 1929 (16 December 2010) (reporting on a December 2009 ITC Report, *China: Intellectual Property Infringement, Indigenous Innovation Policies, and Frameworks for Measuring the Effects on the U.S. Economy*, which states (*inter alia*) that 79% of all seizures of IP infringing goods by the U.S. CBP are from China, and Hong Kong accounts for an additional 10%, and that weak IP enforcement in China depresses American FDI there, which in 2009 was just 1.4% of total FDI).

1255 *See* Rick Mitchell, *ICC Says Counterfeiting, Piracy to Cost Global Economy $1.7 Trillion a Year by 2015*, 28 International Trade Reporter (BNA) 261 (17 February 2011).

1256 In February 2012, U.S. Vice President Joe Biden announced an arrangement with his counterpart, Chinese Vice President Xi Jinping, while hosting his counterpart in Los Angeles, concerning improved market access for American films to China. Under the arrangement, China agreed to (1) increase imports of American movies of 3D, IMAX, and other enhanced-format movies, (2) allow for greater opportunities for distribution of American films through private enterprises rather than the Chinese state-owned film monopoly, and (3) give greater compensation levels for blockbuster American films distributed through

The practical reality was while the Party tightly controlled lawful distribution of foreign cultural products, the piracy market flourished. It had large numbers of inexpensive pirated books, CDs, DVDs, and other entertainment choices, all of which were readily available to Chinese consumers. Were the two realities linked? They could have been, by corrupt Party officials involved in piracy, or pirates with close ties to the Party. But, of course, in WTO proceedings, the U.S. did not draw that link. Perhaps it did not need to. Any informed observer can connect the dots.

VII. Free Speech, Internal Affairs, and Fear

● How Much Free Speech

Setting aside the matter of whether there are distinct "Asian" and "Western" values, it may be observed that underlying the *Audiovisual Products* case is a fundamental difference in the relative emphasis each side places on a universal value: freedom of speech. The U.S. cherishes freedom of speech, including over the internet. It castigates China for blocking websites and discussions. It highlights the "dictator's dilemma" the CCP faces as it clings to power in part through internet censorship via the Great Firewall of China, yet at the same time hitches its future economic growth to new technologies.[1257] The Communist Party falls back on tired-old retorts: Chinese citizens enjoy freedom of speech "in accordance with the law," other countries should not use internet freedom as a pretext for meddling in its internal affairs, and the U.S., in particular, is guilty of "information imperialism."[1258]

But, not all these retorts are tired and old. Even in the dubious hands of the Communist Party, the point about public morality has some persuasive force. China explained its trade regulatory regime is part of a broader system to review the content of relevant products and ensure prohibited content does not gain entry. That is why content review must happen at the border, and only approved or designated entities can be authorized to import the products.[1259]

Indeed, import entities approved by GAPP notify GAPP of reading materials they expect to import and undertake day-to-day content review of books, newspapers, and periodicals.[1260] Their content review is double checked at the time of customs clearance. (A similar procedure is used for electronic publications.) Likewise, the Ministry of Culture regulates importation and distribution of AVHE products, and subjects them to content

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Chinese SOEs. *See* Amy Tsui, *Biden Says Shina Agrees to Increase Market Access for U.S. Film Industry*, 29 International Trade Reporter (BNA) 331 (1 March 2012). This deal was intended as a partial resolution to the *China Audio Visual Products* case, and staved off further litigation, which the U.S. threatened to commence.

1257 *China Warns U.S. Over Clinton's Web Freedom Call*, BBC NEWS, 17 February 2011, www.bbc.co.uk. [Hereinafter, *China Warns*.]

1258 *China Warns*.

1259 *See Audiovisual Products* Appellate Body Report, ¶ 141.

1260 *See Audiovisual Products* Appellate Body Report, ¶ 145.

review.[1261] Items are brought into China under temporary importation procedures, subject to a report about their content that is submitted to the Ministry. Only if the Ministry agrees the product passes content review does it grant final importation, at which point the importing entry presents the requisite documentation to the Chinese customs authority. For the importation and distribution of films for theatrical release, SARFT is the controlling government body.[1262] It has samples of films brought in, again through temporary importation procedures, and reviews them for content. Only if SARFT censors pass the film does SARFT grant approval for importation, thereby enabling the importing entity to get and present to the customs authority the necessary documents.

The public morality logic also is why China enforces its prohibitions on disseminating certain types of content through civil and criminal sanctions.[1263] True enough, such entities screen out truths about the "3Ts" or "4Ts." That is, the Communist Party uses its definition of law to address what it perceives as national security threats.[1264] But, it is not unique in doing so, and it also screens out material that many (if not most) Americans would find obscene. Is it, then, essential that the Chinese public be subjected to everything on offer from the U.S.? Must China worship at the altar of America's First Amendment and American Supreme Court jurisprudence thereunder?

- **Interference with Internal Affairs?**

A favorite argument of China in a wide variety of venues, not the least of which is the U.N. Security Council, is that neither international organizations nor individual foreign countries should interfere with its internal affairs. Concerned about sovereignty in and theoretical sense, and about how it deals with the 3T issues in a practical sense, the Communist Party fears any international decision that might operate as a precedent, of more or less weight, which could be used against it.

The Appellate Body, seemingly aware of that concern, was careful to include the following paragraph in its decision against China's *GATT* Article XX(a) defense:

> Finally, it may be useful to indicate what we are *not* saying in reaching the above conclusion. We are *not* holding that China is under an obligation to ensure that the Chinese Government assumes sole responsibility for conducting content review. Rather, we are agreeing with the Panel that the United States has demonstrated that the proposed alternative would be less restrictive and would make a contribution that is at least equivalent to the contribution made by the measures at issue to securing China's desired level of protection of public morals. China, in turn, has not demonstrated that this alternative is not reasonably available. This does not mean that having the Chinese Government assume sole responsibility for conducting content

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1261 *See Audiovisual Products* Appellate Body Report, ¶ 153.
1262 *See Audiovisual Products* Appellate Body Report, ¶ 159.
1263 *See Audiovisual Products* Appellate Body Report, ¶ 141.
1264 *See* Jacques deLisle, *Security First? Patterns and Lessons from China's Use of Law to Address National Security Threats*, 4 JOURNAL OF NATIONAL SECURITY LAW & POLICY 397-436 (2010).

> review is the *only* alternative available to China, nor that China *must* adopt such a scheme. It does mean that China has not successfully justified under Article XX(a) of the GATT 1994 the provisions and requirements found to be inconsistent with China's trading rights commitments under its Accession Protocol and Working Party Report. It follows, therefore, that China is under an obligation to bring those measures into conformity with its obligations under the covered agreements, including its trading rights commitments. Like all WTO Members, China retains the prerogative to select its preferred method of implementing the rulings and recommendations of the DSB for measures found to be inconsistent with its obligations under the covered agreements.[1265]

This passage is significant, not only for China, but also for all WTO Members.

In the U.S., for example, WTO critics – including in Congress – on occasion have mischaracterized the power of the Appellate Body by vastly overstating it. That tribunal cannot compel a change in the law of any WTO Member, unless the Member itself, under its own constitutional structure, allows for that result. In the U.S., Section 102(a) of the 1994 *Uruguay Round Agreements Act* assures this result does not occur.[1266] In the above passage, the Appellate Body manifestly takes pains to assure the parties to the case, and by extension its critics: for it to hold that an alternative measure is reasonably available is not tantamount to it ordering implementation of that alternative.

- **Scared to Point of Silliness?**

"Silly" is not a word normally hurled at the CCP. After all, Party officials have adroitly engineered an economic transition that has produced impressive growth. Moreover, many senior party officials seem to be well educated and well traveled, and if not exactly cosmopolitan in their outlook, at least have been exposed to alternative perspectives about China and the world.

Accordingly, criticisms of the Party focus on the costs of that growth, most notably in terms of social inequality (which is high) and human rights (especially religious freedom), on whether it will be followed – sooner or later – with genuine democratic development. But, the censorship regime China defended in the *Audiovisual Products* case masks a deep insecurity of Party officials about any matter it perceives as a threat to its monopoly on political power.[1267]

1265 *See Audiovisual Products* Appellate Body Report, ¶ 335. (Emphasis original.)

1266 *See* 19 U.S.C. § 3512(a).

1267 For a general review of GATT Article XX(a) jurisprudence and the "deferential approach" the Appellate Body takes to this exception given "the lack of *travaux préparatorie*s and the open-ended nature of the text," as well as the 'shifting and culturally sensitive' characteristics of public morality," but which cautions against the use of this approach to condone imposition of "trade sanctions to push human rights" as "clearly undesirable," because doing so "ultimately will undermine the international economic order," see Rose Chau Sze Wing, *The Deferential Approach to the GATT Public Morals Exception: Opening the Pandora's Box*, 27 INTERNATIONAL TRADE LAW & REGULATION issue 1, 76-91 (2021).

One such matter, and one of the "3Ts" (or "4Ts") is Tibet. Here is where censorship suggests the censors are scared to the point of silliness. The censorship regime China defended in the case actually includes – supposedly to protect public morality – the control of the reincarnation of His Holiness the 14th Dalai Lama (1935-present), leader of Tibetan Buddhism and winner of the 1989 Nobel Peace Prize, who

In 2007, the Chinese government promulgated a regulation called *Management Rules for Reincarnation of Living Buddhas*.[1268] This regulation prohibits any person living outside of China from influencing the reincarnation process for the Dalai Lama. Such a person of course, would include the Dalai Lama, who was forced during the 1959 Tibet uprising to flee to exile in Dharamsala, India. As the *Financial Times* explained:

> The rules stipulate that reincarnations must be approved by a government authority above the municipal level, conjuring up images of old monks' spirits hovering in limbo while they await approval from the interminable Chinese bureaucracy before they can be reborn.[1269]

The officially atheist CCP had a measure to control an unmistakably religious matter. The Party alone would take the final decision on who is reincarnated as the next Dalai Lama.

If the remit of the CCP extended to the next life, then it certainly covered classrooms in this life. In January 2015, the Chinese Education Minister (Yuan Guiren):

vowed that "western values" will never be allowed into the country's classrooms …

> "Never let textbooks promoting western values enter into our classes," [he said] according to an official account of his remarks. "Any views that attack or defame the leadership of the [Communist] Party or smear Socialism must never be allowed to appear in our universities."[1270]

Exactly how the Party would enforce its ideological guidance, while at the same time condoning Chinese students learning English, was unclear. Surely a few such students would pick up the Bible, John Locke's *Second Treatise on Government* (1689), F.A. Hayek's *The Road to Serfdom* (1944), or J.D. Salinger's *The Catcher in the Rye* (1951). Of course, enforcement begged a key question: what values are "western"?

1268 *See* Jamil Anderlini, *Dalai Lama Divines a Path for His Succession*, FINANCIAL TIMES, 11 March 2011, at 3.

1269 Jamil Anderlini, *Dalai Lama Divines a Path for His Succession*, FINANCIAL TIMES, 11 March 2011, at 3. *See also* James Lamont & Jamil Anderlini, *Dalai Lama Relinquishes Political Role and Urges Move to Tibet Elections*, FINANCIAL TIMES, 11 March 2011, at 1 (reporting the Dalai Lama decided to step down as the political leader of the Tibetan government in exile (but will remain as the spiritual head), which "potentially confound[s] the Chinese government's efforts to control the succession process after his death," because it will make it more difficult for the government to argue the temporal power of the Dalai Lama passes to his reincarnated successor whom the government chooses, in other words, because the decision divorces religious and political authority and thus makes it harder for the government to control the politics of Tibet through a reincarnated religious leader of the governments liking).

1270 *Quoted in* Jamil Anderlini, *Beijing Blocks "Western Values" in Classrooms*, FINANCIAL TIMES, 31 January-1 February 2015, at 4.

To be sure, the *Buddha Reincarnation Management Rules* were not among the measures at issue in the *Audiovisual Products* case, and the anti-western values edict post-dated the case. China apparently had not made a market access or national treatment commitment on any of the Modes of supply of religious services. Yet, these *Management Rules* and edict evince the extent of concern the Party has about controlling what the Chinese public reads, sees, and hears. That is, they provide insight into the mentality behind the measures that were at stake in the case. They also connect to a deeper point about freedom of conscience and its relation to free trade.[1271]

[1271] The sovereign state with the largest number of diplomatic relations is the Holy See (Vatican), which has them with 188 countries. The second highest number of diplomatic relations is enjoyed by the U.S. – 177. *See* John Thavis, *Vatican Emerges from WikiLeaks as a Key Player on Global Scene*, CATHOLIC NEWS SERVICE, 23 December 2010, Yet, the Holy See does not officially recognize China (as well as Afghanistan and Saudi Arabia), in part because of disagreement with China over selection of Bishops and Cardinals. *See The Party Versus the Pope*, THE ECONOMIST, 11 December 2010, at 53. As George Weigel's monumental biography of Pope John Paul II, *Witness to Hope* (1999), shows, having encountered this issue throughout the former Soviet Bloc during the Cold War era, the Holy See is no stranger to Communist authorities claiming the right to make decisions about Catholic clergy ordinations. On this topic, and others, the Catholic Church and Tibetan Buddhist officials share much in common.