WTO CASE REVIEW 2019[1]

Raj Bhala,[2] David Gantz,[3] Dukgi Goh,[4] Eric Witmer,[5] and Cody N. Wood[6]

[1] This *WTO Case Review* is the 20th in our annual series on substantive international trade adjudications issued by the Appellate Body of the World Trade Organization. Each Review explains and comments on Appellate Body Reports adopted by the WTO Dispute Settlement Body (DSB) during the preceding calendar year (January 1 through December 1), excluding decisions on compliance with recommendations contained in previously adopted reports.

In the *WTO Case Review 2018*, we covered one Appellate Body Report, *Brazil – Certain Measures Concerning Taxation and Charges*, which was issued in 2018 and normally might have been adopted at the December 18, 2018 DSB meeting, following its issuance on December 13. Possibly, because of conflict over WTO dispute settlement reform, the DSB did not adopt it until January 11, 2019. For multiple reasons, the future of the multilateral dispute settlement system was in doubt at the time we prepared the *2018 Case Review*. Thus, we thought it best to include the *Brazil Taxes* decision in that Review in the event there were no more adopted decisions to cover, and thus no more Case Reviews.

As this *2019 Case Review* attests, there were subsequently adopted Appellate Body Reports. The Appellate Body itself ceased to function as of December 10, 2019. The U.S. led the charge against the Appellate Body. *See* OFFICE OF THE U.S. TRADE REPRESENTATIVE, REPORT ON THE APPELLATE BODY OF THE WORLD TRADE ORGANIZATION (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf; Raj Bhala, *The Death of The Supreme Court of International Trade*, BLOOMBERG QUINT (Nov. 28, 2019), www.bloombergquint.com/opinion/wto-appellate-body-the-death-of-the-supreme-court-of-international-trade. Thus, uncertainty persists as to what, if any, future decisions may exist for us to analyze. *See, e.g.*, Raj Bhala, *Why the WTO Adjudicatory Crisis Will Not Be Easily Resolved: Defining and Responding to "Judicial Activism," in* THE APPELLATE BODY OF THE WTO AND ITS REFORM 111—123 (Chief Justice Chang-fa Lo et al. eds. Springer, 2020).

Our preceding *Reviews* are:

- *WTO Case Review 2018*, 37 Ariz. J. Int'l & Comp. L. 49–135 (2020).
- *WTO Case Review 2017*, 36 ARIZ. J. INT'L & COMP. L. 253–366 (2019).
- *WTO Case Review 2016*, 34 ARIZ. J. INT'L & COMP. L. 281–460 (2017).
- *WTO Case Review 2015*, 33 ARIZ. J. INT'L & COMP. L. 505–629 (2016).
- *WTO Case Review 2014*, 32 ARIZ. J. INT'L & COMP. L. 497–646 (2015).
- *WTO Case Review 2013*, 31 ARIZ. J. INT'L & COMP. L. 475–510 (2014).
- *WTO Case Review 2012*, 30 ARIZ. J. INT'L & COMP. L. 207–419 (2013).
- *WTO Case Review 2011*, 29 ARIZ. J. INT'L & COMP. L. 287–476 (2012).
- *WTO Case Review 2010*, 28 ARIZ. J. INT'L & COMP. L. 239–360 (2011).
- *WTO Case Review 2009*, 27 ARIZ. J. INT'L & COMP. L. 83–190 (2010).
- *WTO Case Review 2008*, 26 ARIZ. J. INT'L & COMP. L. 113–228 (2009).
- *WTO Case Review 2007*, 25 ARIZ. J. INT'L & COMP. L. 75–155 (2008).
- *WTO Case Review 2006*, 24 ARIZ. J. INT'L & COMP. L. 299–387 (2007).
- *WTO Case Review 2005*, 23 ARIZ. J. INT'L & COMP. L. 107–345 (2006).
- *WTO Case Review 2004*, 22 ARIZ. J. INT'L & COMP. L. 99–249 (2005).
- *WTO Case Review 2003*, 21 ARIZ. J. INT'L & COMP. L. 317–439 (2004).
- *WTO Case Review 2002*, 20 ARIZ. J. INT'L & COMP. L. 143–289 (2003).
- *WTO Case Review 2001*, 19 ARIZ. J. INT'L & COMP. L. 457–642 (2002).
- *WTO Case Review 2000*, 18 ARIZ. J. INT'L & COMP. L. 1–101 (2001).

We are grateful to the Editors and Staff of the *Arizona Journal of International and Comparative Law* for their excellent editorial assistance and continuing support of our work.

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

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

[2] Brenneisen Distinguished Professor, The University of Kansas, School of Law, Green Hall, 1535 West 15th Street, Lawrence, KS 66045-7577 U.S.A. Tel. 785-864-9224. Senior Advisor, Dentons U.S. LLP (Kansas City, Missouri). Monthly Columnist, "On Point," BLOOMBERG QUINT (Mumbai), www.bloombergquint.com.

J.D., Harvard (1989); M.Sc., Oxford (1986); M.Sc., London School of Economics (1985); A.B., Duke (1984). Marshall Scholar (1984-86). Member, Council on Foreign Relations, Royal Society for Asian Affairs, and Fellowship of Catholic Scholars. Author of *International Trade Law: A Comprehensive Textbook* (5th ed., 2019), *Modern GATT Law* (2d ed., 2013), *TPP Objectively* (2d ed., 2019), *Trade, Development, and Social Justice* (2003), *Dictionary of International Trade Law* (3d ed., 2015), and *Understanding Islamic Law* (*Sharī'a*) (2d ed., 2016).

The discussion of the cases herein may appear subsequently in modified form in the *International Trade Law Textbook* and/or other publications. The views expressed herein do not necessarily represent those of the University of Kansas, Bloomberg, or Dentons, or their employees, affiliates, or clientele.

[3] Samuel M. Fegtly Professor of Law Emeritus; University of Arizona, James E. Rogers College of Law; Will Clayton Fellow for Trade and International Economics, Center for the US and Mexico, Baker Institute for Public Policy, Houston, TX; Author of *An Introduction to the United States-Mexico-Canada Agreement: Understanding the New NAFTA* (Edward Elgar, 2020).

Web: http://www.law2.arizona.edu/faculty/facultyprofile.cfm?facultyid=41.

Baker Institute publications: https://www.bakerinstitute.org/experts/david-a-gantz/.

SSRN page: http://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=361657.

[4] J.D., University of Kansas (2020).

[5] Research Attorney, Kansas Courts of Appeal; Former Junior Research Attorney, Chief Justice Lawton Nuss, Supreme Court of Kansas; Former Criminal Law Clerk, Missouri State Courts (Division 9, Judge Joel Fahnestock).

J.D., University of Kansas (2017); B.A., Penn State University (2005); Sergeant First Class, U.S. Army (1999—2009). Member, Missouri Bar. The views expressed herein do not represent those of the Supreme Court of Kansas, the State of Kansas, or their employees, departments or constituents.

[6] Associate, Dentons US LLP, Kansas City, Missouri, J.D., University of Kansas School of Law, 2017.

The views expressed herein do not necessarily represent those of Dentons, or their employees, affiliates, or clientele.

TABLE OF CONTENTS

INTRODUCTION

This may be the penultimate edition of our WTO Case Review. Three of the cases pending after the demise of the Appellate Body (AB) on December 10, 2019, have been completed by the one sitting member and the two members whose terms expired on December 10, 2019 but agreed to remain for these pending cases.[7] They will be reviewed in our 2020 WTO Case Review, if one is published. However, with only one sitting member remaining, the AB is legally unable to accept new appeals given that AB members must sit in panels of three.[8] Moreover, the United States has already refused to recognize the validity of one of these proceedings, on the grounds that the report "is not a valid Appellate Body report . . . [because] it was not provided and circulated on Behalf of three valid Appellate Body members . . . ."[9]

The reasons for the ongoing refusal by the United States to consent to the appointment of new AB members has been widely discussed, including in our *WTO Case Review 2018*.[10] These reasons include concerns over (a) AB procedures (extension of judges' terms and extension of the 90–day rule); (b) objections to the use of precedent in AB decisions; (c) objections to the use of dicta in AB decisions; and (d) alleged violations of the Dispute Settlement Understanding (DSU) Article 3, which provides that "Recommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements."[11] These

---

[7] *See* Appellate Body Report, *Australia – Certain Measures Concerning Trademarks, Geographical Indications and Other Plain Packaging Requirements Applicable to Tobacco Products and Packaging*, WTO Doc. WT/DS435/AB/R, WT/DS441/AB/R (adopted Jun. 29, 2020); Appellate Body Report, *Russia – Measures Affecting the Importation of Railway Equipment and Parts Thereof*, WTO Doc. WT/DS499/AB/R (adopted Mar. 5, 2020); Appellate Body Report, *United States—Countervailing Measures on Supercalendared Paper from Canada*, WTO Doc. WT/DS505/AB/R (adopted Mar. 5, 2020).

[8] Understanding on Rules and Procedures Governing the Settlement of Disputes [hereinafter DSU], art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, Legal Instruments--Results of the Uruguay Round, 1869 U.N.T.S. 401.

[9] Communication from the United States, *United States—Countervailing Measures on Supercalendared Paper from Canada*, WTO Doc. WT/DS505/12 (Apr. 17, 2020), https://docs.wto.org/dol2fe/Pages/FE_Search/FE_S_S009-DP.aspx?language=E&CatalogueIdList=263317,263318&CurrentCatalogueIdIndex=1&FullTextHash=371857150&HasEnglishRecord=True&HasFrenchRecord=True&HasSpanishRecord=True.

[10] *See* Raj Bhala et al.*, WTO Case Review 2018*, 37 ARIZ. J. INT'L & COMP. L. 49, 52—58 (2020); *see also* Peter Van den Bossche, *Between Hope and Despair*, NEWSLETTER (SOC'Y OF INT'L ECON. LAW), Winter 2020 (providing an overview of the dispute over the Appellate Body).

[11] *See* Bhala et al., *WTO Case Review 2018, supra* note 10, at 54–55.

objections and others have recently been set out in an exhaustive U.S. Trade Representative (USTR) report, berating the Appellate Body, in February 2020.[12] The introduction to the USTR report makes the position of the United States very clear:

> For more than 20 years, the United States has expressed concerns that the dispute settlement system of the World Trade Organization – and in particular its Appellate Body – has not functioned according to the rules agreed by the United States and other WTO Members. This Report details those concerns and assesses the repeated failure of the Appellate Body to apply the rules of the WTO agreements in a manner that adheres to the text of those agreements.
>
> Specifically, the Appellate Body has added to U.S. obligations and diminished U.S. rights by failing to comply with WTO rules, addressing issues it has no authority to address, taking actions it has no authority to take, and interpreting WTO agreements in ways not envisioned by the WTO Members who entered into those agreements. This persistent overreaching is plainly contrary to the Appellate Body's limited mandate, as set out in WTO rules.[13]

Clearly, one of the takeaways from the report is the accurate assertion that the concerns of the United States with the Appellate Body did not arise with the Trump Administration.[14] In actuality, they arose, although in a non-specific fashion, even before the WTO Agreements entered into force. In 1995, Senator Robert Dole (R-Kansas) proposed the WTO Dispute Settlement Review Commission Act, which would have created a commission to review all decisions adverse to the United States, with the possibility that a series of adverse decisions could be grounds for the U.S. withdrawal from the WTO.[15] A later version was more specific: it "[r]equires the Commission to determine whether, with respect to an adverse finding, the panel or the Appellate Body exceeded its authority, acted arbitrarily or

---

[12] *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, *Report on the Appellate Body of the World Trade Organization* (Feb. 2020), https://ustr.gov/sites/default/files/Report_on_the_Appellate_Body_of_the_World_Trade_Organization.pdf.

[13] *Id.*

[14] *See id.*

[15] *See* WTO Dispute Settlement Review Commission Act: Hearing on S. 16 Before the Comm. on Fin., 104th Cong.104—124 (1995).

capriciously, deviated from applicable standards, and added to the obligations, or diminished the rights, of the United States under the Uruguay Round Agreement."[16]

Other conflict areas for the United States at the present time are the inability of the WTO to effectively address the repeated violations by China–particularly regarding illegal subsidies, theft of intellectual property, rampant discrimination against foreign investors with dominance of production by State-Owned Enterprises (SOEs), state-owned and controlled banks and other vestiges of a centrally-planned economy.[17] The United States has also objected strenuously to affording "special and differential treatment" to large developing economies such as China and India, both of whom are among the WTO members who strongly oppose the U.S. initiative.[18] Some of the problems might be cured if Hung Tran's suggestions[19] could be implemented—broadening the application of the Agreement on Subsidies and Countervailing Measures (SCMA) to SOEs, confirming China's status as a Non-Market Economy (NME), and shifting the burden of proof to China—but those changes have zero chance of being accepted by China and its close allies.

Also, the insistence of India and China, among other major developing countries, that they have a "right" to special and differential treatment, generally and regarding the plurilateral negotiations on fisheries, has created widespread skepticism beyond the United States, and few have espoused any of the changes in the system.[20] Here again, reaching a consensus on changes is in our view inconceivable in the short or medium term. Thus, if such changes are considered by the United States to be a condition precedent to supporting new appointments to the AB, that body will continue to be non-functional for a very long time. As Senator Lindsay Graham (R-S.C.) has observed:

> These flaws [with the Appellate Body] are not fixable by ticking boxes—by coaxing critics to "just tell us what you want" as if it

---

[16] WTO Dispute Settlement Review Commission Act, H.R. 4706, 106th Cong. (as introduced to the House, Jun. 21, 2000), https://www.congress.gov/bill/106th-congress/house-bill/4706.

[17] *See* OFF. OF THE U.S. TRADE REPRESENTATIVE, EXEC. OFF. OF THE PRESIDENT, *2020 Report to Congress on China's WTO Compliance* (Jan. 2020), https://ustr.gov/sites/default/files/files/reports/2020/2020USTRReportCongressChinaWTOCompliance.pdf.

[18] *See* Hannah Monicken, *Shea: WTO Reform a Priority 'at the Highest Levels' in the U.S.*, INSIDE U.S. TRADE (Mar. 2, 2020), https://insidetrade.com/daily-news/shea-wto-reform-priority-%E2%80%98-highest-levels%E2%80%99-us (summarizing U.S. WTO Ambassador Shea's remarks at a heads-of-delegation meeting).

[19] Hung Tran, *Two Proposals for WTO Reform*, FIN. TIMES (Jun. 27, 2019), https://www.ft.com/content/34d7c5d0-98c5-11e9-8cfb-30c211dcd229.

[20] *See* Hannah Monicken*, Developing WTO Members' Statement Highlights Divide on Key Issues*, INSIDE U.S. TRADE (May 29, 2019), https://insidetrade.com/daily-news/developing-wto-members%E2%80%99-statement-highlights-divide-key-issues (noting the contrast with U.S. positions).

> were merely a matter of horse-trading or a few procedural items . . . They grew over decades and they became an integral part of what the Appellate Body system was and of the U.S. critique of that system. And the failure to respect that critique or to genuinely engage with it was, I believe, what led the U.S. to bring the Appellate Body down.[21]

Many WTO Members have suggested the desirability of moving forward with plurilateral negotiations, but negotiations to date in such areas as the Trade in Services Agreement (TISA), the Environmental Goods Agreement (EGA), and Fisheries Subsidies have not significantly progressed.[22] The fisheries negotiations were abandoned shortly after an attempt was made to continue them electronically.[23] Little progress had apparently been made, and the postponement of the 12th ministerial meeting until mid- or late 2021, removed what little pressure remained to conclude an agreement.[24] The lack of progress may be affected by the free rider problems, but the problems seem to go much deeper, reflecting fundamental differences between Quads and BRICs in addition to the United States' lack of support. E-commerce negotiations are continuing as of June but whether these multiyear negotiations will be successfully concluded in the near term is uncertain.[25]

One can hope that despite the demise of AB, rules that are key to support the Quads, such as protection of IP and expansion of services, as well as basic General Agreement on Tariffs and Trade (GATT) obligations (such as Most Favored Nation (MFN) treatment and bound tariffs), will continue to be observed despite weak or a total lack of effective enforcement. Also, many of the rules set

---

[21] *See* Hannah Monicken, *Graham: Appellate Body Problems Run Deep, Won't be Fixed with 'Tweaks'*, INSIDE U.S. TRADE (Mar. 5, 2020), https://insidetrade.com/daily-news/graham-appellate-body-problems-run-deep-won%E2%80%99t-be-fixed-%E2%80%98tweaks?s=na (quoting Senator Graham).

[22] *See, e.g.*, *Negotiations on fisheries subsidies*, WTO, https://www.wto.org/english/tratop_e/rulesneg_e/fish_e/fish_e.htm (last visited Feb. 19, 2021); *Trade in Services Agreement (TISA)*, GLOBAL AFFAIRS CANADA, https://www.international.gc.ca/trade-agreements-accords-commerciaux/topics-domaines/services/tisa-acs.aspx?lang=eng#a (last visited Feb. 19, 2021); *Environmental Goods Agreement (EGA)*, WTO, https://www.wto.org/english/tratop_e/envir_e/ega_e.htm (last visited Feb. 19, 2020).

[23] Mark Godfrey, *WTO Fishing Subsidies Deal Pushed to End of Year as Discord Divides Main Players*, SEAFOODSOURCE (Apr. 23, 2020), https://www.seafoodsource.com/news/environment-sustainability/wto-fishing-subsidies-deal-pushed-to-end-of-year-as-discord-divides-main-players (last visited May 24, 2020).

[24] *See POSTPONED: WTO Ministerial Conference (MC12)*, U.S. COUNCIL ON INT'L BUS. (Jun. 8, 2020), https://www.uscib.org/event/wto-ministerial-conference-mc12/ (reporting on the WTO decision to postpone the Kazakhstan meeting).

[25] *See Canada's WTO Ambassador: E-Commerce Talks Will Guide Organization During the Pandemic*, INSIDE U.S. TRADE (May 22, 2020), https://insidetrade.com/daily-news/canada%E2%80%99s-wto-ambassador-e-commerce-talks-will-guide-organization-during-pandemic.

forth under the GATT and the WTO covered agreements, particularly those that are relatively uncontroversial, such as customs valuation, will continue to govern relations among most Members, but violations in many cases will be effectively unchallengeable. Historically, many countries have complied with international agreements, even where no effective dispute settlement mechanism existed, because they believed in a kind of golden rule of "comply[ing] with the provisions of the agreement as you would expect other parties to so." This doesn't necessarily happen; consider the sorry record of the Endangered Species Convention[26] and the Framework Convention on Climate Change[27] among others that lack mandatory third-party dispute settlement.

Of the proposals to provide a continuing WTO dispute settlement mechanism in the (possibly very long) interim before AB reform can be accomplished, the most promising include the following.

Some WTO members are likely to continue to try to use the dispute settlement mechanism when litigating with each other, typically by agreeing beforehand to waive their rights of appeal to the AB generally or, more likely, in specific cases, as the United States has done in a compliance panel proceeding with India, where both parties after an initial U.S. appeal (which would have left the case in limbo) have agreed to resolve the dispute "amicably."[28] Otherwise, once a panel decision is appealed, further WTO proceedings are halted, and the Dispute Settlement Body is precluded from adopting the panel report or authorizing trade sanctions.[29]

The EU developed a potentially more effective solution for a DSU-Article-25-based mechanism, expected to reflect concepts found in the EU's investment

---

[26] *See* Convention on International Trade in Endangered Species of Wild Fauna & Flora, art. XVIII, Mar. 3, 1973, 27 U.S.T. 1087 (providing in Art. XVIII that disputes are to be settled by negotiation or, if both parties agree, by reference to the Permanent Court of Arbitration at the Hague). To the best of our knowledge no dispute under CITES has ever been submitted.

[27] *See* United Nations Framework Convention on Climate Change, *opened for signature* May 9, 1992, 1771 U.N.T.S. 107, https://unfccc.int/files/essential_background/background_publications_htmlpdf/application/pdf/conveng.pdf (last visited Feb. 28, 2020) (providing in Article 14 of the FCCC, which applies to the Kyoto Protocol as well, that only states are to settle disputes by negotiation or other peaceful means. Parties may declare that they agree to submit disputes to the International Court of Justice or international arbitration, but almost none of the Parties have done so.).

[28] *See India, US Agree to Resolve Amicably Dispute Over Steel Import Duty*, ECON. TIMES (last updated Jan. 24, 2020), https://economictimes.indiatimes.com/news/economy/foreign-trade/india-us-agree-to-resolve-amicably-dispute-over-steel-import-duty/articleshow/73582768.cms?from=mdr.

[29] *See* DSU, *supra* note 8, art. 17.1 (stating that the "Appellate Body *shall* hear appeals from panel cases); *id.* at art. 17.12 ("The Appellate Body shall address each of the issues raised in accordance with paragraph 6 [issues of law covered in the panel report and legal interpretations developed by the panel].").

court/appellate mechanism embedded in its free trade agreement with Canada.[30] The group in January 2020 called for reform of the WTO mechanism but also committed itself to find an interim appeal solution:

> We, the Ministers of Australia, Brazil, Canada, China, Chile, Colombia, Costa Rica, European Union, Guatemala, Republic of Korea, Mexico, New Zealand, Norway, Panama, Singapore, Switzerland, Uruguay, remain committed to work with the whole WTO membership to find a lasting improvement to the situation relating to the WTO Appellate Body. We believe that a functioning dispute settlement system of the WTO is of the utmost importance for a rules-based trading system, and that an independent and impartial appeal stage must continue to be one of its essential features.
>
> *Meanwhile, we will work towards putting in place contingency measures that would allow for appeals of WTO panel reports in disputes among ourselves, in the form of a multi-party interim appeal arrangement based on Article 25 of the WTO Dispute Settlement Understanding, and which would be in place only and until a reformed WTO Appellate Body becomes fully operational. This arrangement will be open to any WTO Member willing to join it. We have instructed our officials to expeditiously finalize work on such an arrangement.*[31]

The initial agreement on the "Multi-Party Interim Appeal Arbitration Arrangement" (MPIA) was finalized and the document was published at the end of March 2020, and the first proceedings began in June 2020.[32] As anticipated, it calls for primary use of the DSU's Article 25 arbitration mechanism, with an understanding that the Members utilizing this system will voluntarily refrain from pursuing appeals under Articles 16.4 and 17.1 of the DSU. Rather, the group is creating an alternative appellate mechanism.[33] According to the outline of the mechanism, "[t]he appeal arbitration procedure will be based on the substantive and procedural aspects of Appellate Review pursuant to Article 17 of the DSU, in order

---

[30] Comprehensive Economic and Trade Agreement, Can.-EU, Oct. 30, 2016 (in provisional force as of Sept. 21, 2017, without the investment dispute settlement mechanism), http://trade.ec.europa.eu/doclib/docs/2014/september/tradoc_152806.pdf.

[31] *Statement by Ministers, Davos, Switzerland, 24 January 2020*, https://insidetrade.com/sites/insidetrade.com/files/documents/2020/jan/wto2020_0035a.pdf (last visited Feb. 28, 2020).

[32] *First WTO Disputes Proceeding under Interim Plan; Final Appellate Report Imminent,* INSIDE U.S. TRADE (Jun. 4, 2020), https://insidetrade.com/daily-news/first-wto-disputes-proceeding-under-interim-plan-final-appellate-report-imminent.

[33] *See generally* Multi-Party Interim Appeal Arbitration Arrangement Pursuant to Article 25 of the DSU, WTO Doc. JOB/DSB/1/Add.12 (Apr. 30, 2020).

to keep its core features, including independence and impartiality, while enhancing the procedural efficiency of appeal proceedings."[34] It is expected to function until such time as the WTO's Appellate Body is able to hear new appeals,[35] primarily on a *mutatis mutandis* basis compared to the AB.[36] The "Multi-party Interim Appeal Arbitration" arrangement (MPIA) became effective April 30, 2020.[37]

Whether a significant number of WTO Members can effectively implement this mechanism of course remains to be seen, although the fact that the founding group consists of most major world economies except for the United States and India gives some cause for optimism.[38] Perhaps even the United States would consider using the mechanism in some cases, but it can be expected that for the most part the United States will remain outside the realm of WTO dispute settlement for the foreseeable future.[39]

We note, however, that it is not only the United States' administration under Trump that is seriously questioning the effectiveness and fairness of the AB.[40] For example, one prominent trade law professor, Joost Pauwelyn (one of the initially appointed panelists for the MPIA) has suggested that the discussion of steps forward should not focus on preserving the WTO AB per se ("appellate body 2019") but on broader concepts of independent third-party adjudication (ITPA) of international trade disputes, with or without an appellate function.[41] Pauwelyn persuasively argues:

> "[A]ppellate review 2019" is in line with ITPA and may be the preferred evolution of some or even a majority of WTO members (even though, in the US view, it breaches the DSU). But, as hard as it may be for some people who have been building and inside "appellate review 2019," there are valid, ITPA-consistent alternatives to it. The demise of "appellate review 2019" must not and cannot be equated to the demise of ITPA.[42]

---

34 *Id.* ¶ 3.

35 *See id.* ¶ 1.

36 *Id.* Annex 1, ¶ 4.

37 *Interim Appeal Arrangement for WTO Disputes Becomes Effective*, EUROPEAN COMMISSION (Apr. 30, 2020), https://trade.ec.europa.eu/doclib/press/index.cfm?id=2143&utm_campaign=24f476658c-EMAIL_CAMPAIGN_2020_05_01_05_02&utm_medium=email&utm_source=POLITICO.EU&utm_term=0_10959edeb5-24f476658c-189723609.

38 *See id.*

39 *Id.*

40 *See* Joost Pauwelyn, *Reply to Prof. Petersmann: Why the end of the Appellate Body Must not Mean the end of Independent Third-Party Adjudication,* INT'L ECON. L. & POL'Y BLOG (Mar. 18, 2020, 9:57 AM), https://ielp.worldtradelaw.net/2020/03/reply-to-prof-petersmann-why-the-end-of-the-appellate-body-must-not-mean-the-end-of-independent-thir.html.

41 *Id.*

42 *Id.*

Pauwelyn further suggests that the focus going forward should be convincing all WTO members of the need for ITPA and "constructing a form of WTO dispute settlement that is acceptable to critics of 'appellate review 2019' but stays within the 'red lines' of independent third-party adjudication."[43]

While the MPIA will be functioning without any substantive changes in the WTO system, as noted above, Pauwelyn believes that in time the ultimate result could be some sort of "appellate review 2024."[44] In other words, eventually (in four years or more as Pauwelyn implies) a quicker mechanism may emerge, focusing more on speed and less on consistency, while still being consistent with the concept of ITPA.[45] Defending "appellate review 2019" in his view, as well as ours, could result in the world trading community losing ITPA as well.[46]

The fact remains that the United States is not likely, at least under the Trump Administration, to be a supporter of AB reform, except in the highly unlikely event that the remaining WTO members were to agree to all or most of the United States' desired procedural and substantive changes. As U.S. Trade Representative Robert Lighthizer told a congressional committee in June 2020:

> I think it [the Appellate Body] was working against the United States. I think it was hurting our workers. It was non-representative and from my point of view I don't feel any compulsion to have it ever come back into effect. . . . I'm not a fan of the Appellate Body, I think if it never goes back into effect that would be fine.[47]

More recently, Ambassador Lighthizer has proposed a series of steps for "reforming" the WTO.[48] He has argued, inter alia, that the WTO should develop, as a replacement for the current panel and AB dispute resolution system, a mechanism relying on ad hoc tribunals similar to those which are used for international commercial arbitration, with rulings limited in effect to the Parties to

---

43 *Id.*

44 *Id.*

45 Pauwelyn, *supra* note 40.

46 *Id.*

47 *Quote-Unquote: Lighthizer Live,* WORLD TRADE ONLINE (Jun. 18, 2020), https://insidetrade.com/trade/quote-unquote-lighthizer-live.

48 Bryce Baschuk, *U.S. Trade Chief Lays Out His Vision to Revive the Ailing WTO*, BLOOMBERG LAW (Aug. 21, 2020), https://www.bloomberglaw.com/product/blaw/bloomberglawnews/international-trade/BNA%2000000174-1089-dfed-a1fc-d58d04e80000?bwid=00000174-1089-dfed-a1fc-d58d04e80000.

the dispute.[49] It is safe to say that there will be few if any of the other 163 WTO Members[50] that are likely to embrace this approach to dispute settlement.

It also seems clear, now that Mr. Biden has become President, that in the future the United States will remain a member of the WTO, even though the extent to which a new administration is able to deal with the U.S. concerns noted earlier remains uncertain. As former WTO Director General Pascal Lamy has noted, "[it's] better to have a WTO without the U.S. than no WTO at all, at least as far as the dispute settlement system is concerned."[51] Such a result is not difficult to anticipate even if most WTO members and many members of Congress and other U.S. stakeholders find it repugnant.

---

[49] *Id.* Other reforms that have been advocated include limiting free trade agreements to those among contiguous states, ending special and differential treatment for countries with large or advanced economies (e.g., China and India), and creating new rules to stop economic distortions resulting from state capitalism. *Id.*

[50] *See Members and Observers*, WTO, https://www.wto.org/english/thewto_e/whatis_e/tif_e/org6_e.htm (last visited Feb. 18, 2021).

[51] *Former Director-General Lamy: A WTO Without the U.S. is Better than None*, INSIDE U.S. TRADE (Jun. 18, 2020), https://insidetrade.com/daily-news/former-director-general-lamy-wto-without-us-better-none.

DISCUSSION OF THE 2019 CASE LAW FROM THE APPELLATE BODY

I. TRADE REMEDIES – DEFINITION OF INDUSTRY, INJURY, AND CAUSATION

A. Citation

> WTO Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WTO Doc. WT/DS504/AB/R (*adopted* Sept. 30, 2019) [hereinafter *Korea Valves AD*].[52]

B. Facts

Importer SMC Korea sold Japanese-made pneumatic valves in Korea in 2013.[53] Domestic producers of pneumatic valves TPC Mechatronics Corporation (TPC) and KCC Co., Ltd. (KCC) applied for the Korea Trade Commission (KTC) to begin an antidumping investigation.[54] The KTC initiated an investigation on February 21, 2014.[55]

The KTC's Office of Trade Investigation (OTI) sent questionnaires to all nine known producers of the domestic like product. But only the original applicants, TPC and KCC, submitted responses and reported their production volumes.[56] Two additional producers, Yonwoo Pneumatics (Yonwoo) and Shin Yeong Mechatronics (Shin Yeong) submitted limited data.[57] The OTI did not have any reliable source for accurate production data from the other five domestic producers.[58] Based on the data available, the OTI found that the production volume of applicants TPC and KCC constituted 55.4% of the total domestic production of the like product.[59] For the purpose of the investigation, the OTI defined the

---

[52] Appellate Body Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WTO Doc. WT/DS504/AB/R (adopted Sept. 30, 2019) (hereinafter *Korea Valves AD* Appellate Body Report); *see also* Panel Report, *Korea – Anti-Dumping Duties on Pneumatic Valves from Japan*, WTO Doc. WT/DS504/R (issued Apr. 12, 2018) [hereinafter *Korea Valves AD* Panel Report]. At the Appellate stage, 10 WTO Members participated as Third Parties – Brazil, Canada, China, Ecuador, European Union, Norway, Singapore, Turkey, United States, and Viet Nam.

[53] *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.246.

[54] *Id.* ¶ 1.2.

[55] *Id.*

[56] *Id.* ¶ 5.44.

[57] *Id.*

[58] *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.44.

[59] *Id.*

"domestic industry" as the "total of TPC's and KCC's businesses producing a like product."[60]

After Japan argued Yonwoo and Shin Yeong were not suffering from injury, the OTI's additional investigation found that the operating profit ratio of these two companies was "relatively good compared to [TPC and KCC]," but only because Yonwoo and Shin Yeong had smaller selling, general, and administrative (SG&A) expenses.[61] The KTC concluded that the inclusion of domestic producers other than TPC and KCC "would not significantly change the overall trends of the injury indicators of the domestic industry."[62]

As part of its investigation, the OTI reviewed 115,524 individual transactions in the pneumatic valve market.[63] The list of these transactions reports the product code, series, date, quantity, value, and unit price of resale transactions of certain models of the dumped imports, and the average price and the high-end price of corresponding models of the domestic like product.[64] But, with less specificity, the OTI made a notation of "undercutting" for each instance where the transaction resale price of the dumped import was lower than the *average* or *high-end* price of the domestic like product, without identifying which particular model of the domestic like product was "undersold."[65] The OTI also did not identify the quantity or value of the sales of those models.[66]

Ultimately, the KTC determined Japanese pneumatic valves were being dumped in the Korean market and such dumping caused injury.[67] The KTC determined that "the final dumping margins of the dumped products were ranged between 11.66% and 31.61%, which means the size of dumping margin is not insignificant. Accordingly, such dumping appears to have had significant impact on the sales price of the dumped products and that of the like product."[68] The KTC concluded dumping had this impact on the sales prices of the like products, despite the fact that the prices of the dumped imports were still consistently higher than domestic like product prices.[69] In fact, dumped import prices increased from 2011 to 2012 while domestic like product prices decreased.[70] Nevertheless, the KTC attributed the impact of dumped imports on the domestic industry in part to "fierce" competition, particularly on the part of importer SMC Korea.[71] The KTC also partially explained injury to the domestic industry by relying on the 78.9% increase

---

60 *Id.*

61 *Id.* ¶ 5.46.

62 *Id.* ¶ 5.47.

63 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.252.

64 *Id.*

65 *Id.* ¶¶ 5.252, 5.254.

66 *Id.* ¶ 5.254.

67 *See id.* ¶ 1.2.

68 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.161 (quoting KTC's Final Resolution).

69 *See id.* ¶ 5.161.

70 *Id.* ¶ 5.208.

71 *Id.* ¶ 5.178.

in dumped imports from 2012 to 2013, the same year in which dumping was found.[72] Japan requested a Panel, and both parties appealed the Panel's decision to the AB.[73]

C. Key Issues

1. Magnitude of Margin of Dumping

In its Panel request, Japan stated that the antidumping duties imposed were inconsistent with Korea's obligations under:

> Articles 3.1 and 3.4 of the [Anti-Dumping] Agreement because Korea's analysis of the impact of the imports under investigation on the domestic industry at issue did not involve an objective examination based on positive evidence, including an evaluation of all relevant economic factors and indices having a bearing on the state of the domestic industry at issue.[74]

In advancing this claim, Japan argued that Korea's finding regarding the magnitude of the margin of dumping "has no factual support, and is contradicted by the fact that the prices of the dumped imports were consistently higher than domestic like product prices."[75] Korea argued that "the magnitude of the dumping margins (between 11.66% and 31.61%) was not insignificant and that such magnitude had a significant impact on the interaction between the sales prices of the dumped imports and the like product."[76] Japan contended that Korea failed to connect its finding that the "size of the dumping margin is not insignificant" to the

---

72 *Id.* ¶ 5.311.

73 In addition to the two issues outlined here, Japan contested Korea's assertions of confidential business information (CBI). In short, Article 6.5.1 of the Anti-Dumping Agreement obligates investigating authorities to get from submitting parties a non-confidential summary of information which is to be treated as confidential. The Appellate Body held that Korea failed to provide an explanation of what information was confidential and why, as Article 6.5.1 requires. *See generally Korea Valves AD* Appellate Body Report, *supra* note 52, ¶¶ 5.441–5.443.

74 *Id.* ¶ 5.96.

75 *Id.* ¶ 5.161.

76 *Id.* ¶ 5.161.

conclusion that "such dumping appears to have had a significant impact."[77] Japan argued that Korea's conclusion is "not explained at all."[78]

To Japan, Korea's findings were insufficient to satisfy the requirements of Article 3.4 of the Anti-Dumping Agreement. Article 3.4 states:

> The examination of the impact of the dumped imports on the domestic industry concerned shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry, including actual and potential decline in sales, profits, output, market share, productivity, return on investments, or utilization of capacity; factors affecting domestic price; the magnitude of the margin of dumping; actual and potential negative effects on cash flow, inventories, employment, wages, growth, ability to raise capital or investments. This list is not exhaustive, nor can one or several of these factors necessarily give decisive guidance.[79]

Japan asserted that Korea's calculations of 11.66% to 31.61% were so flawed as to be useless because they were unsupported by data.[80] Japan argued that Korea essentially ignored the requirement to calculate the magnitude of the dumping margin because Korea ignored important information in doing its calculations. Japan noted that the assessment "must take into account the relationship among the dumping margins, the actual prices of the dumped imports, and the prices of the domestic like products," but Korea failed to include price differentials in its calculation.[81] The fact that the dumped imports had a higher price than the domestic product should have affected the dumping margin calculation to a greater extent, in Japan's view.

Korea fired back that Japan's standard was nebulous and inarticulate, stating that there was no basis in the text of Article 3.4 for Japan's argument that "something more was legally required."[82] Korea also criticized Japan for failing "to clarify what that 'something substantive' should be" in addition to the calculations Korea had already made.[83]

Finally, Japan offered up one additional argument against Korea's evaluation of the magnitude of the dumping margin. To determine injury caused to the domestic industry, Japan argued "an investigating authority is *required* to

---

77 *Id.* ¶ 5.175.

78 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.175.

79 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 3.4, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization [hereinafter Antidumping Agreement].

80 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.161.

81 *Id.* ¶ 5.170.

82 *Id.* ¶ 5.171.

83 *Id.*

undertake some form of counterfactual analysis, specifically in this case by adding the dumping margin to the actual prices of the dumped imports or comparing the magnitude of the dumping margin with the level of overselling."[84] Korea argued that Japan's "counterfactual analysis" argument is not supported by the text of Article 3.4 or any previous AB Report.[85]

2. Causation

Japan's claims four, five, and six all concerned whether Korea's actions were inconsistent with Article 3.5 of the Anti-Dumping Agreement.[86] Article 3.5 provides, in relevant part:

> It must be demonstrated that the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury within the meaning of this Agreement. The demonstration of a causal relationship between the dumped imports and the injury to the domestic industry shall be based on an examination of all relevant evidence before the authorities. The authorities shall also examine any known factors other than the dumped imports which at the same time are injuring the domestic industry, and the injuries caused by these other factors must not be attributed to the dumped imports.[87]

Japan noted the absence of sufficient correlation between the dumped import volumes and prices against the domestic industry's profits.[88] Japan argued that this non-correlation undermined a causal relationship.[89]

The Panel agreed with Japan up to a point, even if it ultimately ruled in Korea's favor on this question.[90] That is, the Panel found that Korea acted inconsistently with Article 3.5 in failing to: (1) ensure price comparability when comparing individual transaction prices of certain models of dumped imports with the average prices of the domestic like product; and (2) adequately explain their consideration of the price-suppressing and depressing effects of dumped imports despite the dumped imports having consistently higher prices.[91] Still, the Panel found that Japan failed to show that Korea's causation determination was inconsistent with Article 3.5 because Korea could still explain causation.[92] The

---

84 *Id.* ¶ 5.164.
85 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.164.
86 *Id.* ¶ 5.182.
87 Antidumping Agreement, *supra* note 79, art. 3.5.
88 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.182.
89 *Id.*
90 *Id.* ¶¶ 5.182, 1.7(b).
91 *Id.* ¶ 5.186.
92 *Id.*

prices of the domestic products and the dumped imports did not decrease at the same rate from 2012 to 2013 and in fact moved in opposite directions from 2011 to 2012, but these facts alone would not necessarily negate causation.[93]

D. Holdings and Rationales

1. Magnitude of Margin Dumping

The Panel first addressed Korea's obligations, saying, "Article 3.4 does not require that the magnitude of the margin of dumping be evaluated in any particular manner or be given any particular weight."[94] An evaluation of the magnitude of the dumping margin must be undertaken as a substantive matter, but the relevance of the dumping margin will vary from case to case.[95] The investigating authority must assess how much weight to give the dumping margin as one of the factors in determining injury.[96] This assessment requires more than a simple "listing of the margins of dumping" to demonstrate that the dumping margin was evaluated consistently with Article 3.4.[97] The AB upheld the Panel's interpretation of Article 3.4.[98]

On appeal, Japan argued that the Panel allowed Korea to skip a step in evaluating the magnitude of the margin of dumping.[99] Japan argued that the "dumping margin alone is insufficient, because whether and to what extent the dumping margin may have any impact on the domestic prices depends on the degree of competition between the dumped imports and the domestic like products."[100] Japan argued that once Korea determined that the dumping margin was between 11.66% to 31.61%, Korea simply assumed the dumping affected the domestic industry.[101] Japan felt Korea would need to do a bit more to connect these dots, saying the "fact that Article 3.4 does not specify any particular method does not mean the [investigating] authorities need do nothing."[102]

The AB held that Korea had not done "nothing," but had in fact made a connection between the dumping margin and the domestic industry.[103] The dumping margin allowed the Japanese respondents to offer selective low pricing

---

93 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.186.
94 *Id.* ¶ 5.162.
95 *Id.*
96 *Id.*
97 *Id.*
98 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.169.
99 *Id.* ¶ 5.175.
100 *Id.*
101 *See id.* ¶¶ 5.161, 5.170.
102 *Id.* ¶ 5.175.
103 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.177.

and aggressively market the dumped products.[104] That low pricing and aggressive marketing prevented the domestic industries from raising sales prices to the level of a "reasonable sales price."[105]

> Thus, in light of the competitive relationship between the dumped imports and the domestic like product found by the KTC, we do not consider that Japan has established that the KTC's findings regarding the magnitude of the margin of dumping were "not explained at all" or that the Panel erred in finding that the KTC's findings are "sufficient to demonstrate that it evaluated the magnitude of the margins of dumping 'as a substantive matter.'"[106]

The AB rejected Japan's counterfactual analysis argument as swiftly as the Panel did.[107] The Appellate Body agreed with Japan that an investigating authority could benefit from understanding "what the state of the domestic industry would have been without any dumping."[108] But such understanding is not required.[109] "While a counterfactual analysis may be useful in certain circumstances, we consider that Japan has not established that the existence of overselling in this case necessarily renders a counterfactual analysis obligatory under Article 3.4."[110]

2. Causation

The AB agreed that correlation helps in demonstrating causation:

> A coincidence in time between upward trends in imports and a decline in the performance indicators of the domestic industry could be evidence of the existence of a causal link between increasing important and material injury to the domestic industry. However, while such a coincidence, by itself, cannot prove causation, its absence would create serious doubts as to the existence of a causal link and would require a very compelling analysis of why causation is still present. Thus, the existence of a correlation, though indicative, is by no means dispositive of the existence of a causal link. Moreover, a lack of correlation does

104 *Id.* ¶ 5.176.
105 *Id.*
106 *Id.* ¶ 5.178.
107 *See generally Korea Valves AD* Appellate Body Report, *supra* note 52.
108 *See id.*
109 *Id.*
110 *Id.* ¶ 5.180.

> not preclude a finding that a causal link exists, provided that a very compelling explanation is provided.[111]

In short, the lack of correlation was not a wall blocking Korea's path to imposing antidumping duties.[112] But the lack of correlation did present a high hurdle for Korea to get over.

Japan pounced, pointing out the differing trends.[113] From 2011 to 2012, subject import prices increased while domestic prices decreased, whereas, from 2012 to 2013, subject import prices fell sharply, but domestic prices fell only slightly.[114] Japan argued that these diverging price trends precluded the necessary demonstration of a causal relationship.[115]

But Korea had its "very compelling explanation" ready.[116] Korea's causation analysis did not rely solely on the movement in the prices, but acknowledged the deterioration of operating profit as well.[117] Korea repeatedly insisted that the domestic industry had to respond to the strengthened marketing activities of the dumped imports.[118] This response increased operating costs.[119] Further, domestic industry had to keep cutting prices in order to stay under the dumped imports.[120] According to Korea, "the deterioration of the operating profit in 2012, after improving in 2011, was the result of the price reduction of the like product and the increase in the operating cost in response to the competition of the dumped products."[121]

Thus, Korea's causation analysis was not deficient. Korea acknowledged that prices of the dumped imports increased from 2011 to 2012 and their volume and market share declined.[122] But during the same period, the domestic industry's operating loss worsened, when it might have improved.[123] Korea explained that this divergence was due to the increase of operating costs in response to the competition with the dumped imports.[124] These increased costs, piled on top of the

---

111 *Id.* ¶ 5.291.
112 *Korea Valves AD Appellate Body Report, supra* note 52, ¶ 5.291.
113 *Id.* ¶ 5.292.
114 *Id.* ¶ 5.294.
115 *Id.*
116 *See id.* ¶¶ 5.291, 5.295.
117 *See Korea Valves AD Appellate Body Report, supra* note 52, ¶ 5.299.
118 *Id.* ¶¶ 5.213, 5.231, 5.243, 5.250, 5.276, 5.299, 5.330.
119 *Id.* ¶¶ 5.246, 5.299.
120 *Id.* ¶ 5.299.
121 *Id.*
122 *Korea Valves AD Appellate Body Report, supra* note 52, ¶ 5.300.
123 *Id.* ¶ 5.300.
124 *Id.*

decrease in domestic like product prices, helped explain how the dumped imports caused injury to the domestic market.[125]

Neither Korea nor the Panel ignored factors which should be considered in an Article 3.5 causation analysis. The Panel was mindful of the lack of correlation between the domestic-industry profit, dumped import prices, and the volume and market share of the dumped imports.[126] The Panel considered why it would be that Korea's profits decreased even as dumped import prices rose.[127] As stated in the preceding paragraph, operating costs accounted for Korea's downward trend.[128] The upward trend in dumped import prices also had an explanation; "The average price of the dumped products increased in 2011 and 2012 not because their actual sales prices rose but mainly because the product composition was changed such that they were mainly composed of high-priced products."[129] The AB upheld the Panel's analysis.[130] Even though prices of dumped imports and domestic like products did not move in the same direction or at the same rate, other factors sufficiently showed a relationship between operating losses and dumped imports which was "reasonable and grounded in the underlying facts."[131] Japan failed to demonstrate that Korea acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement with respect to its conclusion that the dumped imports, through the effects of dumping, were causing injury to the domestic industry.[132]

E. Commentary

Korea Valves AD is an unusual antidumping case because of the Appellate Body's particularly strong interest in the panel request here.[133] Although this Case Review omits procedural matters, the AB focused on procedure over substance in this Report.[134] The panel request governs a panel's terms of reference and delimits the scope of the panel's jurisdiction.[135] The Panel had found several of Japan's claims to be outside its terms of reference.[136] The AB reversed all of them, ruling that the claims were within the terms of reference.[137]

But the AB was frustrated in its attempts to complete the legal analysis on those claims because the Panel had not addressed either facts or law.[138] Most

---

125 *Id.*
126 *Id.*
127 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.300
128 *Id.* ¶ 5.299.
129 *Id.* ¶ 5.301.
130 *Id.*
131 *Id.*
132 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 6.21.
133 *See id.*
134 *See generally id.*
135 *Id.*
136 *Id.*
137 *See Korea Valves AD* Appellate Body Report, *supra* note 52, ¶¶ 6.2–6.5.2.
138 *See generally id.*

importantly, the Panel found Japan's claim seven to be outside of its terms of reference and did not address it.[139] In claim seven, Japan disputed Korea's definition of the domestic industry because Korea defined it as only the two companies TPC and KCC.[140] Japan alleged that this definition did not sufficiently encompass a "major proportion" of the domestic industry because these were only two out of nine companies and accounted for only 55.4% of the production.[141] Because the Panel did no fact-finding on this issue, the AB was unable to review Japan's claim that a definition of domestic industry barely over half of all production creates a material risk of distorting the antidumping investigation.[142] The AB Report addresses claim seven first, likely because the definition of the domestic industry is so foundational to all the other arguments in an antidumping case.[143] With nearly palpable frustration, the AB found that the Panel erred in finding that the definition of domestic industry was not in its terms of reference.[144] Subsequently, much of *Korea Valves AD* focuses on how parties are to draft panel requests and how Panels are to analyze them.[145]

The AB describes the proper litigation procedure in ways it has done before, but with an emphasis that is stronger than in previous cases.[146] That is, the AB has previously addressed the differences between good and bad panel requests.[147] Two earlier AB Reports have extensively explored the requirements of panel requests, with *US – Countervailing Measures (China)* and *China – HP-SSST (Japan) / China – HP-SSST (EU)* both having recourse to the panel's terms of reference.[148] But *Korea Valves AD* is an extension of the AB's instructions to future Petitioners and future Panels.[149] In fact, *Korea Valves AD* reads as almost a tutorial on what American lawyers would call Civil Procedure.[150] The AB found that almost all substantive questions in *Korea Valves AD*, aside from the margin of

---

139 *See id.* ¶ 6.4.

140 *Id.* ¶ 5.30.

141 *Id.* ¶¶ 5.49–5.51.

142 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 6.33.

143 *Id.* ¶¶ 5.19–5.35.

144 *Id.* ¶¶ 5.34–5.35.

145 *See, e.g.*, *id.* ¶¶ 5.3–5.18.

146 *Id.* ¶¶ 5.3–5.18.

147 *Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.7.

148 *See* Appellate Body Report, *United States – Countervailing and Anti-Dumping Measures on Certain Products from China*, ¶¶ 4.5–4.9, WTO Doc. WT/DS449/AB/R (adopted July 7, 2014); *see* Appellate Body Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes From Japan* / Appellate Body Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes From European Union*, ¶¶ 5.10–5.16, WTO Docs. WT/DS454/AB/R, WT/DS460/AB/R (adopted Oct. 14, 2015).

149 *See generally Korea Valves AD* Appellate Body Report, *supra* note 52.

150 *Id.* ¶ 5.8.

dumping and causation, were practically unanswerable because of some procedural deficiency in the "lower court."[151] The AB took great pains to explain why.

The elaborate explanations of the AB make perfect sense, given the context of the AB's impending demise at the time they drafted this Report. In *Korea Valves AD*, the AB meticulously instructed future Panels in properly evaluating panel requests and thereby setting their terms of reference.[152] As we have discussed in our Introduction above, Members will not be able to appeal Panel decisions in the foreseeable future, so it is all the more important that Panels get it right in the first instance. The AB may have seen *Korea Valves AD* as one last shot to provide instructions on properly interpreting panel requests. Similarly, *Korea Valves AD* explores the question for future Petitioners of what they will need to include, at a bare minimum, for each claim to be within the Panel's terms of reference.[153] Japan's panel request here provides a good working template for the bare minimum needed in each claim of the panel request.

---

151 *See id.* ¶¶ 6.1–6.5.2.

152 *Id.* ¶¶ 5.3–5.9.

153 *See, e.g., Korea Valves AD* Appellate Body Report, *supra* note 52, ¶ 5.2.1.

II. TRADE REMEDIES – DUMPING MARGIN DETERMINATION

A. Citation

WTO Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WTO Doc. WT/DS493/AB/R, (*adopted* Sept. 30, 2019) [hereinafter *Ukraine Ammonium AD*].[154]

B. Facts

On May 21, 2008, Ukraine's Intergovernmental Commission on International Trade (ICIT) imposed anti-dumping duties on imports of ammonium nitrate from the Russian Federation (Russia).[155] The ICIT's 2008 decision imposed a 10.78% anti-dumping duty on ammonium nitrate imports from a Russian producer, JSC MCC EuroChem (EuroChem).[156] EuroChem responded to this measure by challenging it in the District Administrative Court of Kiev (the District Court).[157]

The District Court determined that the ICIT erred in imposing anti-dumping duties on EuroChem's imports, as the Ministry of Economic Development and Trade of Ukraine (MEDT) improperly calculated EuroChem's dumping margin by including a discount when, in fact, no discount existed.[158] The District Court then concluded that there was an absence of dumping by EuroChem, and that its dumping margin had a negative value/rate of 0.35.[159] The Kiev Appellate Administrative Court (Appellate Court) and the Higher Administrative Court of Ukraine (Higher Court) each upheld the District Court's judgment.[160] EuroChem's victory caused the ICIT to issue an amendment (the 2010 Amendment) to its original 2008 decision.[161] This 2010 Amendment imposed a zero percent anti-dumping duty on EuroChem's ammonium nitrate imports in accord with the Ukrainian courts' judgments.[162]

Several years after the 2010 Amendment, the MEDT conducted interim and expiry reviews of its application of the anti-dumping measure.[163] These

---

154 WTO Appellate Body Report, *Ukraine – Anti-Dumping Measures on Ammonium Nitrate*, WTO Doc. WT/DS493/AB/R (*adopted* Sept. 30, 2019) [hereinafter *Ukraine Ammonium AD* Appellate Body Report].

155 *Id.* ¶ 1.2.

156 *Id.* ¶ 5.3.

157 *Id.* ¶ 5.4.

158 *Id.*

159 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 5.4.

160 *Id.*

161 *Id.* ¶ 5.5.

162 *Id.*

163 *Id.* ¶ 5.6.

reviews resulted in an Investigation Report, which contained findings and recommendations on the continued imposition of anti-dumping duties at modified rates on imports of ammonium nitrate originating in Russia.[164] The ICIT used this Investigation Report to issue an extension and modification of the anti-dumping duties in 2014, which included raising the prior zero percent EuroChem duty to 36.03%.[165] Crucial to the MEDT's calculation of the dumping margin was its decision to use a surrogate cost of gas (an input in ammonium nitrate production), as opposed to using Russia's reported cost, to determine the normal value of ammonium nitrate.[166] MEDT reasoned, using the "ordinary-course-of-trade test," that Russia's domestic gas prices were lower than the reasonable cost of production.[167]

C. Key Issues

Ukraine raised three issues before the AB under Articles 6.2, 7.1, and 11 of the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU).[168] Those issues were:

(1) Whether Russia's request for the Panel identified in the 2008 decision and the 2010 Amendment as specific measures for consideration, which would determine whether the Panel erred in its analysis under Article 6.2;
(2) Whether the Panel erred under Articles 7.1 and 11 by ruling on Russia's claim under Article 5.8 of the Anti-Dumping Agreement; and
(3) Whether the Panel erred under Article 11 by failing to consider Ukraine's arguments regarding the inability of Ukrainian courts and investigating authorities to calculate dumping margins under Ukrainian law.[169]

Ukraine also raised three issues before the AB under Articles 2.2, 2.2.1, and 2.2.1.1 of the Anti-Dumping Agreement.[170] Those issues were:

(1) Whether the Panel erred in its interpretation and application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement in finding that MEDT did not provide an adequate basis for rejecting the reported gas cost under that condition;
(2) Whether the Panel consequently erred in finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement because,

---

164 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 5.6.
165 *Id.*
166 *Id.*
167 *Id.*
168 *Id.* ¶ 4.1.
169 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 4.1.
170 *Id.*

in conducting its ordinary-course-of-trade test, MEDT relied on costs calculated inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement; and

(3) Whether the Panel erred in its interpretation and application of Article 2.2 of the Anti-Dumping Agreement in finding that, when constructing normal value, MEDT failed to calculate the cost of production "in the country of origin."[171]

D. Holdings and Rationales

1. Russia's Request for a Panel Identified the 2008 and 2010 Amendment as Measures at Issue

Article 6.2 of the DSU sets forth the requirements a panel request must meet.[172] A request for a panel sets forth the issue a panel may consider within its "terms of reference," and therefore, determines what the panel has jurisdiction to resolve.[173] The request must provide "sufficient information that effectively identifies the precise measures at issue."[174] Ukraine contended the Panel erred under Article 6.2 by failing to demand sufficient precision in determining whether Russia identified the 2008 Decision and 2010 Amendment as "measures at issue."[175]

Ukraine's argument failed.[176] The AB found that the 2008 Decision and 2010 Amendment were linked to Russia's arguments against the propriety of the anti-dumping measures and the inclusion of EuroChem in those measures.[177] The 2008 Decision and 2010 Amendment were referenced in two footnotes concerning these claims.[178]

Ukraine pushed back on this characterization, claiming first that a "measure at issue" must be clearly identified in the text of the request, and not the footnotes.[179] The AB rejected this, noting that the panel request must be construed as a whole.[180] Ukraine next argued that, if footnotes were to be considered, "they must adopt explicit language that clarifies what measures and claims are being brought, and on what conditions."[181] The AB declined to hold such specificity was

---

171 *Id.*
172 *Id.* ¶ 6.20.
173 *Id.*
174 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 6.21.
175 *Id.* ¶¶ 6.21–6.22.
176 *Id.* ¶ 7.2(a).
177 *Id.* ¶¶ 6.23–6.26.
178 *Id.*
179 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 6.30.
180 *Id.* ¶ 6.32.
181 *Id.*

required.[182] Finally, Ukraine argued the footnotes amounted to "background information" that did not identify specific measures.[183] The AB held that background information may be helpful in identifying specific measures, and that such a determination depends on the facts and circumstances of each case.[184]

The AB also reasoned that the Panel correctly connected the 2008 Decision and 2010 Amendment to Russia's challenge that the Ukrainian authorities failed to exclude EuroChem from the scope of the original investigation.[185]

2. The Panel Did Not Err by Ruling Under Articles 7.1 and 11

Ukraine argued that Russia's failure to include the 2008 Decision and 2010 Amendment in the panel request meant it had not properly articulated a claim under Article 5.8 on that basis.[186] The Panel has jurisdiction over claims that are within its terms of reference under Article 7.1.[187] The terms of reference are determined by the measures at issue identified in accord with Article 6.2.[188] As noted in Section D(1) *supra*, the AB found that the 2008 Decision and 2010 Amendment were articulated in Russia's measures at issue in line with Article 6.2.[189] Ukraine conceded that this finding meant this claim under Articles 7.1 and 11 would necessarily fail, and the AB held accordingly.[190]

3. The Panel Did Not Err by Ruling Under Article 11 regarding Ukrainian Courts and Investigating Authority

The Panel found that, under Article 5.8 of the Anti-Dumping Agreement, EuroChem should have been excluded from the original AD investigation instead of having its tariff reduced to zero percent.[191] Ukraine challenged this finding by focusing on Article 5.8's second sentence, "which requires immediate termination of an anti-dumping investigation, and therefore exclusion of a producer or exporter from the scope of that investigation, where a *de minimis* dumping margin has been determined for that producer or exporter."[192] Ukraine maintained the Panel failed to consider that its courts did not "determine" the dumping margin, nor possessed

182 *Id.* ¶ 6.33.
183 *Id.* ¶ 6.34.
184 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 6.35.
185 *Id.* ¶ 6.36.
186 *Id.* ¶ 6.38.
187 *Id.* ¶ 6.39.
188 *Id*.
189 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 6.39.
190 *Id*.
191 *Id.* ¶ 1.6(a)–(b).
192 *Id.* ¶ 6.40.

the legal authority to make such a calculation.[193] As a result, according to Ukraine, the Panel failed to meet Article 11's mandate that it makes an "objective assessment of the matter which embraces 'all aspects of a panel's examination of the matter, both factual and legal.'"[194]

The AB noted that a panel must consider all the arguments and evidence presented before it in a fair manner, and not disregard arguments relevant to a party's case.[195] The panel maintains discretion "to decide which arguments or evidence it addresses or relies on in reaching its findings."[196] As a result, a successful challenge under Article 11 requires a showing that the panel "exceeded its authority as the trier of facts or failed to exercise that authority to conduct a proper analysis."[197] And, if the panel is tasked with assessing the consistency of domestic measures with WTO law, it should do so objectively and "should undertake a holistic assessment of all relevant elements, starting with the text of the law and including, but not limited to, relevant practices of administering agencies."[198]

The AB details the numerous considerations the Panel made in construing the District Court's and Higher Court's judgments.[199] The Panel found that the "combined effect" of these judgments and their implementation was to find that the dumping margin for EuroChem in the original investigation was *de minimis*.[200] The AB found the Panel made this determination while referring to Ukraine's submission that its courts did not have authority to, and did not, calculate the dumping margin.[201]

While the Panel considered this submission, it did not maintain that the courts "calculated" the dumping margin.[202] Instead, according to the AB, the Panel maintained the courts' judgments and that the 2010 Amendment voided the basis for imposing a dumping margin on EuroChem in the first place.[203] This rationale supported the Panel's holding that the "combined effect" of court judgments and 2010 Amendment was to render EuroChem's dumping margin in the original

---

193 *Id.*

194 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶¶ 6.40–6.41 (*quoting* Appellate Body Report, *United States – Anti-Dumping Measures on Certain Hot-Rolled Steel Products from Japan*, WTO Doc.WT/DS184/AB/R ¶ 54 (*adopted* Aug. 23, 2001)).

195 *Id.* ¶ 6.42.

196 *Id.*

197 *Id.*

198 *Id. (quoting* Appellate Body Report, United States – Countervailing Duty Measures on Certain Products from China – Recourse to Article 21.5 of the DSU by China, WT/DS437/AB/RW ¶ 4.101 (July 2019)).

199 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶¶ 6.44–6.48.

200 *Id.* ¶ 6.48.

201 *Id.* ¶ 6.54.

202 *Id.*

203 *Id.* ¶¶ 6.54–6.55.

investigation *de minimis*.[204] Whether Ukraine's courts "calculated" or had the authority to "calculate" the dumping margin was not germane to this decision.[205] As a result, the Panel did not act inconsistently with Article 11.[206]

4. The Panel Did Not Err in Finding That MEDT Did Not Provide an Adequate Basis for Rejecting the Reported Gas Cost

Article 2.2 of the Anti-Dumping Agreement identifies circumstances in which an investigating authority may determine a product's normal value on a basis other than the product's domestic sales.[207] One justification for using an alternate normal value calculation is "[w]hen there are no sales of the like product in the ordinary course of trade in the domestic market of the exporting country."[208]

On this basis, an investigating authority may use other factors to arrive at a constructed value of the product, such as the price of a comparable like product or else the "cost of production in the country of origin plus a reasonable amount for administrative, selling and general costs and for profits."[209] The MEDT used this justification to calculate the gas costs incurred in the production of ammonium nitrate on a basis other than Russia's domestic sales.[210]

When normal value is being constructed because it cannot be determined on the basis of domestic sales, the calculation of 'the cost of production in the country of origin' is subject to Article 2.2.1.1 of the Anti-Dumping Agreement.[211] When an investigating authority is constructing a normal value, the information it uses must be capable of yielding a cost of production in the "country of origin," even if that means the information needs to be adapted.[212]
The first sentence of Article 2.2.1.1 states:

> For the purpose of paragraph 2, costs shall normally be calculated on the basis of records kept by the exporter or producer under investigation, provided that such records are in accordance with the generally accepted accounting principles of the exporting country and reasonably reflect the costs associated with the production and sale of the product under consideration.[213]

---

204 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 6.57.
205 *Id.*
206 *Id.* ¶ 6.58.
207 *Id.* ¶ 6.83.
208 *Id.*
209 *Ukraine Ammonium AD* Appellate Body Report, *supra* note 154, ¶ 6.83.
210 *Id.* ¶¶ 6.73, 6.75, 6.79–6.81.
211 *Id.* ¶ 6.86.
212 *Id.* ¶ 6.83.
213 Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994, art. 2.2.1.1 (Aug. 27, 2002), https://www.wto.org/english/docs_e/legal_e/19-adp.pdf.

If the two conditions are met, then investigating authorities are to "normally" use the records of the exporter or producer (although there may be some circumstances where it is not appropriate to calculate costs on the producer's records even if the two conditions are met).[214] The second condition refers to whether the exporter or producer's records "suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration."[215]

Ukraine's appeal argued that the second condition was not met, such that the MEDT was justified in constructing the normal value utilizing alternative gas prices.[216] Ukraine claimed that the second condition was concerned with the "reliability and accuracy" of the recorded costs, which could be affected by whether the sales are made in non-arm's length transactions or other exceptions.[217] This claim was principally based on Ukraine's reading of *EU – Biodiesel (Argentina)*.[218]

The AB did not adopt Ukraine's reading of *EU – Biodiesel*, finding that the arm's length and other "exceptions" Ukraine noted were not embedded into the second condition.[219] The AB held instead that:

> [T]he question under the second condition in the first sentence of Article 2.2.1.1 is whether the records of the exporter or producer under investigation reasonably reflect the costs associated with the production and sale of the product under consideration and that this question is to be assessed on a case-by-case basis, in light of the evidence before the investigating authority and its determination.[220]

As a result, the AB found that the Panel did not err in its interpretation of Article 2.2.1.1 and its examination of whether the MEDT had an adequate basis to construct an alternative gas cost based on the Russian producer's records.[221]

The AB also held that whether the records reasonably reflected costs is not determined by the fact that those costs are lower than those in other countries.[222] MEDT incorrectly conflated this test, and instead examined "whether the cost of gas incurred by these producers was reasonable, rather than to whether the records reasonably reflect the costs associated with the production and sale of ammonium

---

214 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶ 6.87.
215 *Id.* ¶ 6.88.
216 *Id.* ¶ 6.90.
217 *Id.* ¶¶ 6.92–6.93.
218 *Id.* ¶ 6.94.
219 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶ 6.97.
220 *Id.*
221 *Id.*
222 *Id.* ¶ 6.102.

nitrate."[223] And despite Ukraine's argument that Russia's state-owned gas company, Gazprom, sold gas to producers at artificially low prices, there was "nothing in [the Investigation Report] that shows" this affected the records' reliability.[224] "Crucially," there was no reference to such suppliers and EuroChem in the MEDT's report.[225]

The AB found the Panel did not err in determining that Gazprom's below-cost prices were not a sufficient factual basis for MEDT to conclude that the records did not reasonably reflect the costs associated with the production and sale of ammonium nitrate.[226] As a result, Ukraine failed to establish that the Panel erred in finding that the MEDT lacked a basis under the second condition of the first sentence of Article 2.2.1.1 to reject the reported gas cost.[227]

5. The Panel Did Not Err in Finding That Ukraine Acted Inconsistently with Article 2.2.1

Article 2.2.1 sets out when sales of the like product in the domestic market or to a third country may be treated as not being in the ordinary course of trade and disregarded in determining normal value.[228] Because Ukraine's second challenge under the Anti-Dumping Agreement was contingent on the AB finding the Panel erred in its application of Article 2.2.1.1, the AB saw "no reason to disturb the Panel's finding that Ukraine acted inconsistently with Article 2.2.1 of the Anti-Dumping Agreement."[229]

6. The Panel Did Not Err in Finding that MEDT Failed to Calculate the Cost of Production "in the Country of Origin"

After the Panel found MEDT did not have an adequate basis to reject the reported gas cost, it considered whether MEDT failed to construct a normal value on the basis of the cost of production in Russia within the meaning of Article 2.2 by using the surrogate price of gas.[230] The Panel found that MEDT may construct the normal value using out-of-country evidence so long as the evidence is "apt to yield or capable of yielding the cost of production in the country of origin."[231]

---

223 *Id.*
224 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶ 6.103.
225 *Id.*
226 *Id.* ¶ 6.106.
227 *Id.* ¶ 6.107.
228 *Id.* ¶ 6.84.
229 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶ 6.108.
230 *Id.* ¶ 6.110.
231 *Id.*

MEDT failed to make adjustments that would allow the export price of gas to Germany to reflect costs in Russia.[232]

Ukraine argued that the Panel's error was twofold. First, the Panel erred to the extent it misinterpreted and misapplied Article 2.2.1.1.[233] According to Ukraine, MEDT could not use Russia's domestic gas cost because it found it to be "unreliable."[234] The AB rejected this assertion given its earlier finding that the Panel's application of Article 2.2.1.1 was correct.[235]

Ukraine also argued that the Panel misapplied Article 2.2 in a manner that was not dependent on its interpretation of Article 2.2.1.1.[236] Specifically, Ukraine argued the Panel erred by (i) misinterpreting Article 2.2 by considering AB interpretations of Article 14(d) of the Agreement on Subsidies and Countervailing Measures (SCM Agreement); and (ii) by misapplying Article 2.2 in finding that the export price was not properly adapted to reflect the cost in the "country of origin."[237]

With respect to Ukraine's interpretive argument, the Panel determined that other AB reports interpreting Article 14(d) of the SCM Agreement were not relevant in interpreting the phrase "cost of production in the country of origin" in Article 2.2.[238] The Panel reasoned that Article 14(d) of the SCM Agreement is concerned with assessing the benefit granted to a subsidy recipient.[239] Article 2.2 is not concerned with assessing a benefit and, thus, should not be conflated with Article 14(d).[240] The AB noted that, despite these two provisions' textual similarities, the Panel did not err in contrasting them.[241] As a result, the Panel was justified in finding these SCM Agreement decisions were not relevant in interpreting Article 2.2.

As to Ukraine's application argument, the Panel originally found that the MEDT's adjustment export price of Russian gas at the German border to account for transportation expenses did not sufficiently adapt to reflect prices in Russia.[242] Specifically, the Panel's review of the MEDT's report did not find any explanation as to why the adjustment for transportation expenses adapted it to reflect the cost of the investigated Russian producers.[243] In the absence of any other argument as to why the MEDT was able to adapt the export price to reflect the cost of production in Russia, the AB agreed with the Panel's findings.[244]

---

232 *Id.*
233 *Id.* ¶ 6.111.
234 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶ 6.111.
235 *Id.* ¶ 6.113.
236 *Id.* ¶ 6.114.
237 *Id.*
238 *Id.* ¶ 6.115.
239 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶ 6.116.
240 *Id.*
241 *Id.* ¶ 6.118.
242 *Id.* ¶ 6.119.
243 *Id.* ¶ 6.122.
244 *Ukraine Ammonium AD A*ppellate Body Report, *supra* note 154, ¶ 6.122.

E. Commentary

Ukraine's challenge to whether measures at issue may be delineated in footnotes is not the first time this argument was raised. Ukraine cited to *Indonesia – Import Licensing Regimes*, Request for the Establishment of a Panel by New Zealand, WT/DS477/9, to support its arguments.[245] The AB's reiteration that these questions are evaluated on a case-by-case basis means identifying the measures at issue in the body of the panel request as clearly and extensively as possible and remains the best way to ensure ambiguity does not arise.[246]

The substantive questions surrounding the interpretation and application of the Anti-Dumping Agreement are instructive for investigative authorities (like the MEDT) seeking to construct a normal value for certain products. Ukraine appeared concerned that Russian ammonium nitrate producers were benefitting from cheaper gas costs as a result of the state's control of the gas industry.[247] Not wanting to use this cheaper cost in its constructed value, it sought to exclude it on the basis that such a cost was "unreliable."[248] But whether a cost is unreliable because it is subject to state control, and whether it is unreliable because it was improperly recorded for purposes of Article 2.2.1.1, sentence 1, are two different inquiries. Investigative authorities that believe the cost of an input is suppressed by state control would be in a better position to justify their constructed value if they can make a finding as to why the state's control affects the reliability of the *records* of the cost, as opposed to a finding that the cost itself is unreliable.

---

245 *Id.* ¶ 6.33.
246 *Id.* ¶ 6.69.
247 *Id.* ¶ 6.71.
248 *Id.*

III. SPS MEASURES – ARTICLE 5:7 PRECAUTIONARY RESTRICTIONS

A. Citations

> WTO Appellate Body Report, *Korea – Import Bans and Testing and Certification Requirements for Radionuclides*, WTO Doc. WT/DS495/AB/R (*adopted* Apr. 26, 2019) [hereinafter *Korea Radionuclides* Appellate Body Report].[249]
>
> WTO Appellate Body Report Addendum, *Korea – Import Bans and Testing and Certification Requirements for Radionuclides*, WTO Doc. WT/DS495/AB/R/Add.1 (issued April 11, 2019, *adopted* Apr. 26, 2019) [hereinafter *Korea Radionuclides* Appellate Body Report Addendum].[250]

B. Facts

The Republic of Korea (Korea or South Korea) imposed restrictions on Japanese imports in response to the Fukushima Dai-ichi Nuclear Power Plant (FDNPP) accident in Japan on March 11, 2011.[251] Japan challenged four specific measures imposed by Korea:

> (1) the additional testing requirements adopted in 2011 for non-fishery products, except livestock; (2) the product-specific import bans adopted in 2012 on Alaska pollock from one prefecture and on Pacific cod from fiver prefectures; (3) the additional testing requirements adopted in 2013 for fisher and livestock products; and (4) the blanket import ban adopted in 2013 on all fishery products from eight prefectures in relation to 28 fishery products.[252]

---

[249] Appellate Body Report, *Korea – Import Bans, and Testing and Certification Requirements for Radionuclides*, WTO Doc. WT/DS495/AB/R (adopted as modified by the Appellate Body 11 April 2019) [Hereinafter, *Korea Radionuclides* Appellate Body Report.]. Eleven WTO Members participated as Third Parties – Brazil, Canada, China, European Union, Guatemala, India, New Zealand, Norway, Russia, Taiwan (Chinese Taipei), and United States. The participation of both China and Taiwan (Chinese Taipei) notable. A fruitful area of research may be to examine the instances of this dual participation and evaluate the extent to which China and Taiwan do, or do not, argue similar positions, with a view to gauging the independence of their respective multilateral trade policies.

[250] Appellate Body Report, *Import Bans, and Testing and Certification Requirements for Radionuclides Addendum*, WTO Doc. WR/DS495/AB/R/Add.1 (adopted Apr. 11, 2019) [hereinafter *Korea Radionuclides* Appellate Body Report Addendum].

[251] *See Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶¶ 1.1–1.9.

[252] *Id.* ¶ 1.2.

Japan requested, and obtained, establishment by the Dispute Settlement Body (DSB) of a panel (Panel) to challenge these four Korean measures.[253] Japan claimed the four measures were inconsistent with "(1) Article 5:6 of the *Agreement on Sanitary and Phytosanitary Measures* (*SPS Agreement*) for being more trade-restrictive than required; (2) Article 2:3 of the *SPS Agreement*, [sic] because they arbitrarily or unjustifiably discriminating [sic] against Japanese food products and constituting a disguised restriction on international trade; and (3) Article 7 and Paragraphs 1 and 3 of Annex B to the *SPS Agreement*, as Korea failed to comply with certain transparency requirements."[254] The Panel released its Report on February 22, 2018.[255] The Panel held in favor of Japan on all three claims.[256]

Approximately two months after publication of the Panel Report, on April 9, 2018, Korea notified the DSB of its intention to appeal.[257] Korea sought Appellate Body review of three issues: whether the Panel erred in: "(1) its application of Article 5:6 of the *SPS Agreement*; (2) its interpretation and application of Article 2:3 of the *SPS Agreement*; (3) in making findings under Article 5:7 of the *SPS Agreement*."[258] Of these issues, the most significant one was the third, concerning the so-called "precautionary principle" in the *Agreement*.[259]

C. Key Issues

Korea called upon the AB to reverse the Panel's finding that the four Korean restrictions failed to fulfill the requirements of Article 5:7 of the *SPS Agreement*.[260] Korea argued:

(1) The Panel was not authorized to make findings under Article 5:7, [sic] because this provision was not part of the matter before it, hence the Panel erred under Articles 6:2, 7, and 11 of the *Dispute Settlement Understanding* (*DSU*) in rendering findings about Article 5:7.
(2) The Panel erred in its interpretation and application of Article 5:7 in holding Korea's measures did not meet the requirements of this provision. In particular, the Panel erred in allocating the burden of proof to Korea under Article 5:7.
(3) The Panel was wrong in deciding:

---

253 *Id.* ¶ 1.1.
254 *Id.* ¶ 1.3
255 *Id.* ¶ 1.4.
256 *See Korea Radionuclides* Appellate Body Report, *supra* note 249 ¶ 1.4.
257 *Id.* ¶ 1.6.
258 *Id.* ¶ 4.1.
259 *Id.* ¶¶ 4.1, 5.108.
260 *Id.* ¶ 5.94.

(i) relevant scientific evidence was "not sufficient" with respect to Korea's product-specific import bans, blanket import ban, and 2013 additional testing requirements;
(ii) Korea failed to adopt its blanket import ban and 2013 additional testing requirements on the basis of available pertinent information;
(iii) Korea did not review its measure within a reasonable period of time.[261]

As is well known, "[t]he Appellate Body may uphold, modify or reverse the legal findings and conclusions of the panel."[262] However, the AB may declare a legal finding by a Panel as "moot and having no legal effect" in a case in which the Panel's legal finding no longer is relevant because that finding is related to or based on a legal interpretation that the Appellate Body reversed or modified.[263] In effect, if the AB sets aside a legal finding of a Panel and declares it to be "moot and having no legal effect," then it is a win for the appellant; in this case, Korea.[264]

Korea prevailed on the first issue, in that the AB held the Panel exceeded its mandate in rendering findings as to the inconsistency of Korea's measures with Article 5:7 of the *SPS Agreement*.[265] Therefore, Korea also prevailed on the second and third issues: The AB, holding that the Panel decision in Japan's favor under the first issue was moot and of no legal effect, reasoned that it was unnecessary to consider Korea's other arguments arising under this same provision.[266] Consequently, this AB Report contributed no major substantive insights to the jurisprudence of the *Agreement*.

---

261 *See Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.94.

262 Understanding on Rules and Procedures Governing the Settlement of Disputes art. 17, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 2, 1869 U.N.T.S. 401.

263 World Trade Organization, *The process - Stages in a typical WTO dispute settlement case*, § 6.5 (2004), https://www.wto.org/english/tratop_e/dispu_e/disp_settlement_cbt_e/c6s5p4_e.htm.

264 *Id.*; *see Korea Radionuclides*, *supra* note 250, ¶ 5.121.

265 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.121.

266 *Id.* ¶ 5.122.

D. Holdings and Rationales

1. The Panel's Findings Under Articles 5:7, 6:2, 7, and 11[267]

The AB considered Article 7:1 and 11 of the *DSU* in a synthetic manner to examine whether the Panel had authority to make findings as to the consistency of Korea's measures with Article 5:7:

> A Panel's mandate, as reflected in *DSU* Articles 7:1 and 11, is to examine the matter before it in the light of the relevant provisions of the covered agreements cited by the parties and to make such findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements.[268]

Notably, the AB asserted that a provision (such as Article 5:7) cited (for example, in a written pleading) as mere interpretive context is not subject to the Panel's mandate.[269]

Japan did not make a claim of inconsistency under Article 5:7.[270] Rather, the Panel was prompted to examine Korea's measures under Article 5:7 when Korea introduced Article 5:7 as factual background information to the dispute:

> Korea asserted that there is insufficient relevant scientific evidence to conduct an adequate risk assessment of consuming certain Japanese food products contaminated with radionuclides stemming from the Fukushima Dai-ichi Nuclear Power Plant ("FDNPP") exposure and that this is relevant to the assessment of Japan's claims under other provisions of the *SPS Agreement*.[271]

Korea relied on Article 5:7 as relevant context for the interpretation of Articles 2:3, 5:6, 7, and 8 of, and Annexes B and C to, the *SPS Agreement*, which were the subject of Japan's inconsistency claim.[272] Specifically, Korea used the beginning of Article 5:7, "In cases, where relevant scientific evidence is insufficient,"[273] to serve as a relevant context for interpreting Articles 2:3 and 5:6 of the *SPS Agreement*.

The Panel findings under Article 2:3 of the *SPS Agreement* relied solely on product samples and failed to find other pertinent territorial conditions that created potential for contamination.[274] Due to the insufficiency of relevant scientific evidence, Korea argued, the conditions prevailing in Japan could not be

---

267 *Id.* ¶¶ 5.104–5.122.
268 *Id.* ¶ 5.114.
269 *See id.*
270 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.115.
271 *Id.* ¶ 5.116.
272 *Id.*
273 *Id.* ¶ 5.105.
274 *Id.* ¶ 5.92.

said to be similar or identical to the prevailing conditions, as per Article 2:3 of the *SPS Agreement*, in Korea or other third countries.[275] Regarding Article 5:6 of the agreement, Korea argued Japan's proposed alternative measure has insufficient relevant scientific evidence to achieve Korea's Appropriate Level of Protection (ALOP).[276]

As was clear from the evidentiary record presented to the Panel, Korea did not invoke Article 5:7 of the *SPS Agreement* as its defense.[277] Korea did not argue that Article 5:7 sets different standards and obligations from those in Articles 2:3, 5:6, 7, and 8 of, and Annexes B and C to, the *SPS Agreement*, which clearly were the basis for Japan's inconsistency claim.[278] Korea argued that, "a particular situation—namely, the alleged insufficiency of scientific evidence to conduct an assessment of the risk associated with the consumption of certain food products from Japan—was relevant to the assessment of Japan's claims under Articles 2:3 and 5:6."[279] Korea strictly relied on Article 5:7 as a relevant context for interpreting provisions of the *SPS Agreement* that were the subject of Japan's inconsistency claim.[280] Just as Korea did not invoke Article 5:7 as a defense, Japan did not include an inconsistency claim under Article 5:7 in its Panel request.[281]

Given the absence of this *SPS Agreement*-version of the precautionary principle, Article 5:7, from the pleadings of the complainant or respondent, and given its indirect mention as contextually relevant, the AB declared the Panel was not authorized to make findings under Article 5:7.[282] Thus, the AB held that the Panel exceeded its mandate under Article 7:1 and 11 of the *DSU* by making findings as to Japan's inconsistency claim on Article 5:7.[283] The AB declared, "the Panel's findings under Article 5.7 of the *SPS Agreement* moot and of no legal effect."[284] At a minimum, this decision by the AB was one of judicial restraint: the Panel had failed to exercise it, and the review court overruled it because of its blithe straying beyond its mandate.[285]

2. Korea's Measures and Burden of Proof

In contending that the Panel wrongly allocated the burden of proof to Korea under Article 5.7, Korea urged that the Panel should have put this burden on

---

275 *See Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.116.
276 *Id.*
277 *Id.* ¶ 5.117.
278 *Id.*
279 *Id.*
280 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.117.
281 *Id.* ¶ 5.118.
282 *Id.*
283 *Id.*
284 *Id.* ¶ 5.118.
285 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.118.

Japan.[286] Korea's logic was that Japan had the burden to prove a *prima facie* case of inconsistency with Article 5.7 because this provision establishes a so-called "autonomous right."[287]

However, Korea did not get a ruling on its argument.[288] "Having declared the Panel's findings under Article 5:7 of the *SPS Agreement* moot and of no legal effect,"[289] the AB decided it was not "necessary to consider further Korea's other claims of error in relation to those same Panel findings."[290]

3. Korea's Evidence, Testing Requirements, and Review

First, said Korea, the Panel was wrong to determine that relevant scientific evidence was "not sufficient" with respect to Korea's product-specific import bans, the blanket import ban, and the 2013 additional testing requirements.[291]

The Panel was quick to notice that Korea implemented the blanket import ban and the 2013 additional testing requirements after the disclosure of FDNPP.[292] The Panel also pointed to the fact that some estimate amounts of radioactive materials in the ocean were publicly available.[293] The Panel took note of various other relevant factors, namely, "(i) additional leaks or an uncertainty about the amounts and share of radionuclides; (ii) uncertainty about the levels of radionuclides remaining in the reactor; (iii) uncertainty about environmental contamination levels in seawater, sediment, soil, and air…; and (vii) the ratio between cesium and other radionuclides."[294]

However, for its decision, the Panel relied completely on the consensus of experts to the Panel that information about these factors was not essential to assessing the risk to humans from consumption of food contaminated with radionuclides.[295] The experts emphasized that, "the best way to know what is in food consumed is by testing it."[296] Interpreted literally, of course, that advice could lead to countless ailments and fatalities in various contexts. Not surprisingly, then, Korea argued that the Panel took an unduly narrow approach to assessment of risk.[297] Korea claimed that the Panel failed to account properly for, "the

---

286 *Id.* ¶ 5.119.

287 *Korea Radionuclides* Appellate Body Report Addendum, *supra* note 250, at Annex B-1 ¶ 6.

288 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.120.

289 *Id.*

290 *Id.*

291 *Id.* ¶ 5.94.

292 *Id.* ¶ 5.99.

293 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.99.

294 *Id.*

295 *Id.*

296 *Id.*

297 *Korea Radionuclides* Appellate Body Report Addendum, *supra* note 250, at Annex B-1 ¶ 8.

deficiencies relating to ecological and environmental factors [. . .] in contradiction to Appellate Body's guidance."[298]

Korea pointed to the language of Article 5:2 of the *SPS Agreement*, namely, that "relevant ecological and environmental conditions" shall be taken into account in the assessment of risks.[299] Korea said the Panel negated the opportunity for Korea (and other WTO Members) to take preventative measures by dismissing the potential deficiencies from continuing leaks.[300] So, Korea asked the AB to reverse the Panel's finding that the scientific evidence supporting Korea's product-specific import bans, blanket import ban, and 2013 additional testing requirements, was not sufficient.[301]

Second, Korea said the Panel erred in holding that Korea failed to adopt its blanket import ban and 2013 additional testing requirements on the basis of available pertinent information.[302]

The Panel specifically pointed to the pertinent standard set out in *Codex Alimentarius*, which Korea had listed as one of various pieces of information serving as basis for Korea's blanket import ban and 2013 additional testing requirements.[303] After assessing the relevance of the *Codex* Standard, the Panel said Korea's disputed measures were not based on this Standard.[304]

Korea argued the Panel adopted the wrong standard under Article 5:7 of the *SPS Agreement* concerning provisional SPS measures, which are under this provision, to be taken "on the basis of pertinent information."[305] Korea said Article 5:7 also requires "a rational and objective relationship between the information concerning a certain risk and a Member's provisional SPS measure."[306] And, urged Korea, Article 5:7 does not require that available pertinent information be identified or mentioned in an SPS measure itself.[307]

So, Korea requested the AB to reverse the Panel's finding that Korea failed to prove its blanket import ban and 2013 additional testing requirements were adopted on the basis of available pertinent information.[308] Simply put, said Korea, they were.[309]

---

298 *Id.*
299 *Id.*
300 *Id.*
301 *Id.*
302 *Korea Radionuclides* Appellate Body Report Addendum, *supra* note 250, at Annex B-1 ¶ 9.
303 *See id.* at Annex B-1 ¶ 15.
304 *Id.*
305 *Id.* at Annex B-1 ¶ 9.
306 *Id.*
307 *Korea Radionuclides* Appellate Body Report Addendum, *supra* note 250, at Annex B-1 ¶ 9.
308 *Id.*
309 *Id.*

Third, Korea said the Panel was wrong to find that Korea did not review its measures within a reasonable period of time.[310]

The Panel reviewed numerous activities undertaken by Korea since 2011 to assess whether Korea sought additional information, and whether Korea reviewed its measures accordingly within a reasonable period of time.[311] The evidentiary record before the Panel indicated Korea sought updated information and regularly accessed available public data up to 2013.[312] In 2014, Korea announced the review of its 2013 measures, but never concluded the review.[313] The Panel pointed out that Korea never provided a justification for failing to conclude this review.[314] As a result, the Panel concluded that "Korea did not review its measures within a reasonable period of time."[315]

On appeal, Korea argued the Panel "ignored the standard set out by the Appellate Body that the reasonable period of time has to be established on a case-by[-]case basis."[316] Korea claimed the Panel did not take into account, "specific circumstances of each case, including the difficulty of obtaining the additional information necessary for the review and characteristics of the provisional SPS measure."[317] Korea said the Panel provided no reasons for disregarding the standard set out by the AB.[318] Thus, urged Korea, the Panel failed to "properly assess the specific circumstances of the case, and thus erred in its analysis."[319] In turn, the AB should overturn the Panel's finding that Korea did not review its measure within a reasonable period of time.

As to all three of the aforementioned Panel Holdings, Korea was unable to persuade the AB to reverse them.[320] That was because the AB, having declared the Panel's findings under Article 5:7 of the *SPS Agreement* moot and of no legal effect,"[321] concluded it was not "necessary to consider further Korea's other claims of error in relation to those same Panel findings."[322]

---

310 *Id.* at Annex B-1 ¶11.

311 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶ 5.102.

312 *Id.*

313 *Id.*

314 *Id.*

315 *Id.*

316 *Korea Radionuclides* Appellate Body Report Addendum, *supra* note 250, at Annex B-1 ¶ 11.

317 *Id.*

318 *Id.*

319 *Id.*

320 *Korea Radionuclides* Appellate Body Report, *supra* note 249, ¶¶ 5.120, 6.5.

321 *Id.*

322 *Id.*

E. Commentary

1. Historical Context

The *Radionuclides* WTO Appellate Body Report is one dispute between Korea and Japan across 110 years of fraught relations.[323] There has been bad blood between Korea and Japan since 1910, when Japan occupied Korea.[324] The memories of this occupation are long and deep.[325] Anti-Japanese sentiment still lingers in Korea, fueled in part by the controversial Yasukuni Shrine, Liancourt rocks ("Dokdo") dispute, the lack of just-compensation for Korean "comfort women" used by Japanese troops during the Second World War, and for forced labor during the occupation period.[326]

Most recently, in October and November of 2018, Korea's Supreme Court ordered Japanese firms, which declined to compensate forced laborers, to provide financial payments to them.[327] That decision sparked outrage in Japan, and the Japanese government reputedly "became the latest advanced nation to weaponize trade,"[328] namely, by arbitrarily restricting essential chemical inputs used by South Korea's vast semiconductor industry.[329] Japan imposed this restriction several months after the *Korea Radionuclides* AB Report was released, and not long after the Korean Supreme Court rendered its decision.[330] Upon imposing the restrictions, Shinzo Abe, the Prime Minster of Japan, claimed "the trade measures reflect the broken trust between the two countries because of historical issues."[331] The Korean government characterized this restriction as, "a warning shot: If the South Korean government refused to make the labor issues disappear, Tokyo would kneecap one of the country's main industries."[332]

---

323 *See* Ben Dooley & Choe Sang-Hun, *Japan Imposes Broad New Trade Restrictions on South Korea*, N.Y. TIMES (Aug. 1, 2019), https://www.nytimes.com/2019/08/01/business/japan-south-korea-trade.html.

324 *Id.*

325 Sung-Yoon Lee, *Who's not to Blame in the South Korea-Japan Spat?*, ORIGINS (Sept. 2020), https://www.origins.osu.edu/article/whos/not/blame/south/korea/japan.

326 *Id.*

327 *See* Victoria Kim & Don Lee, *Japan Uses Trade Restrictions as a Weapon Against South Korea*, L.A. TIMES, (Jul. 21, 2019), https://www.latimes.com/world-nation/story/2019-07-21/japan-trade-restrictions-hit-south-korea.

328 *Id.*

329 *Id.*

330 Dooley & Sang-Hun, *supra* note 323.

331 Kim & Lee, *supra* note 327.

332 Dooley & Sang-Hun, *supra* note 323.

2. Bullying and Pride?

Japan, with respect to possible inconsistencies under the *SPS Agreement* of Korean measures affecting Japanese food products, requested the DSB to establish a Panel on August 20, 2015.[333] Did Japan specifically target Korea? No less than 23 other WTO Members had similar restrictions on Japanese food imports.[334] Might the acrimonious relations between Korea and Japan have influenced Japan's selection among possible respondents?[335]

These questions are not possible to answer. Truth be told, no rule in the *DSU* forbids one Member from being influenced by its history with other Members when choosing which one to sue.[336] That would be a rule impossible to implement, if for no other reason than the difficulty in proving motivations. And yet, from Korea's perspective, Korea scored a notable victory in persuading the AB to reverse a critical holding of the Panel.[337]

Just as the *DSU* does not, and could not, regulate litigation motivations, it is quiet as to litigation responses.[338] There is a "must beat Japan" mentality that cuts across different fields of endeavor; baseball, soccer, technological innovation, and, of course international trade litigation.[339] Thus, prevailing in the first WTO case in which the AB overturned a Panel ruling on food hygiene and safety was a "plus" for Korea.[340] However, query whether excessive pride in this ruling might have the unwanted effect of reinforce the aforementioned historical biases.

---

[333] *Korea — Import Bans, and Testing and Certification Requirements for Radionuclides Current Status*, WTO, https://www.wto.org/english/tratop_e/dispu_e/cases_e/ds495_e.htm (last visited Feb. 23, 2021).

[334] Pearly Neo, *'Meaningless Restrictions': Japan continues to demand South Korean Fukushima food ban repeal after WTO decision*, https://www.foodnavigator-asia.com/Article/2019/04/17/Meaningless-restrictions-Japan-continues-to-demand-South-Korean-Fukushima-food-ban-repeal-after-WTO-decision (last updated Apr. 17, 2019).

[335] *See generally South Korea WTO Appeal Succeeds in Japanese Fukushima Food Dispute*, REUTERS (Apr. 11, 2019), https://www.reuters.com/article/us-japan-southkorea-wto/south-korea-wto-appeal-succeeds-in-japanese-fukushima-food-dispute-idUSKCN1RN24X?feedType=RSS&feedName=healthNews&utm_source=dlvr.it&utm_medium=facebook.

[336] *See generally Understanding on rules and procedures governing the settlement of disputes*, WTO, https://www.wto.org/english/tratop_e/dispu_e/dsu_e.htm (last visited Feb. 15, 2021) (demonstrating the absence of such a rule).

[337] *Korea Radionuclides* Appellate Body Report Addendum, *supra* note 250, ¶ 5.122.

[338] *See generally Understanding on rules and procedures governing the settlement of disputes, supra* note 336 (demonstrating the absence of such a rule).

[339] *See generally* Shim Jae Hoon, *South Korea's Anti-Japan Campaign Alarms Allies* (Aug. 29, 2019), https://yaleglobal.yale.edu/content/south-koreas-anti-japan-campaign-alarms-allies (noting the continued competition between Japan and South Korea).

[340] *See Korea Radionuclides* Appellate Body Report Addendum, *supra* note 250, ¶ 5.122.

3. WTO Director-General Selection

The current WTO Director-General, Mr. Roberto Azevêdo, is stepping down effective August 31, 2020, one year in advance of the end of his second full term, and multiple candidates to replace him have been nominated.[341] On June 24, 2020, Ms. Yoo Myung-hee of South Korea was nominated to run for the position against seven other candidates.[342] To no one's surprise, Japan immediately expressed its discomfort with the Korean candidate across Japan's national media.[343]

Possible concerns, from the Japanese perspective, were that Ms. Yoo might be inexperienced and lack the ability to coordinate divergent interests among major countries.[344] Japan could attempt to mitigate this concern by joining forces with European countries to support a candidate from Nigeria; but that would be a hard-headed and possibly misguided effort to thwart the possibility of a Korean becoming WTO Director-General, which might create unforeseen negative backlashes from Korea.[345] Japan also had concerns about unfavorable rulings against Japan if disputes between Japan and Korea arose and Ms. Yoo became Director-General.[346] For example, Japan might lose challenges brought by Korea against Japan for export restrictions Japan imposed on Korea in July 2019, which

---

[341] *See Candidates for DG Selection Process 2020*, WTO, https://www.wto.org/english/thewto_e/dg_e/dgsel20_e/dgsel20_e.htm (last visited Feb. 15, 2021).

[342] *See Republic of Korea Nominates Ms Yoo Myung-hee for Post of WTO Director-General*, WTO (Jun. 24, 2020), https://www.wto.org/english/news_e/news20_e/dgsel_kor_24jun20_e.htm.

[343] *See generally South Korea's first female trade minister bids for top WTO job*, JAPAN TIMES (Jun. 24, 2020), https://www.japantimes.co.jp/news/2020/06/24/asia-pacific/south-korea-female-trade-minister-wto/.

[344] *See generally S. Korea Trade Minister Seeking to Become Next WTO Head*, THE MAINICHI (Jun. 24, 2020), https://mainichi.jp/english/articles/.

[345] *See generally Japan Decides Against Backing South Korean Nominee for WTO Chief*, JAPAN TIMES (Oct. 26, 2020), https://www.japantimes.co.jp/news/2020/10/26/business/japan-south-korea-nominee-wto/.

[346] *See South Korea's First Female Trade Minister Bids for Top WTO Job*, *supra* note 343; *see also* Park Sejin, *Japan Might be Troubled if Yoo Myung-hee is Elected WTO Director-General*, YONHAP NEWS (Jul. 9, 2020) (Dukgi Goh trans.) (discussing this concern); *Japan seems poised to block S. Korea's candidate for director-general of the WTO*, HANKYOREH (Jul. 8, 2020), http://english.hani.co.kr/arti/english_edition/e_international/952820.html ("[t]he *Yomiuri Shimbun* said that 'the big question is how Japan will respond [to Yoo's candidacy] given its dispute with South Korea over Japan's tougher export controls.' *Jiji Press* reported earlier that 'the Japanese government is cautious about South Korea increasing its international clout by filling the director-general position.' The Sankei Shimbun reported that 'the election of a South Korean director-general would create an element of uncertainty for Japanese trade policy.'").

Korea has claimed are arbitrary, retaliatory restrictions.[347] Yet, both countries should consider the legal truth that the Director-General plays almost no role in any WTO dispute settlement case.[348] That is due to the limited powers, concerning good offices, under *DSU* Article 5.[349] Nothing in that provision, or anywhere else in the pantheon of GATT-WTO treaties, empowers a Director-General to determine the outcome of a case.[350] Simply put, WTO dispute settlement is one theater in which both Korea and Japan can put a high degree of confidence that their arguments and rebuttals will be decided on the merits.

Nevertheless, Japan seemed disinclined to favor a Korean candidate for the top-most position in the WTO Secretariat hierarchy. However, to be fair, the hypothetical reverse question should be asked: would unfriendly relations between these two great Asian powerhouses cause Korea to look askance at a Japanese candidate?

4. Focus on China

Korea and Japan are often characterized as being close geographically but far apart in mind.[351] They should work together towards a goal of mutual understanding, all the more so amidst the mutual challenge they face: China and a possible new Cold War.[352] Japan and Korea need to see their technical trade disputes in a wider geo-political context. Toward that end, each needs to move on from a bitter past. Japan might consider a sincere apology to Korea for its actions during the occupation of Korea, while Korea might consider being open to extending to Japan genuine forgiveness. Without mutual understanding, trade disputes between them will be more bitter than necessary, and thus more difficult to resolve, with China being the potential beneficiary.

---

[347] *See generally South Korea downgrades Japan trade status as dispute deepens*, CNBC (Sept. 18, 2019), https://www.cnbc.com/2019/09/18/south-korea-downgrades-japan-trade-status-as-dispute-deepens.html.

[348] Jennifer Hillman, *What to Know about the Race to Lead the WTO*, Council on Foreign Relations (Sept. 3, 2020, 8:00 AM), https://www.cfr.org/article/what-know-about-race-lead-wto.

[349] *WTO Analytical Index* (last updated Feb. 2018), https://www.wto.org/english/res_e/publications_e/ai17_e/dsu_art5_oth.pdf.

[350] *Id.*

[351] Klaus Dodds, *Hotspot—Japan and South Kore*a, GEOGRAPHICAL (May 7, 2019), https://geographical.co.uk/geopolitics/hotspot/item/3166-japan-and-korea.

[352] *See* Raj Bhala, *Are The U.S. And China In A 'Cold War' Or Not?*, BLOOMBERG QUINT (Mumbai) (May 30, 2020, 3:50 PM), www.bloombergquint.com/opinion/are-the-us-and-china-in-a-cold-war-or-not.