WORLD TRADE ORGANIZATION

ANNUAL REPORT FOR 2015

APPELLATE BODY

March 2016

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WORLD TRADE ORGANIZATION

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APPELLATE BODY

March 2016

APPELLATE BODY MEMBERS: 1 JANUARY 2015 – 31 DECEMBER 2015

From left to right: Mr. Ujal Singh Bhatia; Mr. Peter Van den Bossche; Mr. Shree Baboo Chekitan Servansing; Mr. Thomas Graham; Ms. Yuejiao Zhang; Mr. Seung Wha Chang; Mr. Ricardo Ramírez-Hernández.

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WTO ABBREVIATIONS USED IN THIS ANNUAL REPORT

Abbreviation	Description
2013 Final Rule	USDOC, National Oceanic and Atmospheric Administration (NOAA), Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products, *United States Federal Register*, Vol. 78, No. 131 (9 July 2013), pp. 40997-41004
ACP	African Caribbean Pacific Group
ADB	Asian Development Bank
AI	avian influenza
AIDCP	Agreement on the International Dolphin Conservation Program (Original Panel Exhibits US-23a and MEX-11; Panel Exhibit MEX-30)
ALOP	appropriate level of protection
amended tuna measure	The United States' dolphin-safe labelling regime for tuna products, comprising: (i) the DPCIA; (ii) Subpart H of Part 216 of CFR Title 50 as amended by the 2013 Final Rule (implementing regulations); (iii) the Hogarth ruling; and (iv) any implementing guidance, directives, policy announcements, or any other document issued in relation to instruments (i) through (iii), including any modifications or amendments in relation to those instruments
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
ATC	Agreement on Textiles and Clothing
BCI	business confidential information
CI	import certificate (*Certificados de Importación*)
CIETAC	China's International Trade and Economic Arbitration Commission
COOL	certain country of origin labelling
COP	cost of production
Customs Valuation Agreement	Agreement on Implementation of Article VII of the General Agreement on Tariffs and Trade 1994
DJAI	Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación*)
DPCIA	Dolphin Protection Consumer Information Act of 1990, codified in USC Title 16, Section 1385
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EPA	Economic Partnership Agreement

ETP	Eastern Tropical Pacific Ocean
FTA	Peru – Guatemala free trade agreement
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994
Hogarth ruling	United States Court of Appeals for the Ninth Circuit, *Earth Island Institute et al. v. William T. Hogarth*, 494 F.3d 757 (9th Cir. 2007)
HP-SSST	high-performance Stainless Steel Seamless Tubes
HPAI	highly pathogenic avian influenza
HPNAI	highly pathogenic notifiable avian influenza
ICC	International Chamber of Commerce
ICC	International Criminal Court
ICTY	International Criminal Tribunal for the Former Yugoslavia
IDCP	International Dolphin Conservation Program
IDLO	International Development Law Organization
ILC	International Law Commission
Import Licensing Agreement	Agreement on Import Licensing Procedures
Livestock Act	Live-Stock Importation Act, as amended
LPAI	low pathogenicity avian influenza
LPNAI	low pathogenicity notifiable avian influenza
MOFCOM	Ministry of Commerce of the People's Republic of China
NEPAD	New Partnership for Africa's Development
NME	non-market economy
NMFS	National Marine Fisheries Service
OCTG	Oil Country Tubular Goods
OIE	World Organization for Animal Health
PRS	Price Range System (*Sistema de Franja de Precios*)
Rules of Conduct	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes, adopted by the DSB on 3 December 1996, WT/DSB/RC/1
SAA	Statement of Administrative Action
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SG&A	administrative, selling and general costs
SPS Agreement	Agreement on the Application of Sanitary and Phytosanitary Measures
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TRIPS Agreement	Agreement on Trade-Related Aspects of Intellectual Property Rights

TTFs	Tuna Tracking Forms
Tubacex	Tubos Inoxidables, S.A
URAA	Uruguay Round Agreements Act
USCIT	United States Court of International Trade
USDOC	United States Department of Commerce
USITC	United States International Trade Commission
USTR	United States Trade Representative
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

FOREWORD

2015 marked the 20th anniversary of the WTO and its dispute settlement system. At conferences, seminars, colloquia and workshops worldwide, both the WTO and its dispute settlement system were praised and criticized in equal measure. The WTO dispute settlement system has been very busy in 2015. Never before were there so many active disputes at the consultation and panel stages. Also the Appellate Body's workload in 2015 was one of the highest ever. The Appellate Body circulated eleven reports concerning seven distinct matters. These reports concerned matters relating to the TBT Agreement (*US – COOL (Article 21.5 – Canada and Mexico*) and *US – Tuna II (Mexico) (Article 21.5)*); the Agreement on Import Licensing Procedures (*Argentina – Importation of Goods*); the Agreement on Agriculture (*Peru – Agricultural Products*); the SPS Agreement (*India – Agricultural Products*); and the Anti-Dumping Agreement (*US – Shrimp II (Viet Nam)* and *China – HP-SSST (Japan) / China – HP-SSST (EU)*). All Appellate Body reports circulated in 2015 also addressed matters relating to the GATT 1994 and the DSU. Based on the number of cases currently at the panel stage (28) and the average appeal rate of 67 per cent, it is expected that the workload of the Appellate Body will increase significantly and remain very high in coming years. Also note that among the disputes currently before panels are *EC and certain member States – Large Civil Aircraft (Article 21.5)*, *US – Large Civil Aircraft (2nd complaint) (Article 21.5)* and *Australia – Plain Packaging*, which are likely to result in very large appeals that will place a heavy burden on the Appellate Body's limited resources.

WTO Members rightly expect the Appellate Body to produce reports of the highest quality and in the shortest time possible. However, there is of course an inevitable trade-off between, on the one hand, the time taken to hear and decide an appeal, and, on the other hand, the quality of the Appellate Body's report in a given appeal. We have, over the last few years, undertaken various efforts to continue to ensure both the high quality of our reports and the completion of appellate proceedings in as short a time as possible. In 2015, these efforts included the revision of internal processes, as well as the adoption, on a trial basis, of the practice of annexing to Appellate Body reports the executive summaries of the arguments submitted by the participants and third participants. The Communication of the Appellate Body of 11 March 2015 on *Executive Summaries of Written Submissions in Appellate Proceedings* is reproduced in Annex 1 to this Annual Report. It has been suggested that adopting limits on the length of written submissions would also allow for better management of WTO appellate proceedings and contribute to a more optimal use of the resources of the Appellate Body and of participants in appellate review proceedings. On 23 October 2015, the Appellate Body therefore issued a Communication on *Limits on the Length of Written Submissions*, which is reproduced in Annex 2 to this Annual Report. The intention of this Communication was to initiate further reflection and discussion among and with WTO Members on issues that may arise in connection with the setting of limits on the length of written submissions. The reflection and discussion on these issues is on-going. Finally, throughout 2015, the Appellate Body has also been in regular contact with the Director-General regarding the staffing needs of the Appellate Body Secretariat. We have taken note of, and appreciate, the efforts undertaken and the commitments made by the Director-General in this respect. More broadly, however, the challenges facing the Appellate Body, and the dispute settlement system in general, are of a systemic and structural nature, and can only be successfully addressed with the full involvement and support of WTO Members.

At its meeting on 25 November 2015, the DSB decided to reappoint Mr Ujal Singh Bhatia and Mr Thomas Graham for a second four-year term starting on 11 December 2015. The DSB took this decision on the basis of the outcome of the consultations held by its Chair, Ambassador Harald Neple. In the context of his consultations Ambassador Neple hosted a meeting with Mr Bhatia and Mr Graham to which all WTO Members were invited. Neither the DSU nor the 1995 DSB Decision on the Establishment of the Appellate Body set out the procedure to be followed by the DSB for taking a decision on the reappointment of Appellate Body Members. The modalities of this procedure have been the subject of some debate among WTO Members in recent years. The procedure followed for the reappointment of Mr Bhatia and Mr Graham

ensured the transparency of the reappointment process and protected the independence and impartiality of the Appellate Body Members seeking reappointment as well as the confidentiality of Appellate Body deliberations. The modalities of the procedure followed are set out on page 10 of this Annual Report.

2015 has not only been an anniversary year and a year of much dispute settlement activity. It has also been a year of loss and sadness. With great regret and sorrow, we learnt of the passing of Florentino Feliciano and John Jackson. Justice Florentino Feliciano, who was one of the original seven Appellate Body Members, passed away in Manila on 15 December 2015, at the age of 87. Following an illustrious legal career in the Philippines, including as Senior Associate Justice of the Supreme Court of the Philippines, Justice Feliciano was appointed in 1995 to serve on the newly created Appellate Body. Known to many simply as "Toy", Justice Feliciano played a key institution-building role throughout his six-year tenure as an Appellate Body Member. Justice Feliciano is remembered by many for his ability to combine great intellect and wisdom with a beautiful turn of phrase, and for being an incredibly principled, rigorous, and fierce jurist. Professor John H. Jackson, who was professor of law at the University of Michigan Law School from 1966 to 1998, and subsequently University Professor at the Georgetown University Law Center, passed away in Ann Arbor, Michigan on 7 November 2015 at the age of 83. John Jackson was one of the great intellectual architects of the multilateral trading system and he was a staunch defender of a strong WTO dispute settlement system. He considered such a system to be indispensable to making WTO rules effective and providing security and predictability to the multilateral trading system. John Jackson was a mentor and a friend to many of us. May the lives and work of Justice Feliciano and Professor Jackson continue to inspire and guide our efforts to improve further the WTO dispute settlement system.

Peter Van den Bossche
Chair, Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY
ANNUAL REPORT FOR 2015

1. INTRODUCTION

This Annual Report summarizes the activities of the Appellate Body and its Secretariat for the year 2015.

Dispute settlement in the World Trade Organization (WTO) is regulated by the Understanding on Rules and Procedures Governing the Settlement of Disputes (DSU), which is contained in Annex 2 of the Marrakesh Agreement Establishing the World Trade Organization (WTO Agreement). Article 3.2 of the DSU states the overarching purposes of the dispute settlement system as such: "The dispute settlement system of the WTO is a central element in providing security and predictability to the multilateral trading system." Further, Article 3.2 provides that the dispute settlement system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." The dispute settlement system is administered by the Dispute Settlement Body (DSB), which is composed of all WTO Members.

A WTO Member may have recourse to the rules and procedures established in the DSU if it "considers that any benefits accruing to it directly or indirectly under the covered agreements are being impaired by measures taken by another Member."[1] The DSU procedures apply to disputes arising under any of the covered agreements listed in Appendix 1 to the DSU, which include the WTO Agreement and all the multilateral agreements annexed to it relating to trade in goods[2], trade in services[3], and the protection of intellectual property rights[4], as well as the DSU itself. Pursuant to Article 1.2 of the DSU, the special or additional rules and procedures listed in Appendix 2 of the DSU prevail over those contained in the DSU to the extent that there is an inconsistency. The application of the DSU to disputes under the plurilateral trade agreements annexed to the WTO Agreement[5] is subject to the adoption of a decision by the parties to each of these agreements setting out the terms for its application to the individual agreement.[6]

Proceedings under the DSU take place in stages. In the first stage, Members are required to hold consultations with a view to reaching a mutually agreed solution to the matter in dispute.[7] If these consultations fail to produce a mutually agreed solution, the dispute may advance to the adjudicative stage in which the complaining Member requests the DSB to establish a panel to examine the matter.[8] Panelists are chosen by agreement of the parties, based on nominations proposed by the Secretariat.[9] However, if the parties cannot agree, either party may request the WTO Director-General to determine the composition of the panel.[10] Panels shall be composed of well-qualified governmental and/or non-governmental individuals with

1 Article 3.3 of the DSU.
2 Annex 1A to the WTO Agreement.
3 Annex 1B to the WTO Agreement.
4 Annex 1C to the WTO Agreement.
5 Annex 4 to the WTO Agreement.
6 Appendix 1 to the DSU.
7 Article 4 of the DSU.
8 Article 6 of the DSU.
9 Article 8.6 of the DSU.
10 Article 8.7 of the DSU.

expertise in international trade law or policy.[11] In discharging its adjudicative function, a panel is required to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements, and make such other findings as will assist the DSB in making the recommendations or in giving the rulings provided for in the covered agreements."[12] The panel process includes written submissions by the main parties and also by third parties that have notified their interest in the dispute to the DSB. Panels usually hold two meetings with the parties, one of which also includes a session with third parties. Panels set out their factual and legal findings in an interim report that is subject to comments by the parties. The final report is first issued to the parties, and is subsequently circulated to all WTO Members in the three official languages of the WTO (English, French, and Spanish), at which time it is also posted on the WTO website.

Article 17 of the DSU establishes a standing Appellate Body. The Appellate Body is composed of seven Members who are each appointed to a four-year term, with a possibility to be reappointed once. The expiration dates of terms are staggered in order to ensure that not all Members begin and complete their terms at the same time. Members of the Appellate Body must be persons of recognized authority, with demonstrated expertise in law, international trade, and the subject matter of the covered agreements generally. They shall be unaffiliated with any government. Moreover, the Appellate Body membership shall be broadly representative of the membership of the WTO. Appellate Body Members elect a Chairperson to serve a one-year term, which can be extended for an additional one-year period. The Chairperson is responsible for the overall direction of Appellate Body business. Each appeal is heard by a Division of three Appellate Body Members. The process for the selection of Divisions is designed to ensure randomness, unpredictability, and opportunity for all Members to serve, regardless of their national origin. To ensure consistency and coherence in decision-making, Divisions exchange views with the other four Members of the Appellate Body before finalizing Appellate Body reports. The Appellate Body receives legal and administrative support from its Secretariat. The conduct of Members of the Appellate Body and its staff is regulated by the Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes[13] (Rules of Conduct). These Rules emphasize that Appellate Body Members shall be independent and impartial, avoid any direct or indirect conflict of interest, and maintain the confidentiality of appellate proceedings.[14]

Any party to a dispute, other than WTO Members that were third parties at the panel stage, may appeal a panel report to the Appellate Body. These third parties may however participate and make written and oral submissions in the appellate proceedings. The appeal is limited to issues of law covered in the panel report and legal interpretations developed by the panel. Appellate proceedings are conducted in accordance with the procedures established in the DSU and the Working Procedures for Appellate Review[15] (Working Procedures), drawn up by the Appellate Body in consultation with the Chairperson of the DSB and the Director-General of the WTO, and communicated to WTO Members. Proceedings involve the filing of written submissions by the participants and third participants, as well as an oral hearing. The Appellate Body report is to be circulated within 90 days of the date when the appeal was initiated, and is posted on the WTO website immediately upon circulation to Members. In its report, the Appellate Body may uphold, modify, or reverse the legal findings and conclusions of a panel.

Panel and Appellate Body reports must be adopted by WTO Members acting collectively through the DSB. Under the reverse consensus rule, a report is adopted unless the DSB decides by consensus not to adopt the report.[16] Upon adoption, Appellate Body reports and panel reports (as modified by the Appellate Body) become binding upon the parties.

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[11] Article 8.1 of the DSU.

[12] Article 11 of the DSU.

[13] The Rules of Conduct, as adopted by the DSB on 3 December 1996 (WT/DSB/RC/1), are incorporated into the Working Procedures for Appellate Review (WT/AB/WP/6), as Annex II thereto. (See WT/DSB/RC/2, WT/AB/WP/W/2)

[14] Former Appellate Body Members, Secretariat staff and interns are subject to Post Employment Guidelines, which facilitate compliance with relevant obligations of conduct following a term of service (WT/AB/22).

[15] Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

[16] Articles 16.4 and 17.14 of the DSU.

Following the adoption by the DSB of a panel or Appellate Body report that includes a finding of inconsistency of a measure of the responding Member with its WTO obligations, Article 21.3 of the DSU provides that the responding Member should, in principle, comply immediately. However, where immediate compliance is "impracticable", the responding Member shall have a "reasonable period of time" to implement the DSB's recommendations and rulings. The "reasonable period of time" may be determined by the DSB, by agreement between the parties, or through binding arbitration pursuant to Article 21.3(c) of the DSU. In such arbitration, a guideline for the arbitrator is that the reasonable period of time to implement panel or Appellate Body recommendations should not exceed 15 months from the date of adoption of the panel or Appellate Body report. However, that time may be shorter or longer, depending upon the particular circumstances. Arbitrators have indicated that the reasonable period of time shall be the shortest time possible in the implementing Member's legal system.

Where the parties disagree "as to the existence or consistency with a covered agreement of measures taken to comply", the matter may be referred to the original panel in compliance proceedings under Article 21.5 of the DSU. In these Article 21.5 compliance proceedings, a panel report is issued and may be appealed to the Appellate Body. Upon their adoption by the DSB, panel and Appellate Body reports in Article 21.5 compliance proceedings become binding on the parties.

If the responding Member does not bring its WTO-inconsistent measure into compliance with its obligations under the covered agreements within the reasonable period of time, the complaining Member may request negotiations with the responding Member with a view to reaching an agreement on compensation as a temporary and voluntary alternative to full compliance. Compensation is subject to acceptance by the complaining Member, and must be consistent with the WTO agreements. If no satisfactory compensation is agreed upon, the complaining Member may request authorization from the DSB, pursuant to Article 22 of the DSU, to suspend the application of concessions or other obligations under the WTO agreements to the responding Member. The level of the suspension of concessions or other obligations authorized by the DSB shall be equivalent to the level of the nullification or impairment resulting from non-compliance with the DSB recommendations and rulings. The responding Member may request arbitration under Article 22.6 of the DSU if it objects to the level of suspension proposed or considers that the principles and procedures concerning the suspension of concessions or other obligations have not been followed. In principle, the suspension of concessions or other obligations must relate to the same trade sector or agreement as the measure found to be inconsistent. However, if this is impracticable or ineffective for the complaining Member, and if circumstances are serious, the complaining Member may seek authorization to suspend concessions with respect to other sectors or agreements. The arbitration under Article 22.6 shall be carried out by the original panel, if its members are available. Compensation and the suspension of concessions or other obligations are temporary measures; neither is to be preferred to full implementation of a recommendation to bring a measure into conformity with the covered agreements.[17]

A party to a dispute may request good offices, conciliation, or mediation as alternative methods of dispute resolution at any stage of dispute settlement proceedings.[18] In addition, under Article 25 of the DSU, WTO Members may have recourse to arbitration as an alternative to the regular procedures set out in the DSU.[19] Recourse to arbitration, including the procedures to be followed in such arbitration proceedings, is subject to mutual agreement of the parties.[20]

[17] Article 22.1 of the DSU.

[18] Article 5 of the DSU.

[19] There has been only one recourse to Article 25 of the DSU and it was not in lieu of panel or Appellate Body proceedings. Rather, the purpose of that arbitration was to set an amount of compensation pending full compliance by the responding Member. (See Award of the Arbitrators, *US – Section 110(5) Copyright Act (Article 25)*)

[20] Articles 21 and 22 of the DSU apply *mutatis mutandis* to decisions by arbitrators.

2. COMPOSITION OF THE APPELLATE BODY

The Appellate Body is a standing body composed of seven Members, each appointed by the DSB for a term of four years with the possibility of being reappointed once for another four-year term.

The first four-year terms of Mr Ujal Singh Bhatia and Mr Thomas Graham expired on 10 December 2015. Mr Bhatia and Mr Graham both expressed their interest and willingness to be appointed for a second four-year term. At a meeting held on 22 April 2015, the DSB Chair informed WTO Members of his intention to consult informally with delegations on this matter.[21] In the light of these consultations, he announced at the DSB meeting on 28 October his intention to host a meeting on 12 November with the two Appellate Body Members and invited any interested delegations who wished to participate to contact him directly or via the Secretariat, and to indicate the topics they wished to raise.[22] A total of 28 delegations, including several EU member States, participated in the meeting with Mr Bhatia and Mr Graham held on 12 November. There were separate sessions for each Appellate Body Member.

At the outset of the meeting on 12 November, the Chair of the DSB set out ground rules for the orderly conduct of the meeting. In this regard, the Chair emphasized that the meeting was not intended to replicate or repeat the extensive interviews conducted by delegations in connection with the original appointments. The Chair also informed the delegations that questions to the Appellate Body Members could be posed by Ambassadors or Deputies only, and that each delegation was allowed to ask only two questions. Moreover, the delegations could not ask questions that touched upon: (i) any legal issues raised in disputes currently under consultations, before panels or before the Appellate Body; (ii) any legal issues on which the Appellate Body ruled during the term of the Appellate Body Member seeking reappointment; and (iii) any legal issues which have not yet been addressed by the Appellate Body. The Chair recalled that the Appellate Body Members are bound by the Rules of Conduct for the DSU as annexed to the Working Procedures for Appellate Review, and that pursuant to Rules II.1 and III.2 they shall be independent and impartial, shall avoid direct and indirect conflicts of interest, and shall maintain confidentiality. In this regard, the Chair emphasized that the Appellate Body Members could at any time decline to answer any of the questions posed during the meeting.

Following the Chair's introductory remarks at the 12 November informal meeting, four delegations made statements regarding the nature of the meeting and expressed their views on the issue of reappointment, as set out in Article 17.2 of the DSU. Subsequently, some delegations posed questions. These questions related to: (i) the Appellate Body Member's interest in reappointment and the experiences and insights gained as an Appellate Body Member; (ii) the issue of the increased workload of the Appellate Body and how to address it; (iii) the issue of collegiality; and (iv) what the Appellate Body can do itself to improve the efficiency of the Appellate Body process. The Chair noted that the Appellate Body Members had answered all questions posed to them.

In the light of the results of the DSB Chair's consultation process, including the meeting held on 12 November, the DSB decided, at its meeting on 25 November 2015, to reappoint Mr Ujal Singh Bhatia and Mr Thomas Graham for a second four-year term starting on 11 December 2015.[23]

Appellate Body Members Mr. Ujal Singh Bhatia and Mr. Thomas Graham.

[21] See WT/DSB/M/360.
[22] See WT/DSB/M/369.
[23] See WT/DSB/M/370.

The composition of the Appellate Body in 2015 and the respective terms of office of its Members are set out in Table 1.

TABLE 1: COMPOSITION OF THE APPELLATE BODY IN 2015

Name	Nationality	Term(s) of office
Ujal Singh Bhatia	India	2011–2015 2015–2019
Seung Wha Chang	Korea	2012–2016
Thomas R. Graham	United States	2011–2015 2015–2019
Ricardo Ramírez-Hernández	Mexico	2009–2013 2013–2017
Shree Baboo Chekitan Servansing	Mauritius	2014-2018
Peter Van den Bossche	Belgium	2009–2013 2013–2017
Yuejiao Zhang	China	2008–2012 2012–2016

Pursuant to Rule 5.1 of the Working Procedures, the Members of the Appellate Body elected Mr Peter Van den Bossche to serve as Chairman of the Appellate Body from 1 January to 31 December 2015.[24] In November 2015, Mr Thomas Graham was elected to serve as Chairman as of 1 January 2016 until 31 December 2016.

Biographical information about the Members of the Appellate Body is provided in Annex 4. A list of former Appellate Body Members and Chairpersons is provided in Annex 5.

The Appellate Body receives legal and administrative support from the Appellate Body Secretariat, in accordance with Article 17.7 of the DSU. As at 31 December 2015, the Secretariat comprised a Director, seventeen lawyers, one administrative assistant, and four support staff. Werner Zdouc has been Director of the Appellate Body Secretariat since 2006.

[24] See WT/DSB/69.

3. APPEALS

Pursuant to Rule 20(1) of the Working Procedures and Article 16(4) of the DSU, an appeal is commenced by a party to the dispute giving written notice to the DSB and filing a Notice of Appeal with the Appellate Body Secretariat. Rule 23(1) of the Working Procedures allows a party to the dispute other than the initial appellant to join the appeal, or appeal on the basis of other alleged errors, by filing a Notice of Other Appeal within five days of the filing of the Notice of Appeal.

Eight panel reports concerning seven matters were appealed in 2015. Two disputes related to compliance proceedings, while all remaining disputes related to original proceedings. "Other appeals" were filed pursuant to Rule 23(1) of the Working Procedures in six out of the eight disputes. Table 2 sets out further information regarding appeals filed in 2015.

TABLE 2: PANEL REPORTS APPEALED IN 2015

Panel report appealed	Date of appeal	Appellant[a]	Document symbol	Other appellant [b]	Document symbol
United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam	6 January 2015	Viet Nam	WT/DS429/5	–	–
India – Measures Concerning the Importation of Certain Agricultural Products	26 January 2015	India	WT/DS430/8	–	–
Peru – Additional Duty on Imports of Certain Agricultural Products	25 March 2015	Peru	WT/DS457/7	Guatemala	WT/DS457/8
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan	20 May 2015	Japan	WT/DS454/7	China	WT/DS454/8
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union	20 May 2015	China	WT/DS460/7	European Union	WT/DS460/8
United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products: Recourse to Article 21.5 of the DSU by Mexico	5 June 2015	United States	WT/DS381/24	Mexico	WT/DS381/25

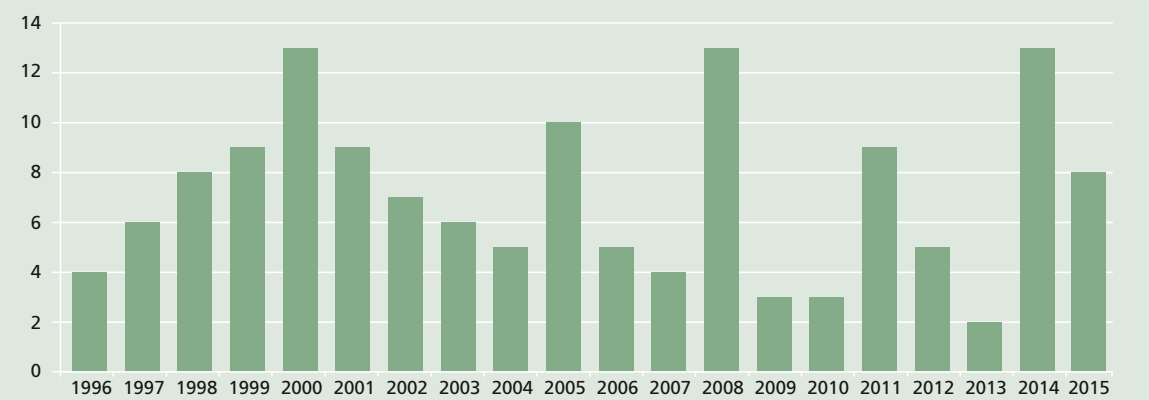
Panel report appealed	Date of appeal	Appellant[a]	Document symbol	Other appellant [b]	Document symbol
European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China	9 September 2015	European Union	WT/DS397/21	China	WT/DS397/22
Argentina – Measures Relating to Trade in Goods and Services	27 October 2015	Panama	WT/DS453/7	Argentina	WT/DS453/8

[a] Pursuant to Rule 20(1) of the Working Procedures.

[b] Pursuant to Rule 23(1) of the Working Procedures.

Further information on the number of appeals filed each year since 1995 is provided in Annex 6. Chart 1 shows the number of appeals filed each year between 1995 and 2015.

CHART 1: TOTAL NUMBER OF APPEALS 1995–2015



The overall average of panel reports that have been appealed from 1995 to 2015 is 67%. A breakdown of the percentage of panel reports appealed each year is provided in Annex 7.

4. APPELLATE BODY REPORTS

Eleven Appellate Body reports concerning seven matters were circulated in 2015, the details of which are summarized in Table 3. As of the end of 2015, the Appellate Body has circulated a total of 138 reports.

TABLE 3: APPELLATE BODY REPORTS CIRCULATED IN 2015

Case	Document symbol	Date circulated	Date adopted by the DSB
*Argentina – Measures Affecting the Importation of Goods**	WT/DS438/AB/R WT/DS444/AB/R WT/DS445/AB/R	15 January 2015	26 January 2015
*United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico**	WT/DS384/AB/RW WT/DS386/AB/RW	18 May 2015	20 May 2015
United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam	WT/DS449/AB/R	7 April 2015	22 April 2015
India – Measures Concerning the Importation of Certain Agricultural Products	WT/DS430/AB/R	4 June 2015	19 June 2015
Peru – Additional Duty on Imports of Certain Agricultural Products	WT/DS457/AB/R	20 July 2015	31 July 2015
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / the European Union	WT/DS454/AB/R WT/DS460/AB/R	14 October 2015	28 October 2015
United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico	WT/DS381/AB/RW	20 November 2015	3 December 2015

* Appellate Body reports concerning disputes with the same title were circulated as a single document.

Table 4 below shows which WTO agreements were addressed in the Appellate Body reports circulated in 2015.

TABLE 4: WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED IN 2015

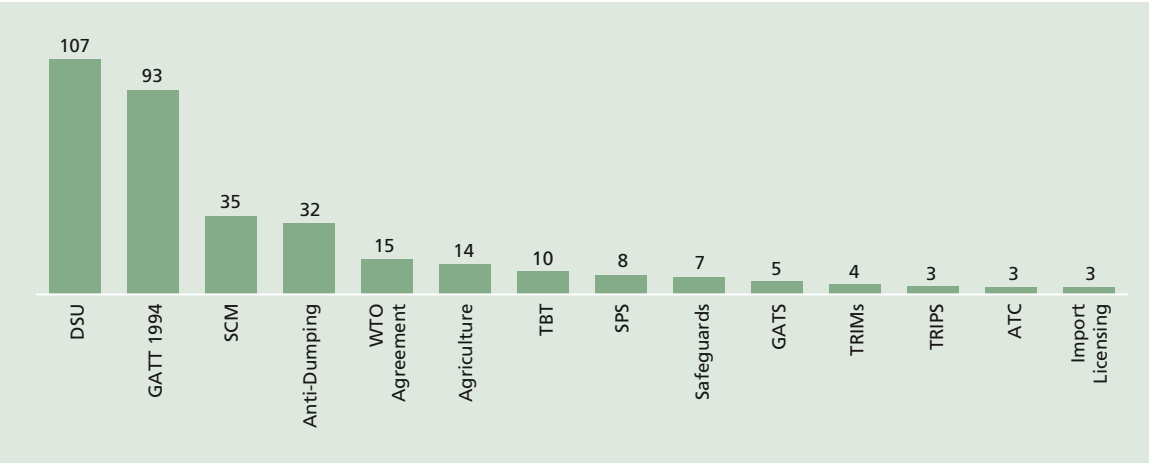
Case	Document symbol	WTO agreements addressed
*Argentina – Measures Affecting the Importation of Goods**	WT/DS438/AB/R WT/DS444/AB/R WT/DS445/AB/R	Agreement on Import Licensing Procedures DSU GATT 1994
*United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico**	WT/DS384/AB/RW WT/DS386/AB/RW	DSU GATT 1994 TBT Agreement
United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam	WT/DS429/AB/R	Anti-Dumping Agreement DSU GATT 1994

Case	Document symbol	WTO agreements addressed
India – Measures Concerning the Importation of Certain Agricultural Products	WT/DS430/AB/R	DSU GATT 1994 SPS Agreement
Peru – Additional Duty on Imports of Certain Agricultural Products	WT/DS457/AB/R	Agreement on Agriculture DSU GATT 1994
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan / the European Union	WT/DS454/AB/R WT/DS460/AB/R	Anti-Dumping Agreement DSU GATT 1994
United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico	WT/DS381/AB/RW	DSU GATT 1994 TBT Agreement

* Appellate Body reports concerning disputes with the same title were circulated as a single document.

Chart 2 below shows the number of times specific WTO agreements have been addressed in the 138 Appellate Body reports circulated from 1996 through 2015.

CHART 2: WTO AGREEMENTS ADDRESSED IN APPEALS 1996–2015



The findings and conclusions contained in the Appellate Body reports circulated in 2015 are summarized below.

4.1 Appellate Body Reports, *Argentina – Measures Affecting the Importation of Goods*, WT/DS438/AB/R, WT/DS444/AB/R, and WT/DS445/AB/R

These disputes concerned challenges brought by the European Union (DS438), the United States (DS444), and Japan (DS445) (the complainants) against Argentina's imposition on prospective importers of five trade-related requirements (TRRs) as a condition to import goods into Argentina or to obtain certain benefits (the TRRs measure). The complainants also challenged a procedure through which Argentina requires prospective importers to file an Advance Sworn Import Declaration (*Declaración Jurada Anticipada de Importación* (DJAI)) prior to importation, and prohibits importation or imposes certain conditions on importation depending on the reaction of certain government agencies to such declaration (the DJAI procedure).

As defined by the complainants, the TRRs measure consists of the imposition by Argentina of one or more of the following TRRs: (a) to export goods of a value equal to or higher than the value of imports; (b) to reduce imports; (c) to incorporate more local content into domestically produced goods; (d) to make or increase investments in Argentina; and (e) to refrain from repatriating profits. With respect to this measure, the complainants claimed before the Panel that Argentina acted inconsistently with Articles X:1 and XI:1 of the GATT 1994. The European Union and Japan also claimed that the TRRs measure is inconsistent with Article III:4 of the GATT 1994.

With respect to the DJAI procedure, the complainants claimed before the Panel that Argentina acts inconsistently with Articles X:3(a) and XI:1 of the GATT 1994, and Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), and 5.1-5.4 of the Agreement on Import Licensing Procedures (Import Licensing Agreement). The European Union and Japan also claimed that the DJAI procedure is inconsistent with Article X:1 of the GATT 1994.

The Panel found that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994 because it constitutes a restriction on the importation of goods, but exercised judicial economy with respect to the complainants' claims under Articles X:1 and X:3(a) of the GATT 1994 and Articles 1.3, 1.4(a), 1.6, 3.2, 3.3, 3.5(f), and 5.1-5.4 of the Import Licensing Agreement. With respect to the TRRs, the Panel found that the measure at issue is inconsistent with Article XI:1 of the GATT 1994, because it constitutes a restriction on the importation of goods. Having made this finding, the Panel exercised judicial economy with respect to the complainants' claim that the TRRs measure had not been published promptly as required under Article X:1 of the GATT 1994. The Panel also found that the TRRs measure, with respect to the local content requirement, is inconsistent with Article III:4 of the GATT 1994, because it grants imported products treatment less favourable than that granted to like domestic products. The Panel further found that the TRRs measure is inconsistent "as such" with these provisions.

4.1.1 The Panel's terms of reference

4.1.1.1 Argentina's appeal

Argentina appealed the Panel's findings that the TRRs measure fell within the Panel's terms of reference. Argentina argued that, because the complainants did not identify a single or "overarching" TRRs measure in their requests for consultations, the identification of a single or "overarching" TRRs measure in their panel requests expanded the scope or changed the essence of the dispute.

The Appellate Body compared the consultations requests and panel requests and, like the Panel, observed a high degree of similarity in the language and content of the two sets of requests. First, with respect to the TRRs, the consultations requests and the panel requests identify the same five "commitments" or "requirements" that Argentina imposes on economic operators. Second, both sets of requests describe these five "commitments" or "requirements" as being "trade restrictive". While the consultations requests use the term "trade restrictive commitments", the panel requests each contain a separate heading entitled "Restrictive Trade Related Requirements". Third, both sets of requests describe these "commitments" or "requirements" as being imposed pursuant to Argentina's "stated policies" or "policy objectives" of "import substitution" and the "elimination of trade deficits". Finally, both sets of requests identify a relationship between the "commitments" or "requirements", on the one hand, and the import certificates (*Certificados de Importación*, CIs) and the DJAI, on the other hand. The Appellate Body thus found that the language identifying the single TRRs measure in the complainants' panel requests can be considered to have evolved from the language of their consultations requests.

The Appellate Body recognized that the two sets of requests also have some differences. For example, the EU panel request refers to an "overarching measure" whereas its consultations request does not. Nevertheless, the Appellate Body considered that these differences alone do not mean that the language identifying the single TRRs measure in the panel requests cannot be considered to have evolved from the

language identifying the "commitments" in the consultations requests. In this connection, the Appellate Body recalled that there is no need for a "precise and exact identity" between the consultations request and the panel request, provided that there is no expansion in the scope of the dispute or a change in its essence. The Appellate Body stated that a panel request must identify the "*specific* measure at issue" in a manner that is sufficiently precise, as required by Article 6.2 of the DSU, and that does not expand the scope or change the essence of the dispute. In the view of the Appellate Body, the language identifying the single TRRs measure in the panel requests can be considered to have evolved from, and to be a more elaborate version of, the language identifying the "commitments" in the consultations requests. The Appellate Body agreed with the Panel that the description of the TRRs as a single or "overarching" measure is only an "enunciation in different terms" of the same measures identified in the consultations requests. For these reasons, the Appellate Body agreed with the Panel that the panel requests reflect a permissible reformulation of the measure at issue that did not expand the scope or change the essence of the dispute.

Furthermore, the Appellate Body found that nothing in the language of the requests mentioned above suggested that the challenge raised by the complainants was limited to specific instances of application of the TRRs, or precluded the identification of a single or "overarching" TRRs measure in the panel requests. Specifically, the complainants' consultations requests state that Argentina "*often requires*" importers to undertake five "commitments", which are the same five "requirements" identified in the panel requests. The consultations requests also state that the measures identified therein (i.e. the DJAI procedure, the CIs, and the "commitments") are aimed at advancing or pursuing Argentina's "stated policies" of "import substitution" and "elimination of trade balance deficits". The consultations requests then state that the "legal measures through which Argentina imposes these restrictions include, but are *not limited to*, the legal instruments listed in the Annexes". The Appellate Body found that, rather than limiting the measures at issue identified in the panel requests to those that are challenged "as applied", the foregoing language of the consultations requests may reasonably be read as establishing a basis from which the complainants could legitimately elaborate their description of the measure at issue as the single or "overarching" TRRs measure in their panel requests.

Accordingly, the Appellate Body upheld the Panel's ruling that the characterization of the TRRs as a single measure in the complainants' panel requests did not expand the scope or change the essence of the dispute. Hence, the TRRs measure was within the Panel's terms of reference.

4.1.1.2 The European Union's other appeal

The European Union appealed the Panel's finding that the 23 specific instances of application of the TRRs identified in its panel request do not constitute measures at issue in this dispute. The European Union argued that the language of its panel request shows that it was not only challenging the existence of an overarching measure, but also challenging separately 29 instances in which Argentina imposed certain TRRs that share the same characteristics as the five requirements described as part of the overarching measure.

The Appellate Body found that the Panel erred in ruling that the European Union's Panel request was not "sufficiently precise" in identifying these 23 specific instances as measures at issue because a reader of the panel request would have to visit the websites on which information regarding these instances may be found, and then deduce therefrom what the challenged measures are. The Appellate Body recalled that the determination of whether a panel request satisfies the requirements of Articles 6.2 of the DSU must be based on an examination of the panel request on its face as it existed at the time of its filing. The term "on its face", however, must not be so strictly construed as to automatically preclude reference to sources that are identified in the text of the panel request, but the contents of which are only accessible outside the panel request document itself. In this case, the Appellate Body found that the European Union's Panel request provides references to the websites on which press releases and news articles explaining the 23 instances may be found, and that the contents of these websites may be permissibly examined in order to ascertain whether the measure at issue is identified consistently with the requirements of

Article 6.2 in the EU Panel request. Thus, the Appellate Body reversed the Panel's finding that the 23 measures described by the European Union in Section 4.2.4 of its first written submission as "specific instances" of application of the TRRs were not precisely identified in the EU Panel request as measures at issue, and that these 23 specific instances do not constitute measures at issue in this dispute.

The Appellate Body then assessed whether the EU Panel request identified the 23 specific instances of application of the TRRs as measures at issue by examining the contents of each of the press releases and news articles from the websites referred to in the EU Panel request. The Appellate Body found the 23 specific instances of application of the TRRs that are the object of the European Union's claims to be discernible from the press releases and news articles. In each instance, the Appellate Body found the contents of the press release or news article to provide the following information: (i) the involvement of the Argentine Government; (ii) the particular economic operator, sector, or industry concerned; and (iii) the specific TRR(s) allegedly imposed. Thus, the specific measures at issue were discernible from the press releases and news articles.

Turning to Argentina's contention that these 23 measures were in any event outside the Panel's terms of reference because they were not identified in the consultations request, the Appellate Body recalled that the European Union's consultations request enumerates five "commitments" that Argentina "often requires" importers of goods to undertake. The instances listed by the European Union in Annex III to its panel request, in turn, appear to be specific instances of application of these "commitments". Thus, the language of the European Union's consultations request encompasses the specific instances of application identified in the EU Panel request. Consequently, the identification of these 23 measures in the EU Panel request did not amount to an expansion in the scope or a change in the essence of the dispute, but may rather be considered as a permissible refinement or reformulation of the complaint following the consultations process. Thus, the Appellate Body did not find any merit in Argentina's arguments.

Accordingly, unlike the Panel, the Appellate Body considered that the EU Panel request identified the specific measures at issue in this dispute consistently with the requirements of Article 6.2 of the DSU. In consequence, the Appellate Body reversed the Panel's finding that these specific instances "were not precisely identified in EU Panel request as measures at issue" and that "accordingly, those 23 measures do not constitute 'measures at issue' in the present dispute". In addition, the Appellate Body found that these 23 measures were within the Panel's terms of reference.

The European Union also made a conditional appeal, requesting completion of the legal analysis with respect to the consistency or inconsistency of the 23 specific instances of application of the TRRs with Articles XI:1 and/or III:4 of the GATT 1994 in the event that the Appellate Body were to reverse or otherwise declare moot and of no legal effect the Panel's findings that: (i) the TRRs measure exists; and (ii) the TRRs measure is inconsistent with Articles XI:1 and III:4 of the GATT 1994. Because the conditions on which this request was based were not met, as explained below, the Appellate Body refrained from completing the analysis.

4.1.2 TRRs measure

4.1.2.1 Identification of the single unwritten TRRs measure

4.1.2.1.1 The joint claims against the TRRs measure

Argentina appealed the Panel's finding that the complainants had established that the TRRs measure exists or operates as a single measure and, consequently, that the TRRs measure is inconsistent with Articles III:4 and XI:1 of the GATT 1994. In particular, Argentina claimed that the Panel failed to apply the correct legal standard in ascertaining the existence of the alleged TRRs measure in its evaluation of the joint claims by the three complainants against the TRRs measure ("joint claims"). For Argentina, it was evident that the complainants had, in effect, raised "as such" claims against the TRRs measure. Thus, the Panel should have applied the legal standard articulated by the Appellate Body in *US – Zeroing (EC),* rather than the one articulated by the Panel in *US – COOL* to ascertain whether multiple measures can be assessed for WTO-consistency as a single measure, rather than as individual measures. Argentina, therefore, requested the Appellate Body to reverse the Panel's conclusions that the TRRs measure operates as a single measure and that it is inconsistent with Articles XI:1 and III:4 of the GATT 1994.

The Appellate Body considered that, when tasked with assessing a challenge against an unwritten measure, a Panel need not always apply the legal standard or criteria formulated by the Appellate Body for the evaluation of "as such" challenges against measures. The Appellate Body stated that the distinction between "as such" and "as applied" claims does not govern the definition of the measures that can be challenged in WTO dispute settlement and that the distinction between rules or norms of general and prospective application and their individual applications does not define exhaustively the types of measures that are subject to WTO dispute settlement.

The Appellate Body recalled that the "measures" that may be the object of WTO dispute settlement extend to any act or omission that is attributable to a WTO Member and that this broad concept of measures is not limited merely to rules or norms of general and prospective application and their individual applications. Thus, the Appellate Body considered that the notion of a measure that is a rule or norm of general and prospective application as reflected in the finding of the Appellate Body in *US – Zeroing (EC)* cannot be considered as setting forth a general legal standard that must always be satisfied in order to prove the existence of an unwritten measure challenged in WTO dispute settlement. Rather, according to the Appellate Body, the constituent elements that must be substantiated with evidence and arguments in order to prove the existence of a challenged measure will be informed by how such measure is described or characterized by the complainant. The specific measure challenged and how it is described or characterized by a complainant will inform the kind of evidence a complainant is required to submit and the elements that it must prove in order to establish the existence of that measure. A complainant seeking to prove the existence of an unwritten measure will invariably be required to prove the attribution of that measure to a Member and its precise content. Depending on the specific measure challenged and how it is described or characterized by a complainant, however, other elements may need to be proven.

In these disputes, considering that in their joint claims the complainants did not challenge the TRRs measure as a rule or norm of general and prospective application, the Appellate Body was not persuaded that they were required to demonstrate the existence of the TRRs measure based on the criteria formulated by the Appellate Body in *US – Zeroing (EC)* and, in particular, that such measure had general and prospective application. Rather, the complainants had to provide evidence and arguments to demonstrate the existence of the challenged measure, and specifically a measure that, as they contended, was applied systematically and would continue to be applied in the future.

The Appellate Body concluded that the Panel correctly examined the relevant constituent elements of the measure subject to the joint claims and determined, based on the evidence and arguments the complainants

presented, the existence of a TRRs measure composed of several individual TRRs operating together in an interlinked fashion as part of a single measure in pursuit of the objectives of import substitution and trade deficit reduction. The Panel also found that the TRRs measure has systematic application, as it applies to economic operators in a broad variety of different sectors, and that it has present and continued application, in the sense that it currently applies and it will continue to be applied in the future unless and until the underlying policy is modified or withdrawn by the Argentine Government. Accordingly, the Appellate Body held that the Panel correctly found that the complainants had demonstrated the existence of a TRRs measure.

Therefore, the Appellate Body upheld the Panel's finding in respect of the joint claims that "the Argentine authorities' imposition on economic operators of one or more of the five requirements identified by the complainants as a condition to import or obtain certain benefits operates as a single measure (the TRRs measure) attributable to Argentina". Consequently, the Appellate Body upheld the Panel's findings that the TRRs measure is inconsistent with Articles III:4 and XI:1 of the GATT 1994.

4.1.2.1.2 Article 11 of the DSU – Japan's "as such" claims

Argentina claimed that the Panel acted inconsistently with its duty under Article 11 of the DSU to conduct an objective assessment of the matter when examining Japan's "as such" claims. Argentina contended that the Panel found that Japan had established the existence of the alleged TRRs measure without properly examining whether and to what extent Japan had adduced sufficient evidence to demonstrate the alleged measure's precise content, or its general and prospective application, and based on insufficient and incoherent reasoning.

Before addressing Argentina's appeal under Article 11 of the DSU, the Appellate Body made two preliminary observations. First, the Appellate Body considered the Panel's findings on the TRRs measure "as such" to amount in substance to no more than the findings the Panel had already made in respect of the TRRs measure as challenged under the joint claims. The Appellate Body reached this view after having noted that the Panel's findings in respect of the joint claims and those in respect of Japan's "as such" claims concerned the same underlying TRRs measure and were based on virtually the same evidence and the same reasoning. Second, the Appellate Body stated that its consideration of Argentina's claim under Article 11 of the DSU could not ignore the fact that Argentina bore at least some responsibility for the evidentiary difficulties faced by the Panel. In this respect, the Appellate Body recalled that, before the Panel, Argentina had refused to provide copies of the agreements between the Argentine Government and economic operators, which it did not deny were in its possession. These agreements constitute the principal evidence of the TRRs imposed by Argentina.

With respect to the Panel's finding regarding the precise content of the TRRs measure, the Appellate Body considered that the Panel had adopted a unified, holistic approach to its analysis of the TRRs measure, meaning that the Panel's analysis of Japan's "as such" claims could not be read in isolation from the Panel's earlier findings on the TRRs measure. The Appellate Body noted that the Panel made findings on the precise content of the same TRRs measure in the section of the Panel Reports addressing the complainants' joint claims based on extensive record evidence produced by the complainants. Therefore, when the Panel turned to consider Japan's "as such" claims against the TRRs measure, the Panel was clearly relying on its earlier findings on the precise content of the TRRs measure as challenged under the joint claims, having already devoted a significant part of its Reports to discussing evidence of the content of each individual TRR and of the TRRs measure.

With respect to the Panel's finding that the TRRs measure has general application, the Appellate Body considered that Argentina took issue with the Panel's interpretation and application of the concept of "general" application, rather than with the Panel's treatment of the evidence showing how the TRRs were

applied, or the Panel's reasoning on the basis of that evidence. In this respect, the Appellate Body did not consider that Argentina's claim that the complainants failed to demonstrate that the TRRs measure had "general" application was properly raised under Article 11 of the DSU.

With respect to the Panel's finding that the TRRs measure has prospective application, the Appellate Body considered that, contrary to Argentina's assertion, the Panel did not rely exclusively on a single piece of evidence to determine that the TRRs measure has prospective application. Rather, the Appellate Body noted that the Panel cross-referenced its earlier findings that the TRRs measure reflects a "deliberate policy", constituting repeated actions, coordinated and publicly announced by the highest authorities. The Appellate Body also considered that depending on the circumstances of a particular case, a single piece of evidence may constitute sufficient proof that a measure has prospective application and that thus, even assuming that the Panel relied only on one exhibit to support its findings that the TRRs measure is prospective in nature, this did not in and of itself constitute a violation of Article 11 of the DSU.

Finally, the Appellate Body emphasised that Argentina did not elaborate any specific allegations or examples of incoherence or contradictions in the Panel's reasoning or point to any lack of even-handedness in the evaluation of the evidence. Moreover, Argentina had not presented competing evidence to the Panel, or engaged with the evidence presented by the complainants. For these reasons, the Appellate Body found that Argentina did not establish that the Panel's reasoning on the general and prospective application of the TRRs measure is incoherent, or that such deficiency amounted to a failure to make an objective assessment.

In sum, the Appellate Body did not consider that Argentina established that the Panel failed to ensure that its findings were based on record evidence and were supported by reasoned and adequate explanations and coherent reasoning. Therefore, the Appellate Body rejected Argentina's claim that the Panel acted inconsistently with Article 11 of the DSU.

In reaching this conclusion, the Appellate Body stated that it did not wish to be seen as endorsing the Panel's additional findings on Japan's "as such" claims against the TRRs measure. The Appellate Body explained that it considered the Panel's "as such" findings on the TRRs measure as amounting in substance to no more than the findings the Panel had already made in respect of the TRRs measure as challenged under the joint claims. In particular, the Appellate Body stated that it understood the Panel, in purporting to find that the TRRs measure has "general application", in fact to have found nothing other than that the TRRs measure has "systematic application". Similarly, the Appellate Body understood the Panel, in purporting to find that the TRRs measure has "prospective application", to have found no more than that the TRRs measure will continue to be applied in the future.

4.1.2.2 The Panel's exercise of judicial economy under Article X:1 of the GATT 1994

Japan appealed the Panel's exercise of judicial economy with respect to Japan's claim against the TRRs measure under Article X:1 of the GATT 1994. According to Japan, the Panel acted inconsistently with Articles 3.4, 3.7, 7.2, and/or 11 of the DSU by exercising judicial economy on this claim because the "scope and content" of Article X:1 is distinct from the "scope and content" of Articles III:4 and XI:1 of the GATT 1994, and compliance with a finding under the latter provisions would not necessarily result in compliance with a finding under Article X:1. Japan requested that the Appellate Body reverse the Panel's decision to apply judicial economy and complete the analysis and find that the TRRs measure is inconsistent with Argentina's obligations under Article X:1.

Before examining Japan's claim, the Appellate Body recalled that that the principle of judicial economy allows a Panel to refrain from making multiple findings that the same measure is *inconsistent* with various provisions when a single, or a certain number of findings of inconsistency, would suffice to resolve the dispute. The Appellate Body also recalled that to provide only a partial resolution of the matter at issue would be false judicial economy, and that a Panel has to address those claims on which a finding is necessary in

order to enable the DSB to make sufficiently precise recommendations and rulings so as to allow for prompt compliance by a Member with those recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members.

Turning to Japan's claim, the Appellate Body considered that the fact that two provisions have different "scope and content" does not, in and of itself, imply that a Panel must address each and every claim under those provisions. Moreover, the Appellate Body noted some ambiguity in Japan's argument concerning compliance obligations, which may be understood to refer to the publication of: (i) any implementing measures that may be adopted by Argentina to bring the TRRs measure into conformity with Articles III:4 and XI:1 of the GATT 1994; or (ii) the current GATT-inconsistent TRRs measure.

The Appellate Body disagreed with Japan's argument to the extent that it may be understood as suggesting that a finding under Article X:1 of the GATT 1994 is necessary to ensure that Argentina is subject to an obligation to publish promptly any implementing measures that may be adopted to bring the TRRs measure into conformity with the GATT 1994. This is because the obligation to publish promptly any new or modified laws of general application does not stem from the implementation of a finding of inconsistency of the current TRRs measure with Article X:1. Rather, for any new or modified implementing measures that fall within the scope of Article X:1, the publication obligation stems from Article X:1 itself.

The Appellate Body also disagreed with Japan's argument to the extent that it may be understood as referring to the publication of the current GATT-inconsistent TRRs measure. The Appellate Body noted that, to the extent that Argentina will have to modify or withdraw the TRRs measure to comply with the recommendations under Articles III:4 and XI:1 of the GATT 1994, the TRRs measure – in its current form and with its current content – will cease to exist. Accordingly, the Appellate Body failed to understand how the publication of this WTO-inconsistent measure would contribute to securing a positive solution to this dispute. In addition, referring to Japan's understanding that the publication of the current TRRs measure is necessary to verify Argentina's compliance with its obligations, the Appellate Body considered that the elaboration of the content of the current TRRs measure in the Panel Reports would assist in assessing Argentina's actions to bring the TRRs measure into conformity with Argentina's obligations under the GATT 1994.

The Appellate Body concluded that Japan had not demonstrated that a ruling under Article X:1 of the GATT 1994 was necessary to secure a positive solution to this dispute, or that the Panel's exercise of judicial economy at issue provided only a partial resolution of the matter. Thus, the Appellate Body found that Japan had not established that the Panel erred in exercising judicial economy on Japan's claim that the TRRs measure is inconsistent with Article X:1. Accordingly, the Appellate Body also rejected Japan's request that the Appellate Body complete the analysis.

4.1.3 DJAI procedure: Articles VIII and XI:1 of the GATT 1994

Argentina raised three claims of error in connection with the Panel's analysis of whether the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994, namely that: (i) the Panel erred in its interpretation of Article XI:1 of the GATT 1994; (ii) the Panel erred in its assessment of the scope of Article VIII of the GATT 1994; and (iii) the Panel erred in concluding that, because the approval of a DJAI is not "automatic", the DJAI procedure is inconsistent with Article XI:1. Argentina requested the Appellate Body to modify or reverse the Panel's findings at issue accordingly.

4.1.3.1 Article XI:1 of the GATT 1994

Before examining Argentina's claims, the Appellate Body set out its understanding of certain issues relating to the interpretation of discrete elements of Article XI:1 of the GATT 1994. The Appellate Body recalled that Article XI:1 lays down a general obligation to eliminate quantitative restrictions. It forbids Members

to institute or maintain prohibitions or restrictions, other than duties, taxes or other charges, on the importation, exportation, or sale for export of any product destined for another Member. This provision, however, does not cover simply *any* restriction or prohibition. Rather, Article XI:1 refers to prohibitions or restrictions "on the importation … or on the exportation or sale for export". Thus, in the Appellate Body's view, not every condition or burden placed on importation or exportation will be inconsistent with Article XI, but only those that are limiting, i.e. those that limit the importation or exportation of products. Moreover, this limitation need not be demonstrated by quantifying the effects of the measure at issue; rather, such limiting effects can be demonstrated through the design, architecture, and revealing structure of the measure at issue considered in its relevant context.

The Appellate Body also considered that the words "made effective through" in Article XI:1 of the GATT 1994 indicate that the scope of Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative. The Appellate Body also noted that, despite the fact that the term "or other measures" in Article XI:1 suggests a broad coverage, the scope of application of Article XI:1 is not unfettered. Article XI:1 itself explicitly excludes "duties, taxes and other charges" from its scope of application. Article XI:2 of the GATT 1994 further restricts the scope of application of Article XI:1 by providing that the provisions of Article XI:1 shall not extend to the areas listed therein. The Appellate Body further acknowledged that certain provisions of the GATT 1994, such as Articles XII, XIV, XV, XVIII, XX and XXI, permit a Member, in certain specified circumstances, to be excused from its obligations under Article XI. In these provisions, express reference is made to the relationship of each provision with the obligations contained in Article XI:1 or with the obligations under the GATT 1994 more generally. Other provisions, not explicitly referring to the obligations contained in Article XI:1, or to the obligations under the GATT 1994 more generally, may also contain elements that are relevant to their relationship with, and the interpretation of, Article XI:1.

4.1.3.2 The Panel's interpretation of Article XI:1 of the GATT 1994

Argentina claimed that the Panel erred in its interpretation of Article XI:1 of the GATT 1994 by failing to establish and apply a "proper analytical framework" for distinguishing between the scope and disciplines of Article VIII of the GATT 1994, on the one hand, and the scope and disciplines of Article XI:1, on the other hand. Argentina alleged that the Panel failed to recognize that an import formality or requirement could have some degree of trade-restricting effect that is an ordinary incident of the formality or requirement itself and that does not render the formality or requirement inconsistent with Article XI:1.

First, Argentina argued that the scope of application of Articles VIII and XI:1 of the GATT 1994 are mutually exclusive. Given Argentina's argument, the Appellate Body considered it necessary to examine Article VIII of the GATT 1994. The Appellate Body noted that Article VIII imposes three clear obligations on Members in Article VIII:1(a), Article VIII:2, and Article VIII:3. By contrast, Articles VIII:1(b) and VIII:1(c) of the GATT 1994 do not appear to impose mandatory obligations. Rather, the language of the latter two provisions is more hortatory in nature. The Appellate Body also noted that Article VIII:4 outlines the scope of Article VIII. The Appellate Body accepted that the language in Article VIII:1(c) implies a recognition by Members that import formalities and requirements can have trade-restricting effects, at least to some degree, and that Article VIII:1(c) constitutes context for the interpretation of Article XI:1 and for what amounts to a restriction on importation within the meaning of the latter provision. Yet, the Appellate Body concluded that the language in Article VIII:1(c) does not suffice to establish the type of carve-out or derogation from Article XI:1 that Argentina seemed to envisage for formalities and requirements referred to in Article VIII. Thus, the Appellate Body rejected Argentina's first argument, and agreed with the Panel that formalities or requirements under Article VIII are not excluded *per se* from the scope of application of Article XI:1, and that their consistency could be assessed under either Article VIII or Article XI:1, or under both provisions. The Appellate Body also rejected Argentina's argument that Articles VIII and XI:1 have mutually exclusive spheres of application. Instead, like the Panel, the Appellate Body considered that the obligations contained in Articles VIII and XI:1 apply harmoniously and cumulatively.

The Appellate Body then turned to Argentina's second argument. Argentina argued that a harmonious interpretation of Articles VIII and XI:1 would require, at a minimum, some means of distinguishing the trade-restrictive effect of a formality or requirement itself from the trade-restrictive effect of any substantive rule of importation that the measure implements. Argentina proposed that, for an import formality or requirement to be found to constitute an Article XI:1 restriction, in its own right, it must be shown that: (i) the formality or requirement limits the quantity of imports to a material degree that is independent of the trade-restricting effect of any substantive rule of importation that the formality or requirement implements; and (ii) this independent trade-restricting effect is greater than the effect that would ordinarily be associated with a formality or requirement of its nature. The complainants contended that Argentina's analytical framework is not applicable to these disputes because the complainants' claims do not concern import formalities or requirements. Rather, the complainants' claims concern the DJAI's discretionary system of authorization of imports that, on its face, does not implement a separate WTO-consistent restriction.

At the outset, the Appellate Body noted that Argentina had not identified a specific legal basis for its analytical framework. The Appellate Body also disagreed with Argentina's argument that the Panel's reasoning implied that any measure falling within the scope of Article VIII of the GATT 1994 would be prohibited *per se* under Article XI:1 of the GATT 1994. The Appellate Body noted that, in setting out its understanding of Article XI:1, the Panel expressed the view that not any condition placed on importation is inconsistent with Article XI, but only those that have a limiting effect on imports.

The Appellate Body then examined whether and under what circumstances measures that qualify as "formalities" or "requirements" under Article VIII of the GATT 1994 may constitute "restrictions" under Article XI:1 of the GATT 1994. The Appellate Body noted that formalities and requirements connected to importation that fall within the scope of application of Article VIII typically involve the use of documentary and procedural tools to collect, process, and verify information in connection with the importation of products. Such import formalities and requirements will often entail a certain burden on the importation of products. At the same time, such formalities and requirements are, at least to some extent, a routine aspect of international trade. Compliance with such formalities and requirements enables trade to occur within a Member's specific regulatory framework. In the Appellate Body's view, not every burden associated with an import formality or requirement will entail inconsistency with Article XI:1; rather, only those that have a limiting effect on the importation of products will do so.

The Appellate Body then examined Argentina's proposed analytical framework. The first step of Argentina's proposed analytical framework would require a finding concerning whether an import formality or requirement limits the importation of products independently of any substantive restriction that such formality or requirement may implement. Without necessarily accepting Argentina's suggestion that such an analysis is mandated as the first part of a two-step approach, the Appellate Body observed that, in any event, this analysis is consistent with the Appellate Body's understanding of Article XI:1 of the GATT 1994. As explained above, Article XI:1 covers measures through which a prohibition or restriction is produced or becomes operative. If an import formality or requirement does not itself limit the importation of products independently of the limiting effects of another restriction, such import formality or requirement cannot be said to produce the limiting effect, and thus, it will not amount to a "restriction" captured by the prohibition in Article XI:1.

The second step in Argentina's proposed analytical framework would require a finding concerning whether any "independent trade-restricting effect" of an import formality or requirement is greater than the effect that would ordinarily be associated with a formality or requirement of its nature. Argentina neither identified any textual basis for this proposed analytical step, nor provided any illustration of how this abstract and general legal test might be undertaken in practice. The Appellate Body was not persuaded that this element of Argentina's proposed analytical framework is useful or necessary. Rather, as explained

above, the Appellate Body considered that the analysis under Article XI:1 of the GATT 1994 must simply be done on a case-by-case basis, taking into account the import formality or requirement at issue and the relevant facts of the case.

For these reasons, the Appellate Body found that the Panel did not err in its interpretation of Article XI:1 of the GATT 1994 by failing to establish and apply a "proper analytical framework" for distinguishing between the scope and disciplines of Article VIII of the GATT 1994, on the one hand, and the scope and disciplines of Article XI:1, on the other hand. Consequently, the Appellate Body rejected Argentina's request to modify the Panel's reasoning.

4.1.3.3 The Panel's assessment of the scope of Article VIII of the GATT 1994

Argentina requested that the Appellate Body modify or reverse certain aspects of the Panel's findings in paragraph 6.433 of the Panel reports, concerning whether the DJAI procedure can be considered an import formality or requirement under Article VIII of the GATT 1994. Although Argentina accepted that the Panel ultimately did not make a finding as to the applicability of Article VIII to the DJAI procedure, Argentina contended that the statements in paragraph 6.433, in particular that a DJAI in "exit" status is a necessary prerequisite for importation and that the DJAI procedure determines the right to import, reflect legal error and influenced the Panel's interpretation of Article XI:1 of the GATT 1994, and the application thereof to the DJAI procedure. Argentina argued that the "clear implication" of the statements in paragraph 6.433 is that the Panel considered any import procedure that is a necessary prerequisite for importing goods or by which a Member determines the right to import to be outside the scope of Article VIII.

The Appellate Body noted that certain aspects of Argentina's argumentation seemed to rest on assumptions that do not correspond to the approach taken by the Panel. In particular, although Argentina argued that the DJAI procedure consists exclusively of customs or import formalities, the Panel did not appear to share this view. The Panel did not clearly express a view either on which elements of the DJAI procedure correspond to which types of measures, or on whether individual elements of the DJAI procedure could be assessed separately. Moreover, the Panel decided to examine the DJAI procedure under Article XI:1 of the GATT 1994 "irrespective of whether the DJAI procedure is considered to be a customs or import formality subject to the obligations contained in Article VIII"; declined to opine on whether or not the DJAI procedure is an import licensing procedure; and proceeded to assess the consistency of the DJAI procedure with Article XI:1 "irrespective of whether it constitutes an import licence". In the Appellate Body's view, the Panel's approach did not contribute either to the clarity of its reasoning, or to a clear understanding of the relationship between different obligations under the GATT 1994 and the Import Licensing Agreement. Nevertheless, no party challenged the Panel's approach on appeal.

The Appellate Body then examined the implications that, according to Argentina, arise from the reasoning of the Panel in paragraph 6.433 of the Panel Reports. The Appellate Body noted that paragraph 6.433 of the Panel Reports is concerned solely with the DJAI procedure, as the Panel did not set out, in this paragraph, general principles or legal tests to be applied to import measures generally. In addition, the Appellate Body saw nothing in paragraph 6.433 suggesting that import procedures that are a necessary pre-requisite for the importation of goods are excluded from the scope of Article VIII of the GATT 1994. Finally, the Appellate Body noted that the last two sentences in paragraph 6.433 may imply that procedures by which a Member determines the right to import are not mere formalities in connection with importation within the meaning of Article VIII. Even if this were so, however, the Appellate Body considered that such implication does not support Argentina's claim of error because a statement that a procedure is not a *mere* formality does not necessarily imply that such procedure is *not* a formality. Moreover, the Panel cannot be understood to have implied in paragraph 6.433 of the Panel Reports that the DJAI procedure falls outside the scope of Article VIII because, in the paragraphs that follow paragraph 6.433, the Panel explicitly stated that it would conduct its analysis on the basis of an assumption that the DJAI procedure falls within the scope of Article VIII.

For these reasons, the Appellate Body disagreed with Argentina's understanding of the implications of paragraph 6.433 of the Panel Reports, and rejected Argentina's request to modify or reverse these findings.

4.1.3.4 Application of Article XI:1 of the GATT 1994

Argentina claimed that the Panel erred in finding that, because the attainment of a DJAI in "exit" status is not "automatic", the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994. Argentina sought reversal of this specific basis for the Panel's finding, as well as of the Panel's ultimate finding that the DJAI procedure is inconsistent with Article XI:1. Argentina argued that, in the context of the Panel's overall analysis, it appears to have been the Panel's conclusion that any import formality or requirement that is a necessary condition to import goods and that is not automatically obtained is, necessarily, a prohibited quantitative restriction under Article XI:1. Argentina contended that this conclusion is not supported by the context provided by Article 3.2 of the Import Licensing Agreement, which, according to Argentina, distinguishes between the potential trade-restricting effects of a licensing procedure and those of the underlying rule of importation that the procedure implements. Argentina also argued that to interpret Article XI:1 of the GATT 1994 as prohibiting non-automatic import licensing procedures *per se* would conflict with Article 3.2 of the Import Licensing Agreement.

Although Argentina appeared to have understood the term "automatic" in the same sense as that word is used in connection with import licensing procedures in the Import Licensing Agreement, the Appellate Body considered that the Panel's finding that the attainment of a DJAI in "exit" status is not "automatic" did not, and was not intended to, refer to the definition of "automaticity" in Article 2 of the Import Licensing Agreement. The Appellate Body recalled that the Panel refrained from making any findings with respect to the complainants' claims under the provisions of the Import Licensing Agreement, and that none of the parties sought to separate and distinguish the different elements that compose the DJAI procedure, including any of those possibly relating to import licensing procedures. Even if aspects of the DJAI procedure may resemble an import licensing procedure, these characteristics of the DJAI procedure were not the focus of the complainants' claims under Article XI:1 of the GATT 1994. Rather, the main focus of their claims was the discretionary elements involved in the entering and lifting of observations.

Moreover, the Appellate Body noted that one of the dictionary definitions of "automatic" is "[o]ccurring as a necessary consequence; … taking effect without further process in set circumstances", and that the Panel's reasoning leading up to its statement that the attainment of a DJAI in "exit" status is not "automatic" seems consistent with this meaning of "automatic". Finally, the Appellate Body reasoned that the meaning of the words "not automatic", as intended by the Panel, becomes clear once the Panel's use of these words is examined in the light of the preceding and subsequent paragraphs of the Panel Reports. The Appellate Body considered that the Panel's reference to the attainment of a DJAI in "exit" status as being "not automatic", in paragraph 6.461 of the Panel Reports, is a reference both to the direct connection between the DJAI procedure and the right to import and to the discretionary control exercised by Argentine agencies in deciding when and subject to what conditions "exit" status can be attained.

For these reasons, the Appellate Body disagreed with Argentina's understanding of the Panel's use of the term "automatic" in paragraph 6.461 of the Panel Reports, and found that the Panel did not err in considering that the fact that attaining "exit" status – and thus the right to import – is not "automatic" under the DJAI procedure is an element supporting its finding that the DJAI procedure constitutes an import restriction. Accordingly, the Appellate Body rejected Argentina's request to reverse the Panel's finding.

For all of the above reasons, the Appellate Body upheld the Panel's finding that the DJAI procedure is inconsistent with Article XI:1 of the GATT 1994.

4.2 Appellate Body Reports, *United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico*, WT/DS384/AB/RW and WT/DS386/AB/RW

These appeals arose from two disputes in which Canada (DS384) and Mexico (DS386) challenged the amended Country of Origin Labelling (COOL) measure (the "amended COOL measure") adopted by the United States in order to comply with the recommendations and rulings of the DSB in *United States – Certain Country of Origin Labelling (COOL) Requirements*. The amended COOL measure requires that certain meat products sold by retailers in the United States be labelled with information concerning their country of origin. Such meat must bear a label indicating the countries where the cattle and hogs from which the meat was derived were born, raised, and slaughtered.

Before the Article 21.5 Panel, Canada and Mexico claimed that the amended COOL measure failed to implement the DSB's recommendations and rulings, and that it is inconsistent with: (i) Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, because it accords livestock imported from Canada and Mexico treatment less favourable than that accorded to US livestock; (ii) Article 2.2 of the TBT Agreement, because it is more trade restrictive than necessary to fulfil a legitimate objective, taking account of the risks non-fulfilment would create; and (iii) Article XXIII:1(b) of the GATT 1994, because it nullifies or impairs benefits accruing to Canada and Mexico in respect of imports of livestock into the United States.

The Article 21.5 Panel found that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement, because it entailed an increased detrimental impact on imported livestock that did not stem exclusively from legitimate regulatory distinctions. In particular, the Article 21.5 Panel found that increased segregation and record-keeping requirements prescribed by the amended COOL measures raise the incentive for private actors to choose domestic over imported livestock and that this augments the detrimental impact on competitive opportunities for imported livestock, as compared to the detrimental impact entailed by the original COOL measure. The Article 21.5 Panel further concluded that the complainants had not made out a *prima facie* case that the amended COOL measure is more trade restrictive than necessary within the meaning of Article 2.2 of the TBT Agreement. Furthermore, the Article 21.5 Panel found that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994, because it accords to Canadian and Mexican livestock less favourable treatment than to US livestock. This finding was largely based on its finding of detrimental impact under Article 2.1 of the TBT Agreement and the consideration that any measure causing detrimental impact under Article 2.1 will also cause treatment "less favourable" within the meaning of Article III:4 of the GATT 1994. The Article 21.5 Panel exercised judicial economy with respect to the complainants' non-violation claims under Article XXIII:1(b) of the GATT 1994. It noted that compliance by the United States with the Article 21.5 Panel's findings of violation of Article III:4 would require eliminating the detrimental impact on competitive opportunities for Canadian and Mexican livestock and would therefore restore effective equality between foreign and domestic products, and remove the basis for nullification or impairment under Article XXIII:1(b).

On appeal, each participant challenged certain elements of the Panel's analysis and findings under Article 2.1 of the TBT Agreement.

4.2.1 Article 2.1 of the TBT Agreement

4.2.1.1 Issues appealed by the United States

The United States appealed the Panel's conclusion that the amended COOL measure is inconsistent with Article 2.1 of the TBT Agreement because its detrimental impact on imported livestock does not stem exclusively from legitimate regulatory distinctions. This conclusion, according to the United States, rested on

three intermediate findings, namely: (i) that the amended COOL measure entails an increased recordkeeping burden for producers of livestock; (ii) that Labels B and C convey potentially inaccurate information; and (iii) that the amended COOL measure continues to exempt a large proportion of muscle cuts from its scope.

4.2.1.1.1 The recordkeeping burden entailed by the amended COOL measure

The United States claimed that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden did not support the Panel's conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. This claim rested on two main grounds. First, the United States argued that the Panel erred in relying on its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for concluding that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. Second, the United States argued that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden was flawed to the extent that it was based on incorrect analyses of the impact of point-of-production labelling and the elimination of the country order flexibility on recordkeeping.

The Appellate Body began its analysis by addressing the United States' claim that the Panel erred in its assessment of the impact of point-of-production labelling and the elimination of the country order flexibility on recordkeeping. As regards the Panel's analysis of the impact of point-of-production labelling, the United States alleged that the Panel erred by basing that analysis on incorrect hypothetical transactions involving trade in live animals between Canada and Mexico. At the outset, the Appellate Body set forth general considerations concerning whether, and to what extent, a panel may rely on hypothetical scenarios that are not reflective of actual patterns of trade for the purposes of an analysis under Article 2.1 of the TBT Agreement. The Appellate Body considered that, because Article 2.1 is concerned with competitive opportunities for like imported products, a panel's analysis under that provision must be grounded in an assessment of the technical regulation at issue in scenarios under which competitive opportunities may arise, notwithstanding that they may not be currently reflective of actual patterns of trade. In any event, the Appellate Body did not agree with the United States' assertion that the Panel's assessment of the impact of point-of-production labelling was *based* on "incorrect hypothetical" scenarios involving the trade of live animals between Canada and Mexico. In this regard, the Appellate Body noted that the Panel had included in its analysis scenarios in which muscle cuts from different animals – some born in Mexico, some born in Canada, and both slaughtered in the United States – would be packaged together. Noting that this scenario does not involve the trade of live animals between Canada and Mexico, the Appellate Body observed that the Panel found that, under the original COOL measure, such muscle cuts could be packaged with a single label, while, under the amended COOL measure, they would need to carry distinct labels to reflect their different countries of origin. The Appellate Body was of the view that the United States had not established that this scenario is inconceivable, or constitutes an "incorrect" hypothetical scenario. Accordingly, the Appellate Body considered that the Panel did not err under Article 2.1 by assessing the impact of point-of-production labelling in scenarios that are not representative of actual, or the most common, scenarios in which the products at issue are traded among the parties to the disputes.

Next, the Appellate Body considered the United States' claim that the Panel erred in finding that the removal of the country order flexibility increases the recordkeeping burden entailed by the original COOL measure. Under the original COOL measure, the country order flexibility permitted non-commingled Category B and Category C muscle cuts to bear labels that could look the same in practice – i.e. Label B and Label C could both read "Product of Canada, U.S." By contrast, those same muscle cuts are labelled differently under the amended COOL measure – i.e. Category B muscle cuts are labelled "Born in Canada, Raised and Slaughtered in the U.S.", while Category C muscle cuts are labelled "Born and Raised in Canada, Slaughtered in the U.S." The United States argued, however, that the fact that there are now two labels – where before there

was one – does not mean that the recordkeeping burden has increased under the amended COOL measure because, according to the United States, "different categories of muscle cuts already had different records" under the original COOL measure.[25]

The Appellate Body considered that the United States' assertion that removing the country order flexibility "does not alter the recordkeeping burden" entailed by the original COOL measure was, necessarily, premised on the proposition that the original COOL measure required that records be maintained to substantiate specific production-step information concerning the livestock from which muscle cuts derived. Yet, as the Panel explained, the original COOL measure stipulated that "the origin declaration [for Category B, Category C, and all commingled muscles cuts] *may* include more specific information related to production steps *provided records to substantiate the claims are maintained*." Thus, the Appellate Body considered that, because the provision of specific information on production steps could *voluntarily* be provided under the original COOL measure only if "records to substantiate the claims are maintained", origin claims for non-commingled Category B and Category C muscle cuts carrying the same label as a result of the country order flexibility – e.g. "Product of Canada, U.S." – could be substantiated by records demonstrating that the livestock from which these muscle cuts derived were born outside the United States, in the country appearing on the label. By contrast, the provision of production step information for such muscle cuts is now mandatory under the amended COOL measure. This, in turn, entails corresponding augmentation of the records to be kept by livestock and meat producers to substantiate the origin claims made on the mandatory retail labels for muscle cuts deriving from US-slaughtered livestock, including non-commingled Category B and Category C muscle cuts. In the light of these considerations, the Appellate Body was not persuaded by the United States' contention that removing the country order flexibility has not altered the recordkeeping burden that was entailed by the original COOL measure. Accordingly, the Appellate Body found that the Panel did not err in its analysis of the impact of the elimination of the country order flexibility on recordkeeping.

The Appellate Body next considered the United States' claim that the Panel erred in relying on its finding that the amended COOL measure entails an increased recordkeeping burden as an independent basis for concluding that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.

The Appellate Body noted that, at the outset of its analysis, the Panel had expressly articulated an analytical framework for its assessment under Article 2.1, pursuant to which the recordkeeping burden entailed by the amended COOL measure would serve as a comparator against which to compare the origin information that is ultimately conveyed to consumers on the mandatory labels for muscle cuts of meat. The Appellate Body considered that this approach, as articulated by the Panel, comports with the approach of the Appellate Body in the original proceedings. After reviewing the Panel's application of this analytical framework, the Appellate Body considered that the Panel's conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions was based on a comparative analysis of three key determinants of the informational "disconnect" that the Appellate Body had identified

[25] Under the original COOL measure, separate labelling requirements applied to muscle cuts of meat and to ground meat. Four labelling options were available for muscle cuts: (i) Label A applied to meat derived from animals exclusively born, raised, and slaughtered in the United States, with no imported element, and permitted listing only the United States as the country of origin; (ii) Label B applied to meat derived from animals that had been raised and slaughtered in the United States, but that were born outside the United States, and listed both the foreign country and the United States as countries of origin; (iii) Label C referred to meat derived from animals imported into the United States for immediate slaughter, and prescribed listing the foreign countries of origin including the United States, but not the United States as the first country of origin; (iv) Label D referred to meat derived from livestock not born, raised, or slaughtered in the United States, and listed the foreign country of origin. A fifth Label E applied to ground meat, and prescribed that the origin of the meat that is contained or may reasonably be contained in the meat product be identified on the label.

The amended COOL measure requires that Labels A, B, and C for muscle cuts from animals slaughtered in the United States indicate the country where each production step – birth, raising, and slaughter – took place (point-to-point production labelling). For Label D, the amended COOL measure preserves the requirement to indicate the country of origin on the label as declared to the customs authorities, and adds a voluntary option to provide more specific information about where the production steps took place. The requirements of Label E for ground meat have not changed compared to the original COOL measure.

in the original disputes in relation to the original COOL measure: (i) the informational requirements imposed on upstream producers; (ii) the nature and accuracy of the information conveyed on the labels; and (iii) the proportion of the collected information that is exempted from being communicated to consumers.

The Appellate Body agreed with the United States' assertion that, in order to conclude that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions, origin information required to be collected under that measure must be so disproportionate to the information provided to consumers on labels that the collection of the information cannot be explained by the need to provide consumers with information regarding where livestock were born, raised, and slaughtered. In responding to the United States' assertion that the Panel had failed to make such a determination, the Appellate Body noted several discrete findings made by the Panel within its overall assessment of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions.

First, the Panel acknowledged that the amended COOL measure had increased the amount of information conveyed to consumers on the mandatory labels but, importantly, that it had also increased the recordkeeping burden on upstream producers in order to do so. Second, the Panel noted that the revised labels of the amended COOL measure introduce the potential for informational inaccuracy in respect of the identification of where animals were "raised". Third, in connection with the exemptions from the scope of the COOL requirements, the Panel reasoned that, due to the increased recordkeeping burden under the amended COOL measure, even more "information regarding the origin of all livestock will have to be identified, tracked, and transmitted through the chain of production by upstream producers in accordance with the recordkeeping requirements … even though 'a considerable proportion' of the beef and pork derived from that livestock will ultimately be exempt from the COOL requirements and therefore carry no COOL label at all." For the Appellate Body, these discrete findings support the conclusion that the recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of livestock that cannot be explained by the need to provide consumers with information regarding where livestock were born, raised, and slaughtered. On that basis, the Appellate Body considered that the detrimental impact on imported livestock arising from these same recordkeeping and verification requirements does not stem exclusively from legitimate regulatory distinctions.

In the light of these considerations, the Appellate Body concluded that the Panel's finding that the amended COOL measure entails an increased recordkeeping burden did not serve as an "independent basis" for the Panel's conclusion that the detrimental impact of that measure does not stem exclusively from legitimate regulatory distinctions. Moreover, the Appellate Body did not consider, as the United States alleged, that the Panel "failed to put the issue of recordkeeping within the proper analysis, which involves a comparison of the burdens of recordkeeping and the provision of information through labels." Accordingly, the Appellate Body found that the Panel did not err in its consideration of the increased recordkeeping burden entailed by the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

4.2.1.1.2 The accuracy of the labels prescribed by the amended COOL measure

On appeal, the United States raised two claims of error in relation to the Panel's finding that Labels B and C, as prescribed by the amended COOL measure, convey potentially inaccurate origin information. First, the United States contended that the Panel erred by basing this finding on "incorrect hypotheticals" without regard for actual trade in livestock among the three parties to these disputes. Second, the United States alleged that the Panel erred in considering that its finding that Labels B and C are potentially inaccurate supports a conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions.

As regards the United States' claim that the Panel erred by basing its finding that Labels B and C are potentially inaccurate on "incorrect hypothetical livestock transactions", the Appellate Body first addressed the United States' argument that because the claim before the Panel was one of alleged *de facto* discrimination under Article 2.1 of the TBT Agreement, the Panel was precluded from examining the accuracy of labels under the amended COOL measure in "hypothetical[] [scenarios] that do not reflect" actual trade in livestock between the parties to these disputes. In addressing this argument, the Appellate Body recalled its earlier finding that a panel's analysis under Article 2.1 must be grounded in an assessment of the technical regulation at issue in scenarios under which competitive opportunities may arise, notwithstanding that they may not be currently reflective of actual patterns of trade. Accordingly, the Appellate Body considered that, in assessing claims of *de facto* discrimination under Article 2.1, a panel's analysis is not confined to assessing the effect of a measure based on scenarios that are representative of current patterns of trade.

Noting that, in any event, the United States had argued that the Panel based its finding that Labels B and C are potentially inaccurate on *incorrect* hypotheticals, the Appellate Body observed that, in relation to Label B, the Panel's findings concerning the accuracy of that label were based on unchallenged evidence concerning where feeder cattle were actually "raised", and what must be ultimately indicated on Label B according to the terms of the amended COOL measure. In particular, the Panel had found that feeder cattle imported into the United States may have spent up to 68% of their lifespan outside the United States, yet, the resulting meat products could be labelled to indicate that the animals from which the meat products derived were raised only in the United States. The Appellate Body, therefore, rejected the contention of the United States that the Panel's finding that Label B potentially conveys inaccurate information was based on incorrect hypothetical livestock transactions.

As regards Label C, the Appellate Body noted that, although the Panel found that the design of the rules pertaining to this label may allow omission of actual countries of raising, the Panel had qualified this finding by acknowledging that, "[i]n its actual application to traded livestock … Label C does not appear likely to convey misleading information about the country where animals imported for immediate slaughter are raised, given that these appear to be most commonly born and raised in the country of export." Thus, the Appellate Body found persuasive Mexico's contention that the Panel did not rely on unlikely hypothetical scenarios in determining that there is a potential for label inaccuracy under the amended COOL measure, but, instead, that the Panel "considered all of the potential scenarios" and "discounted or disregarded those that were unlikely to occur in actual practice." Accordingly, the Appellate Body disagreed with the United States that the Panel's finding that the amended COOL measure entails a potential for label inaccuracy was based on "incorrect hypotheticals." The Appellate Body, thus, found that the Panel did not err in its assessment of the accuracy of Labels B and C as prescribed by the amended COOL measure.

The Appellate Body next considered the United States' claim that the Panel's finding that Labels B and C are potentially inaccurate does not support the Panel's conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. The United States argued in this regard that the Panel was required to assess the potential for label inaccuracy under the amended COOL measure in relation to the recordkeeping burden entailed by that measure by determining whether a "disconnect" exists between, on the one hand, the origin information required to be collected by producers of livestock and, on the other hand, the origin information that is ultimately conveyed to consumers on the mandatory labels. According to the United States, the Panel erred by failing to make this determination.

In considering this claim of the United States, the Appellate Body recalled that it had considered earlier that the Panel's conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions was based on a comparative analysis of three key determinants of the informational "disconnect" that the Appellate Body had identified in the original disputes in relation to the original COOL measure. In addition, it had considered that several elements of the Panel's analysis, and discrete findings made by the Panel in relation to these three determinants, support the conclusion that the

recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of livestock that cannot be explained by the need to provide origin information to consumers. Accordingly, the Appellate Body was not persuaded by the United States' contention that the Panel failed to address the question of whether there is a "disconnect" between, on the one hand, the information required to be collected by producers and processors of livestock and, on the other hand, the information ultimately conveyed to consumers on the labels prescribed by the amended COOL measure. Accordingly, the Appellate Body found that the Panel did not err in its consideration of the potential for label inaccuracy under the amended COOL measure within its analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

4.2.1.1.3 The exemptions prescribed by the amended COOL measure

On appeal, the United States put forward three main claims of error in relation to the Panel's finding that the exemptions prescribed by the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. First, the United States claimed that the Panel erred in finding that the exemptions are relevant for the analysis of whether the detrimental impact of the amended COOL measure stems exclusively from legitimate regulatory distinctions. Second, the United States claimed that, "aside from the fact that the exemptions are not relevant", the Panel erred by failing to take into account the following considerations in its assessment: (i) that the exemptions apply equally to meat derived from imported and domestic livestock and are, therefore, even-handed in their design and application; (ii) the "legitimate desire of Members to adjust the scope of their technical regulations" to take account of cost considerations; and (iii) that, in the light of the "enhanced accuracy" of the labels prescribed by the amended COOL measure, the recordkeeping burden entailed by that measure can now "be explained by the need to provide origin information to consumers". Third, the United States claimed that the Panel failed to evaluate the operation of the exemptions within the US market and, therefore, that the Panel erred in concluding that these exemptions support a conclusion that the detrimental impact of the amended COOL measure does not stem exclusively from legitimate regulatory distinctions.

As regards the United States' claim that the Panel erred in finding that the exemptions prescribed by the amended COOL measure are relevant for the analysis of whether the detrimental impact of that measure stems exclusively from legitimate regulatory distinctions, the Appellate Body considered whether elements of a technical regulation that have *not* been identified as relevant regulatory distinctions causing detrimental impact on "like" imported products can be examined for the purpose of determining whether such detrimental impact stems exclusively from legitimate regulatory distinctions. In addressing this issue, the Appellate Body recalled that, if a panel finds that a technical regulation has a *de facto* detrimental impact on competitive opportunities for like imported products, the focus of the inquiry shifts to whether such detrimental impact stems exclusively from legitimate regulatory distinctions. The Appellate Body explained that this inquiry must focus on those regulatory distinctions that account for the detrimental impact on "like" imported products, and that the legitimacy of such regulatory distinctions, for the purposes of Article 2.1, is a function of whether they are designed and applied in an even-handed manner. The Appellate Body emphasized that, while the assessment of even-handedness focusses on the regulatory distinction(s) causing the detrimental impact on imported products, other elements of the technical regulation are relevant for that assessment to the extent that they are probative of whether such detrimental impact stems exclusively from legitimate regulatory distinctions. Indeed, as the Appellate Body explained in the original disputes, a panel, in assessing even-handedness for the purposes of Article 2.1, must "carefully scrutinize the particular circumstances of the case, that is, the design, architecture, revealing structure, operation, and application of the technical regulation at issue". Accordingly, the Appellate Body found that the Panel did not err in finding that the exemptions prescribed by the amended COOL measure are relevant for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

The Appellate Body then turned to address the United States' allegation that, even if the exemptions are relevant to the analysis under Article 2.1, the Panel erred by not taking into account certain considerations in this analysis. First, the Appellate Body considered the United States' contention that the Panel failed to take into account that the exemptions apply equally to meat derived from imported and domestic livestock and are, therefore, even-handed in their design and application. In the Appellate Body's view, the Panel was not required to assess the even-handedness of the exemptions under the amended COOL measure because these exemptions are not relevant regulatory distinctions under that measure. Instead, the exemptions form part of the overall architecture of the amended COOL measure that the Panel scrutinized in order to assess whether the relevant regulatory distinctions at issue – i.e. the distinctions between the three production steps, as well as the mandatory labels to be affixed to muscle cuts of beef and pork – are designed and applied in an even-handed manner. The Appellate Body noted that the Panel ultimately found that the exemptions, as an integral part of the "overall architecture" of the amended COOL measure, were "of central importance" to its overall analysis under Article 2.1 because between 57.7% and 66.7% of beef consumed in the United States, and between 83.5% and 84.1% of pork muscle cuts, will convey no consumer information on origin despite imposing an upstream recordkeeping burden on producers and processors that has a detrimental impact on competitive opportunities for imported livestock. The Appellate Body considered that, for this reason, the exemptions prescribed by the amended COOL measure are probative of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions. Accordingly, the Appellate Body found that the Panel did not err by not attributing significance to the fact that the exemptions under the amended COOL measure apply equally to meat derived from imported and domestic livestock.

The Appellate Body considered next the United States' claim that, in concluding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock reflects discrimination, the Panel erred by failing to take into account the "legitimate desire of Members to adjust the scope of their technical regulations" to take account of cost considerations. The Appellate Body recalled that, in *US – Clove Cigarettes*, it had considered that "[n]othing in Article 2.1 prevents a Member from seeking to minimize the potential costs arising from technical regulations, provided that the technical regulation at issue does not overtly or covertly discriminate against imports." The Appellate Body, therefore, saw no error in the Panel's finding that cost considerations do not constitute a "supervening justification for discriminatory measures". In particular, the Appellate Body did not consider that the cost savings enjoyed by US entities that are exempt from the COOL requirements mitigate the Panel's finding that, as a result of the exemptions, a large proportion of beef and pork muscle cuts consumed in the United States will convey no consumer information on origin, despite imposing an upstream recordkeeping burden that has a detrimental impact on competitive opportunities for imported livestock. Accordingly, the Appellate Body found that the Panel did not err in considering that the cost considerations, which allegedly justify the existence of the exemptions, do not constitute a supervening justification for discriminatory measures.

Next, the Appellate Body considered the United States' claim that, in determining that the exemptions constitute evidence that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions, the Panel erred by failing to take into account that, in the light of the "enhanced accuracy" of the labels prescribed by the amended COOL measure, the recordkeeping burden entailed by that measure can now be explained by the need to provide origin information to consumers. The Appellate Body recalled that, in connection with a separate claim put forward by the United States under Article 2.1, it had found that several discrete findings made by the Panel support the conclusion that the recordkeeping and verification requirements of the amended COOL measure impose a disproportionate burden on producers and processors of imported livestock that cannot be explained by the need to provide origin information to consumers. The Appellate Body, therefore, disagreed with the United States that the Panel failed to examine whether the nature and scope of the exemptions establish a "disconnect" between, on the one hand, the amount of information collected by upstream producers and, on the other hand, the amount of information conveyed to consumers that is so

disproportionate as to support the conclusion that the detrimental impact of the amended COOL measure reflects discrimination in violation of Article 2.1. Accordingly, the Appellate Body found that the Panel did not err in considering that the exemptions prescribed by the amended COOL measure support a conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions.

The Appellate Body then turned to examine the United States' last claim relating to the exemptions from the amended COOL measure. On appeal, the United States claimed that, in concluding that the exemptions under the amended COOL measure support a conclusion that the detrimental impact of that measure reflects discrimination, the Panel erred by failing to evaluate the operation of the exemptions in the US market. The Appellate Body noted that, in considering the exemptions as evidence that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions, the Panel stated that it had "no evidence" before it that called into question the original panel's finding that "the ultimate disposition of a meat product is often not known at any particular stage of the production chain." Noting the United States' assertion on appeal that it was for Canada and Mexico to adduce evidence sufficient to establish whether, and to what extent, the ultimate disposition of a meat product is known at any particular stage of the production chain, the Appellate Body considered that, having not been presented with evidence that would affect the findings of the original panel concerning the operation of the exemptions in the US market, it was appropriate for the Panel to have relied on those findings. Accordingly, the Appellate Body found that the Panel did not err by relying on the original panel's findings and not evaluating the operation of the exemptions under the amended COOL measure in the US market.

4.2.1.2 Appeals of Canada and Mexico under Article 2.1 of the TBT Agreement

Having considered the claims put forward by the United States under Article 2.1 of the TBT Agreement, the Appellate Body turned to consider the claims of Canada and Mexico under the same provision. Although Canada and Mexico did not appeal the Panel's ultimate conclusion that the amended COOL measure is inconsistent with Article 2.1, they did take issue with the Panel's assessment of certain elements of the amended COOL measure in reaching its conclusion that the detrimental impact of that measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. Canada claimed that the Panel failed to assess appropriately the relevance of Labels D and E, as well as the amended COOL measure's prohibition of a trace-back system, for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions. Mexico put forward a similar claim, but limited its appeal to the Panel's assessment of the relevance of Label E for the purposes of its analysis under Article 2.1.

As regards Label D, Canada argued that the Panel failed to recognize that the requirements for that label, together with the informational shortcomings identified by the Panel with respect to Labels B and C, contribute to a labelling regime in which the only information that can be relied on as invariably accurate is the information conveyed on Label A – i.e. origin information in respect of livestock that were born, raised, and slaughtered exclusively in the United States. This discrepancy, according to Canada, exposes the arbitrary and unjustifiable character of the discrimination against Canadian livestock.

In examining Canada's contention, the Appellate Body considered that the accuracy of the muscle cut labels prescribed by the amended COOL measure is a relevant factor to the extent that it demonstrates that the recordkeeping and verification requirements of that measure impose a disproportionate burden on upstream producers and processors in comparison with the level of information conveyed to consumers through the mandatory labelling requirements. For the purposes of assessing Canada's claim as regards Label D, the Appellate Body considered it useful to juxtapose, on the one hand, the requirements for Labels B and C and the exemptions from the coverage of the COOL requirements with, on the other hand, the requirements for Label D. In the Appellate Body's view, the informational shortcomings of Labels B

and C, as well as the exemptions from the coverage of the COOL requirements, are closely connected to the source of the detrimental impact on imported livestock in these disputes, namely, the recordkeeping and verification requirements for US-slaughtered livestock that create an incentive for US producers to process exclusively domestic livestock. In particular, the detailed information required to be tracked and transmitted by upstream producers may not be conveyed to consumers as a result of the informational shortcomings of Labels B and C with regard to the countries where US-slaughtered livestock were raised, and of the exemptions from the coverage of the COOL requirements. For this reason, the detrimental impact of the amended COOL measure on imported livestock that is caused by the same recordkeeping and verification requirements under the amended COOL measure cannot be explained by the need to provide origin information to consumers.

The Appellate Body noted that, by contrast, origin, for the purposes of Category D muscle cuts of meat, is based on the rules of substantial transformation and, in practice, is a function of where the livestock from which such muscle cuts derive were slaughtered. Accordingly, the Appellate Body considered that the requirements for Label D – as compared to the requirements for Labels B and C, as well as the exemptions – do not have a sufficient nexus with the source of the detrimental impact on the imported products at issue in these disputes, namely, the recordkeeping and verification requirements that apply to US-slaughtered livestock and muscle cuts of meat deriving therefrom. Thus, the Appellate Body was not persuaded that the requirements for Label D are probative of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions. Accordingly, the Appellate Body found that the Panel did not err in finding that the requirements for Label D are not compelling evidence of arbitrary or unjustifiable discrimination in violation of Article 2.1.

The Appellate Body then turned to assess the claims of Canada and Mexico that the Panel committed legal error in its assessment of the relevance of Label E for its analysis under Article 2.1, as well as Canada's discrete claim that the Panel disregarded certain evidence that Canada had placed before it, and thereby acted inconsistently with its duty under Article 11 of the DSU. The Appellate Body rejected the claims of Canada and Mexico regarding the requirements for Label E – applicable to ground meat – on similar grounds as those on which it rejected Canada's claim regarding the requirements for Label D. In particular, the Appellate Body was not persuaded that the requirements applicable to Category E ground meat have a sufficient connection to the recordkeeping and verification requirements that cause a detrimental impact on imported livestock "in the context of the muscle cut labels". Nor do they have a sufficient connection to the relevant regulatory distinctions at issue, i.e. the distinction between the three production steps, as well as the mandatory labels to be affixed to muscle cuts of beef and pork. The Appellate Body noted in this regard that the original panel had found that the flexibility provided by the 60-day "inventory allowance" for the labelling of Category E ground meat was available not only for meat grinders "but for market participants at every stage of [ground] meat supply and distribution". Thus, contrary to what Canada and Mexico had suggested on appeal, the Appellate Body was not persuaded that Label E contributes, as the exemptions prescribed by the amended COOL measure do, to the lack of correspondence between, on the one hand, the recordkeeping and verification requirements of the amended COOL measure and, on the other hand, the limited consumer information conveyed through the retail labelling requirements for muscle cuts of meat. Accordingly, the Appellate Body agreed with the Panel that it was not clear that the treatment of ground meat "is sufficiently connected to the relevant regulatory distinctions to justify incorporation into [the Panel's] broad assessment" of the design and operation of the amended COOL measure. The Appellate Body thus found that the Panel did not err in finding that the requirements for Label E do not evidence the amended COOL measure's inconsistency with Article 2.1 of the TBT Agreement.

Turning to Canada's claim under Article 11 of the DSU in connection with the Panel's assessment of the requirements for Label E, the Appellate Body considered that Canada's claim under Article 11 of the DSU implicated issues that it had already considered in examining the requirements for Label E and, in particular,

whether they are probative of the inconsistency of the amended COOL measure with Article 2.1 of the TBT Agreement. Thus, the Appellate Body declined to examine further Canada's claim under Article 11 of the DSU.

Finally, the Appellate Body addressed Canada's claim that the Panel erred by failing to assess the relevance of the prohibition of a trace-back system in its analysis of whether the detrimental impact of the amended COOL measure on imported livestock stems exclusively from legitimate regulatory distinctions. Canada argued that, by prohibiting a trace-back system that, in Canada's view, would not cause a detrimental impact on imported livestock, the United States made an explicit choice in favour of the recordkeeping requirements under the amended COOL measure – i.e. the source of the detrimental impact on imported livestock in these disputes. For Canada, this explicit choice demonstrates that the detrimental impact of the amended COOL measure on imported livestock does not stem exclusively from legitimate regulatory distinctions. In considering Canada's claim, the Appellate Body recalled that Article 2.1 does not, *per se*, prohibit technical regulations that cause a detrimental impact on like imported products. Therefore, the inquiry into whether the detrimental impact stems exclusively from legitimate regulatory distinctions is not answered by comparing the measure at issue and its associated detrimental impact with an alternative measure that, allegedly, would not cause a detrimental impact on the imported products at issue. Thus, the Appellate Body considered that the trace-back prohibition under the amended COOL measure is ultimately not probative of whether that measure's detrimental impact on imported livestock stems exclusively from legitimate regulatory distinctions. The Appellate Body explained in this connection that, the relevant question, for the purposes of Article 2.1 in these disputes, is whether the detrimental impact on imported products caused by the recordkeeping and verification requirements of the amended COOL measure stems exclusively from legitimate regulatory distinctions. The question is not, as Canada suggested, whether such detrimental impact can be avoided by utilizing a trace-back system that could be designed in a manner that avoids a detrimental impact on imported products. Accordingly, the Appellate Body found that the Panel did not err by considering the amended COOL measure's prohibition of a trace-back system as not relevant for the analysis of whether the detrimental impact of that measure on imported livestock stems exclusively from legitimate regulatory distinctions.

4.2.2 Article 2.2 of the TBT Agreement

Canada and Mexico requested the Appellate Body to reverse the Panel's finding that they failed to make a *prima facie* case that the amended COOL measure is inconsistent with Article 2.2 of the TBT Agreement, and to complete the legal analysis in respect of their first and second proposed alternative measures. In this regard, Canada and Mexico claimed that the Panel made a series of errors of interpretation and application, and failed to make, in respect of certain factual findings, an objective assessment of the matter as required under Article 11 of the DSU. Canada and Mexico also requested the Appellate Body to find that the Panel erred in the burden of proof it applied in respect of the complainants' third and fourth proposed alternative measures, but they did not request completion of the legal analysis with respect to those proposed alternative measures.

The United States also made a conditional appeal in respect of Article 2.2 of the TBT Agreement, in the event that Canada or Mexico appealed the Panel's findings under that provision. Thus, in the light of Canada's and Mexico's appeals concerning Article 2.2, the United States' conditional appeal was activated and the Appellate Body was, therefore, called upon to review the United States' request to reverse the Panel's interpretation of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2.

First, the Appellate Body considered the claims of Canada and Mexico in respect of the sequence and order of analysis adopted by the Panel in assessing whether the amended COOL measure was "more trade-restrictive than necessary" under Article 2.2 of the TBT Agreement. The Appellate Body considered that such an assessment ultimately involves the *holistic* weighing and balancing of all relevant factors. These factors include the degree of contribution made by the measure to the legitimate objective at issue;

the trade-restrictiveness of the measure; and the nature of the risks at issue, as well as the gravity of the consequences that would arise from non-fulfilment of the objective pursued by the Member through the measure. The Appellate Body also recalled that, in most cases, a comparison of the challenged measure and possible alternative measures should be undertaken. The Appellate Body found that Article 2.2 does not explicitly prescribe, in rigid terms, the sequence and order of analysis in assessing whether the technical regulation at issue is "more trade-restrictive than necessary".

That notwithstanding, a certain sequence and order of analysis may logically flow from the nature of the examination under Article 2.2. In that regard, the Appellate Body recalled jurisprudence in respect of Article XX of the GATT 1994 that a comprehensive analysis of the "necessity" of a measure is a sequential process that must logically begin with a first step, proceed through a number of additional steps, and yield a final conclusion. Nonetheless, the particular manner of sequencing the steps of analysis under Article 2.2 may be tailored to the specific claims, measures, facts, and arguments at issue in a given case. Panels are afforded a certain degree of latitude to tailor the sequence and order of analysis when assessing the relevant factors and in conducting the overall weighing and balancing under Article 2.2. Where different methodologies for the assessment of a relevant factor are available based on the facts and arguments submitted by the parties, panels must adopt or develop a methodology that is suited to yielding a correct assessment of the relevant factor in the circumstances of a given case. Therefore, an appellant challenging the sequence and order of analysis adopted by a panel must demonstrate why, by following a particular sequence, the panel committed an error in the specific circumstances of the case at hand. It is not sufficient for an appellant merely to claim that a panel erred by deviating from a certain sequence and order of analysis in the abstract.

With those considerations in mind, the Appellate Body dealt first with Mexico's claim that, under the Panel's sequence and order of analysis, the "relational" analysis component of the "necessity" test under Article 2.2 was erroneously narrowed to a determination of whether "exceptional circumstances" exist. The Appellate Body found that, in a context where both Canada and Mexico proposed alternative measures as part of discharging their *prima facie* case under Article 2.2, and in the light of the holistic nature of the weighing and balancing under that provision, the Panel did not err in conducting a "comparative" analysis of the proposed alternative measures. Turning to the points or stages at which to draw conclusions or engage in the weighing and balancing of different factors, the Appellate Body considered that Canada and Mexico had not demonstrated that, in the particular circumstances of this case, the sequence and order of analysis chosen by the Panel was outside the bounds of its latitude to tailor, to the case before it, its approach to the overall weighing and balancing required under Article 2.2.

Second, the Appellate Body considered the request of Canada and Mexico to reverse the Panel's finding that the amended COOL measure makes a "considerable but necessarily partial" contribution to its objective. Canada claimed that the Panel erred under Article 2.2 of the TBT Agreement by failing to take into account Labels D and E in ascertaining the amended COOL measure's degree of contribution to its objective, and thereby also acted inconsistently with its duty under Article 11 of the DSU. Mexico's similar claim was limited to an allegation of error regarding the Panel's failure to take into account Label E in its analysis under Article 2.2. The Appellate Body found that, in principle, a technical regulation should be reviewed in its entirety in order to assess its degree of contribution to its objective. The Appellate Body further considered that a challenged technical regulation should be considered in its entirety *even when* particular elements of the technical regulation are common to both the technical regulation and the proposed alternative measures.

According to the Appellate Body, this is because the manner in which such common elements interact with other elements of a challenged technical regulation or other elements of the proposed alternatives, respectively, may differ. Hence, even if such common elements are excluded from the assessment of the contribution of *both* the technical regulation and the proposed alternatives, this may distort the result of that assessment. In that context, since Labels D and E were part of the technical regulation at

issue – namely, the amended COOL measure – and made a contribution to the objective of that measure, the Appellate Body found that those labels should have been taken into account in the assessment of both the amended COOL measure's degree of contribution, as well as the assessment of the degrees of contribution that would be achieved by the proposed alternative measures. Such an approach would have ensured both conceptual alignment between the respective degrees of contribution for the purposes of a comparison and ensuring that all relevant elements are properly taken into account in assessing the respective overall degrees of contribution. Accordingly, the Appellate Body found that the Panel erred by excluding Labels D and E in reaching its conclusion that the amended COOL measure makes a "considerable but necessarily partial" degree of contribution to its objective.

Third, the Appellate Body considered the request of the United States to find that the Panel erred in its interpretation of the phrase "taking account of the risks non-fulfilment would create" in Article 2.2 of the TBT Agreement. The United States claimed that the Panel erred in contemplating, on the basis of this phrase, that the first or second proposed alternative measure put forward by Canada and Mexico could be found to make a contribution to the amended COOL measure's objective that is equivalent to that of the amended COOL measure itself, notwithstanding that these alternatives provide less information, or less accurate information, on origin to consumers.

The Appellate Body considered that an assessment of whether a proposed alternative measure achieves an *equivalent* degree of contribution to the relevant legitimate objective is essential for a panel to determine whether the technical regulation at issue restricts international trade beyond what is necessary to achieve the degree of contribution that it makes to the achievement of a legitimate objective. For the Appellate Body, the need for equivalence in the respective degrees of contribution between the challenged technical regulation and proposed alternative measures comports with the principle reflected in the sixth preambular recital of the TBT Agreement that a Member shall not be prevented from pursuing a legitimate objective "at the levels it considers appropriate". However, the Appellate Body did not consider that a complainant must demonstrate that its proposed alternative measure achieves a degree of contribution *identical* to that achieved by the challenged technical regulation in order for it to be found to achieve an *equivalent* degree. Thus, the Appellate Body found that the Panel did not err in contemplating that an alternative measure providing less specific or less accurate information, but having significantly wider product coverage, could qualify as making a degree of contribution "equivalent" to that of the amended COOL measure.

Fourth, the Appellate Body considered the claims of Canada and Mexico that the Panel erred in failing to take into account certain factors in assessing "the risks non-fulfilment would create", namely, the "*relative* importance" of the values or interests pursued by the amended COOL measure, as well as its design, structure, and architecture. In respect of the "relative importance" of the values or interests pursued, the Appellate Body turned first to the text of Article 2.2 of the TBT Agreement. The Appellate Body considered that the "risks" to be "tak[en] account of" under Article 2.2 are those that would be created by the "non-fulfilment" of the "legitimate objective" of the technical regulation at issue. The Appellate Body found that the text of Article 2.2 does not provide a textual basis for taking into account the relative importance of the objective pursued, i.e. the importance of the objective pursued as compared to the importance of other objectives. Thus, the Appellate Body found that the Panel did not err by failing to take into account the relative importance of the values or interests pursued by the measure in assessing "the risks non-fulfilment would create" under Article 2.2. However, the Appellate Body noted that the importance of the objective *to the Member implementing the technical regulation at issue* could inform the analysis under Article 2.2 in some capacity, to the extent that it is reflected in the level considered appropriate by the Member to pursue the relevant objective, or the actual degree of contribution made by the technical regulation to its objective.

In respect of the "design, structure, and architecture" of the amended COOL measure, the Appellate Body considered that these factors of a challenged technical regulation may reveal elements relevant for the analysis of the "risks non-fulfilment would create". However, the Appellate Body found that Canada and Mexico had failed to substantiate the connection between specific aspects of the design, architecture, and

structure of the amended COOL measure, on the one hand, and the nature of the risks of the non-fulfilment of its objective or the gravity of the consequences arising from its non-fulfilment, on the other hand. Thus, the Appellate Body found that the Panel did not err by failing to take into account the design, structure, and architecture of the amended COOL measure in assessing "the risks non-fulfilment would create" under Article 2.2 of the TBT Agreement. For the same reasons, the Appellate Body found that the Panel did not fail to "make an objective assessment of the matter before it" under Article 11 of the DSU by omitting these factors from its assessment.

Fifth, the Appellate Body addressed the claims of Canada and Mexico that the Panel erred in concluding that it could not ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective. In considering the Panel's approach, the Appellate Body understood the Panel to have treated its assessment of the gravity of consequences of non-fulfilment as essentially a *quantitative* exercise. Further, the Appellate Body understood the Panel to have considered that its inability to *quantify* the gravity of the consequences of not fulfilling the amended COOL measure's objective meant that it could not make an assessment of "the risks non-fulfilment would create", and that, consequently, it could not take such risks into account in the overall weighing and balancing under Article 2.2. In the light of the Panel's approach in that regard, the Appellate Body recalled that the nature of the risks and the gravity of the consequences of non-fulfilment are merely components of the overall analysis of "the risks non-fulfilment would create". The Appellate Body considered that panels must adopt or develop a methodology that is suited to yielding a correct assessment of the relevant factors under Article 2.2 in the circumstances of a given case, and that the Panel was correct to seek to assess the gravity of the consequences of non-fulfilment of the COOL measure's objective as precisely as it could in the circumstances of this case.

However, the Appellate Body also recognized that it might be difficult, in some contexts, to determine separately the nature of the risks, on the one hand, and to quantify the gravity of the consequences that would arise from non-fulfilment, on the other hand. The Appellate Body considered that, in such contexts, it may be more appropriate to conduct a conjunctive analysis of both the nature of the risks and the gravity of the consequences of non-fulfilment, in which "the risks non-fulfilment would create" could be assessed in qualitative terms. The Appellate Body also considered that difficulties or imprecision that arise in assessing "the risks non-fulfilment would create", due to the nature of the relevant risks or the gravity of the consequences of non-fulfilment at issue, should not, in and of themselves, relieve a panel from its duty to assess this factor. The term "taking account of" calls for the active and meaningful consideration of "the risks non-fulfilment would create", even where there is imprecision in their nature or magnitude, in the weighing and balancing under Article 2.2 of the TBT Agreement. The Appellate Body thus found that a panel should proceed with a holistic weighing and balancing of all relevant factors, and reach an overall conclusion under Article 2.2. Accordingly, the Appellate Body found that the Panel erred in concluding that it was unable to ascertain the gravity of the consequences of non-fulfilment of the amended COOL measure's objective.

The Appellate Body then turned to the requests of Canada and Mexico to find that the Panel erred in concluding that they had failed to make a *prima facie* case that the first and second proposed alternative measures would make an equivalent degree of contribution to the amended COOL measure's objective. Having reviewed the Panel's reasoning, the Appellate Body understood the Panel's ultimate findings in this regard to have been based on the Panel's conclusion that the complainants had not proved how or why less origin information, or less accurate origin information, being offset by increased product coverage would produce an equivalent degree of contribution. The Appellate Body considered that this conclusion of the Panel was, in turn, based on its consideration that, on the evidence before it, the Panel was unable to take account of "the risks non-fulfilment would create", and could, consequently, not assess whether the respective degrees of contribution of the amended COOL measure and of the first and second proposed alternative measures were equivalent.

In this connection, the Appellate Body recalled its earlier finding that the Panel erred in ceasing its analysis when it concluded that it was unable to ascertain the gravity of the consequences that would arise from the non-fulfilment of the amended COOL measure's objective in quantitative terms. Since the Panel cited this inability as its reason for concluding that it could not determine whether the first and second proposed alternative measures made a degree of contribution equivalent to that of the amended COOL measure, the Appellate Body considered that this error also compromised that conclusion of the Panel, as well as the Panel's subsequent decision to end its analysis of whether the amended COOL measure is "more trade-restrictive than necessary" under Article 2.2 on the basis of those proposed alternative measures. Since this, in turn, led to the Panel's overall conclusion that Canada and Mexico had not made a *prima facie* case that the amended COOL measure violated Article 2.2, the Appellate Body reversed the Panel's overall conclusion in that regard. However, in the absence of factual findings by the Panel or sufficient undisputed facts on the Panel record, the Appellate Body could not complete the legal analysis of Canada's and Mexico's claims under Article 2.2 in respect of the first and second proposed alternative measures.

Finally, the Appellate Body addressed the request of Canada and Mexico to reverse the Panel's finding that they had not adequately identified the third and fourth proposed alternative measures for the purpose of making a *prima facie* case that an alternative measure is reasonably available. The Appellate Body recalled that, in general terms, the nature and degree of evidence required for a complainant to establish the "reasonable availability" of a proposed alternative measure as part of a claim under Article 2.2 will necessarily vary from measure to measure and from case to case. That notwithstanding, the Appellate Body also considered certain elements of Article 2.2 to be generally relevant to the question of what nature and degree of evidence is required to establish the "reasonable availability" of a proposed alternative measure. In particular, "reasonable availability" pertains to proposed alternative measures that function as "conceptual tools" to assist in assessing whether a technical regulation is more trade restrictive than necessary. Such alternative measures are of a hypothetical nature in the context of the analysis under Article 2.2 because they do not yet exist in the Member in question, or at least not in the particular form proposed by the complainant. For the Appellate Body, such considerations should inform the nature and degree of evidence required to establish the "reasonable availability" of proposed alternative measures in making a *prima facie* case under Article 2.2. The Appellate Body also considered relevant jurisprudence relating to Article XX of the GATT 1994 and Article XIV of the GATS in assessing the appropriate burden of proof concerning the "reasonable availability" under Article 2.2 of the TBT Agreement. For instance, the Appellate Body noted that an alternative measure may be found not to be "reasonably available" where it is merely theoretical in nature, where the responding Member is not capable of taking it, or where the measure imposes an undue burden on that Member, such as prohibitive costs or substantial technical difficulties.

With those considerations in mind, the Appellate Body noted that Canada and Mexico asserted that their third and fourth proposed alternative measures were based on, *inter alia*, analogous measures that had been implemented in the United States and in other Members. In that context, the Appellate Body considered that the Panel should have enquired whether this evidence provided by the complainants could have provided a sufficient indication that the costs of the proposed alternatives would not be *a priori* prohibitive, and that potential technical difficulties associated with their implementation would not be of such a substantial nature that they would render the proposed alternatives merely theoretical in nature. In the Appellate Body's view, the Panel should have then enquired to what extent the United States had submitted evidence substantiating that the proposed alternative measures were indeed merely theoretical in nature, or entailed an undue burden, for instance, because they involved prohibitively high costs or would entail substantial technical difficulties. Thus, in the light of the Panel's failure to engage in such enquiries, the Appellate Body found that the Panel did not properly allocate the burden of proof applicable under Article 2.2 of the TBT Agreement in finding that Canada and Mexico had not provided sufficient explanation of how their third and fourth proposed alternative measures would be implemented in the United States, and of the costs associated with those alternative measures. However, the Appellate Body did not seek to complete the legal analysis in respect of those alternatives because it had not been requested to do so.

4.2.3 Article III:4 and Article IX of the GATT 1994

The United States appealed the Panel's finding that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994. The United States argued that the Panel erred in finding that less favourable treatment could be demonstrated based on the existence of detrimental impact without further inquiry into the context provided by Article IX. For the United States, Articles IX:2 and IX:4 are relevant context for the interpretation of Article III:4, reflecting a recognition of the fact that regulations aimed at providing consumer information on origin may cause difficulties and inconveniences to exporting Members and increase the cost of imported products.

The Appellate Body noted that both Article IX:2 – which calls for a reduction of difficulties and inconveniences that laws and regulations relating to marks of origin may cause to exporters – and Article IX:4 – which requires that compliance with such laws and regulations should be possible without materially reducing the value of the products, or unnecessarily increasing the cost of the products – call for a *limitation* of the impact of the use of marks of origin. Accordingly, the Appellate Body did not see that the obligations enshrined in these provisions suggest a more flexible interpretation of "treatment no less favourable" in Article III:4. Rather, Articles IX:2 and IX:4 set out obligations with regard to "marking requirements" that are separate from, and additional to, the national treatment obligation in Article III:4 of the GATT 1994.

The Appellate Body also noted that the United States' argument was based on the proposition that the analysis of less favourable treatment under Article III:4 should include an inquiry into whether the detrimental impact of a measure on imports is unrelated to foreign origin and could be explained by other factors that do not reflect discrimination. The Appellate Body stated that this proposition was expressly rejected in *US – Clove Cigarettes*. On this basis, the Appellate Body concluded that the Panel did not err by not attributing contextual relevance to Article IX of the GATT 1994 in its interpretation of Article III:4 of the GATT 1994, and in finding that the amended COOL measure is inconsistent with Article III:4 of the GATT 1994.

4.2.4 Article III:4 and Article XX of the GATT 1994

The United States alleged that the Panel erred by rejecting the United States' request, at the interim review stage, to address the availability of Article XX of the GATT 1994 as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure. The United States requested the Appellate Body to complete the legal analysis under Article XX and to find that an exception under Article XX would be available with respect to the amended COOL measure.

At the outset of its analysis, the Appellate Body noted that the United States had not invoked Article XX either in its written submissions to the Panel or in its oral statements at the Panel meetings, and had referred to Article XX for the first time at the interim review stage. However, even then, the United States did not identify a specific paragraph of Article XX or provide arguments and evidence to demonstrate that the amended COOL measure meets the requirements of Article XX.

With respect to the allegation that the Panel erred in the way it addressed, at the interim review stage, the availability of Article XX of the GATT 1994 as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure, the Appellate Body noted that, pursuant to Article 15.3 of the DSU, "the final report shall include a discussion of the arguments made at the interim review stage." The Appellate Body found no error with the way in which the Panel addressed the United States' request relating to Article XX of the GATT 1994 at the interim review stage.

In particular, the Appellate Body agreed with three considerations articulated by the Panel. First, the Panel found that the United States, as a responding Member, had failed to invoke before the Panel a defence under Article XX. Second, the hypothetical situation suggested by the United States of a measure found to be consistent with Article 2.1 of the TBT Agreement and, at the same time, inconsistent with Article III:4 of

the GATT 1994 did not arise in these disputes because the Panel had found the amended COOL measure to be *inconsistent* with both Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994. Third, addressing, at the interim review stage, the availability of Article XX as an exception for Article III:4 of the GATT 1994 with respect to the amended COOL measure would have required examination of an issue for which neither the United States, nor the complainants, had provided specific evidence or argument. On this basis, the Appellate Body found that the Panel did not err in the way it addressed, at the interim review stage, the United States' request relating to the availability of Article XX of the GATT 1994 as an exception to Article III:4 of the GATT 1994 with respect to the amended COOL measure.

4.2.5 Article XXIII:1(b) of the GATT 1994

Canada and Mexico each raised a conditional appeal under Article XXIII:1(b) of the GATT 1994. In the event that the Appellate Body reversed the Panel's findings under Article 2.1 of the TBT Agreement and Article III:4 of the GATT 1994, Canada and Mexico requested the Appellate Body to find that the Panel erred by exercising judicial economy with respect to their claims under Article XXIII:1(b), and to complete the legal analysis under that provision. Because the condition upon which these appeals were premised was not satisfied, the Appellate Body did not make findings under Article XXIII:1(b) of the GATT 1994.

The United States also raised a conditional appeal under Article XXIII:1(b) of the GATT 1994. In the event that the condition of Canada's and Mexico's appeals under Article XXIII:1(b) was fulfilled, the United States appealed the Panel's conclusion that Canada's and Mexico's claims under Article XXIII:1(b) were within the Panel's terms of reference. Because the condition on which the complainants' appeals were made was not satisfied, the Appellate Body did not make findings in this regard.

4.3 Appellate Body Report, *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/AB/R

The dispute concerned anti-dumping measures imposed by the United States on imports of certain shrimp from Viet Nam, as well as certain US laws or practices concerning the imposition of anti-dumping measures and the implementation of adverse DSB recommendations and rulings in trade remedy cases. The investigation at issue was initiated in January 2004, resulting in a final anti-dumping order on 8 December 2004, amended on 1 February 2005. Viet Nam brought claims before the Panel with respect to the final determinations in administrative reviews, in 2010, 2011, and 2012, published by the United States Department of Commerce (USDOC). Viet Nam's claims concerned: (i) the use of zeroing in the calculation of dumping margins; (ii) the rate that was assigned to certain Vietnamese producers that did not demonstrate sufficient independence from government control and, thus, were deemed by the USDOC to be part of a so-called "Viet Nam-wide entity"; and (iii) the USDOC's failure to revoke the anti-dumping order with respect to certain Vietnamese producers/exporters. Viet Nam also made claims with respect to the USDOC's "likelihood-of-dumping" determination in the context of the USDOC's sunset review in 2010.

The US laws or practices challenged by Viet Nam were: (i) the so-called "simple zeroing" methodology applied by the USDOC in administrative reviews; (ii) the USDOC's "NME-wide-entity rate practice" applied in anti-dumping proceedings concerning imports from non-market economy (NME) countries such as Viet Nam; and (iii) Section 129(c)(1) of the Uruguay Round Agreements Act (URAA), a provision establishing certain procedures for the implementation of adverse DSB recommendations and rulings in the context of anti-dumping, countervailing, and safeguard measures. More specifically, Section 129(c)(1) addresses the question of when revised determinations made pursuant to that mechanism (Section 129 determinations) take effect. It provides that Section 129 determinations apply to imports (entries) of subject merchandise made *on or after* the date on which the Office of the United States Trade Representative (USTR) directs the USDOC to implement a USDOC or US International Trade Commission (USITC) Section 129 determination.

Based on its analysis of Viet Nam's claims, the Panel found that Viet Nam had failed to demonstrate that the zeroing methodology still existed as a rule or norm of general and prospective application, which could be challenged "as such". On this basis, the Panel rejected Viet Nam's "as such" claims of inconsistency under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. The Panel found, however, that the USDOC had used zeroing to calculate the dumping margins of Vietnamese producers/exporters examined individually in the three administrative reviews at issue, and that this was inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

Further, the Panel found that Viet Nam had demonstrated that, in anti-dumping proceedings involving NME countries, the USDOC applies a rebuttable presumption that all producers/exporters within that NME country belong to a single, "NME-wide entity" and assigns a single rate to that entity, and, thus, to companies deemed to belong to that entity. The Panel found that this practice or policy is "as such" inconsistent with the United States' obligation under Article 6.10 of the Anti-Dumping Agreement to determine individual dumping margins for each known producer/exporter, as well as the obligation in Article 9.2 of the Anti-Dumping Agreement to specify individual duties for each supplier. The Panel also found application of this practice, in the three administrative reviews at issue, to be inconsistent with Article 9.2.

The Panel rejected Viet Nam's claim that there existed a USDOC practice with respect to the manner in which the NME-wide entity rate is calculated. However, the Panel found that while, in each of the three administrative reviews at issue, the "Viet Nam-wide entity" and its constituent companies had not been individually examined, they had been assigned a rate exceeding the ceiling applicable under Article 9.4. The Panel therefore found in favour of Viet Nam's claim of inconsistency under Article 9.4 of the Anti-Dumping Agreement. However, the Panel determined that Viet Nam had failed to establish that the rate applied to the "Viet Nam-wide entity" in these administrative reviews was inconsistent with Article 6.8 and Annex II of the Anti-Dumping Agreement.

Moreover, given that, in the proceedings at issue, the USDOC had relied on margins of dumping calculated with zeroing in its consideration of revocation requests by certain companies, the Panel found that the USDOC's treatment of these requests was inconsistent with Article 11.2 of the Anti-Dumping Agreement

Viet Nam's appeal in this dispute focused on the Panel's analysis of Viet Nam's claim that Section 129(c)(1) of the URAA (Section 129(c)(1)) is inconsistent, "as such", with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. Neither party appealed the other Panel's findings.

Before the Panel, Viet Nam had argued that, by limiting the application of new, WTO-consistent determinations to entries of subject merchandise made on or after the "implementation date" of the new determination, Section 129 precludes the US authorities from implementing DSB recommendations and rulings with respect to any entries made *prior* to, and that remain "unliquidated" on, that date (prior unliquidated entries). On this basis, Viet Nam claimed that Section 129(c)(1) is "as such" inconsistent with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.

In its assessment of Viet Nam's claims, the Panel took into consideration the text of Section 129(c)(1), the Statement of Administrative Action that accompanied the URAA, the US authorities' application of Section 129(c)(1) to date, and two opinions of the US Court of International Trade (USCIT) cited by Viet Nam. The Panel also took into account arguments and evidence put forward by the United States concerning alternative means available to the United States that would implement DSB recommendations and rulings. The Panel found that Viet Nam had failed to establish that Section 129(c)(1) precludes "extending the benefits of implementation" to prior unliquidated entries. The Panel concluded, therefore, that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. On appeal, Viet Nam claimed that, in arriving at this finding, the Panel acted inconsistently with its obligations under Article 11 of the DSU, on two grounds. First, Viet Nam argued

that the Panel erred by applying an incorrect analytical framework whereby it determined that it would not consider whether Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement unless Viet Nam could establish that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries. Viet Nam criticized, in particular, the Panel's alleged failure to appreciate that there is a subset of prior unliquidated entries that "might only be addressed" by a Section 129 determination. On appeal, Viet Nam referred to the subset of prior unliquidated entries that have been subject to a final determination in an investigation or review as "Category 1" entries. Second, Viet Nam asserted that the Panel failed to conduct a holistic assessment in ascertaining the meaning of Section 129(c)(1).

4.3.1 The analytical framework applied by the Panel

The Appellate Body disagreed with Viet Nam to the extent that it argued that the Panel had rejected Viet Nam's claims on the basis that Viet Nam had not demonstrated that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to *all* prior unliquidated entries. Instead, the Appellate Body found that the Panel had responded to the argument that Viet Nam had made before the Panel. Thus, the Appellate Body understood the Panel to have examined whether Viet Nam had established that Section 129(c)(1), in and of itself, precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries, rather than requiring Viet Nam to show that Section 129(c)(1) precludes implementation of DSB recommendations and rulings in *all* circumstances.

The Appellate Body agreed with Viet Nam that in order to make an objective assessment of the matter before it, the Panel was required to examine whether Viet Nam had demonstrated that Section 129(c)(1) *necessarily operates*, at least in certain circumstances, to *preclude* implementation of DSB recommendations and rulings. The Appellate Body noted, however, the Panel's finding that the United States had identified instances in which a modification to USDOC practice was effected through a Section 129 determination as well as a Section 123 rule modification, which itself was applied in subsequent administrative reviews with respect to some prior unliquidated entries, and that Viet Nam had not disputed the accuracy of the examples cited by the United States, but merely contested their relevance. The Appellate Body further noted, as did the Panel, that Section 123(g)(1) establishes a mechanism for US authorities to make changes in USDOC (or other agency) regulations or practice in order to render them consistent with DSB recommendations and rulings, and that, under that provision, the regulation or practice at issue may be amended, rescinded, or otherwise modified upon the fulfilment of a series of procedural steps. For the Appellate Body, there appeared to be a tension therefore between Viet Nam's assertion that Section 129(c)(1) precludes implementation of DSB recommendations and rulings with respect to prior unliquidated entries, on the one hand, and Viet Nam's recognition that alternative mechanisms available to the United States may result in WTO-consistent action, on the other hand. The Appellate Body noted in particular that Viet Nam did not dispute that the United States can liquidate entries of the subject merchandise consistently with its WTO obligations, and that it has done so in the past. For the Appellate Body, this undermined Viet Nam's argument that Section 129(c)(1), in itself, precludes implementation of DSB recommendations and rulings.

In addition, the Appellate Body recalled the United States' explanation that Section 129 is but one tool in a toolbox by which the United States can implement DSB recommendations and rulings. For its part, Viet Nam did not contest the fact that there may be other means of implementation available to the United States – rather, as noted, Viet Nam argued that such other means were not relevant for purposes of examining its claim against Section 129(c)(1). In this regard, and by way of example, the United States referred to its negotiation of an agreement in the Softwood Lumber disputes with Canada in 2006, as well as to the resulting liquidation of "so-called Category 1 entries without duties" and the retroactive revocation of certain orders at issue. Specifically in relation to Category 1 entries, the United States also explained that it could liquidate such entries through the mechanism of a judicial remand, and that, in that context, the USDOC has the discretion to modify the applicable margins or even revoke an anti-dumping or countervailing duty order, and also enjoys discretion to request that its determinations be voluntarily

remanded. Further, the United States had highlighted, at the oral hearing, that the Category 1 entries that were subject to administrative proceedings in the *US – Shrimp (Viet Nam)* dispute had been liquidated in a WTO-consistent manner, and that Viet Nam had not disputed this.

4.3.2 The Panel's assessment of the meaning of Section 129(c)(1)

The Appellate Body began by recalling its jurisprudence regarding a panel's duties in establishing the meaning of municipal law. In particular, the Appellate Body recalled its statement in *US – Countervailing and Anti-Dumping Measures (China*) that, in ascertaining the meaning of municipal law, a panel 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. The Appellate Body clarified that an examination of such elements, including legal interpretations given by domestic courts or domestic administering authorities, may inform the question of whether a measure is consistent with a WTO Member's obligations under the covered agreements. The Appellate Body thereafter scrutinized the Panel's analysis to determine whether the Panel had conducted a holistic assessment in ascertaining the meaning of Section 129(c)(1). Based on its review of the Panel's analysis, the Appellate Body found that the Panel had properly relied on the relevant elements put before it by the parties to inform its understanding of the meaning and effect of Section 129(c)(1). These elements included: the text of Section 129(c)(1); the broader statutory context of the provision at issue, especially the Statement of Administrative Action (SAA); the US Government's application of Section 129(c)(1) in the years since it was adopted; the alternative means of implementation put forward by the United States; and two judicial opinions of the US Court of International Trade (USCIT) cited by Viet Nam. Therefore, the Appellate Body did not agree with Viet Nam that the Panel had failed to conduct a holistic assessment in ascertaining the meaning of Section 129(c)(1).

4.3.3 Conclusion

In sum, the Appellate Body found that Viet Nam had not established that the Panel acted inconsistently with Article 11 of the DSU, and consequently upheld the Panel's finding that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. As a result of its findings, the Appellate Body determined that it did not need to address Viet Nam's request for completion of the legal analysis in order to determine whether Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement.

4.4 Appellate Body Report, *India – Measures Concerning the Importation of Certain Agricultural Products*, WT/DS430/AB/R

This dispute concerned a challenge by the United States to measures consisting of prohibitions that India imposes on the importation of various agricultural products, primarily poultry products, because of concerns related to avian influenza (AI). Commonly known as "bird flu", AI is an infectious viral disease of birds, especially wild birds, which can sometimes spread to domestic poultry and may cause infections in other animals and humans. AI viruses are classified as either highly pathogenic avian influenza (HPAI) or low pathogenicity avian influenza (LPAI).

In examining whether India's AI measures are SPS measures, the Panel considered that India's AI measures fall within the scope of the instruments listed in the second sentence of Annex A(1) of the SPS Agreement as they are maintained through the Live-Stock Importation Act, as amended (Livestock Act), and Statutory Order 1663(E) (S.O. 1663(E)), and both are legal instruments that qualify as either "laws", "decrees", or "regulations" within the meaning of the second sentence of Annex A. The Panel also considered that both instruments reflect objectives that fall within the definitions in Annex A(1). The Panel further found that India's AI measures satisfied specific elements in Annex A(1)(a) through (c). The Panel further considered that an import ban such as the one imposed by India's AI measures affects international trade, and therefore concluded that India's AI measures are SPS measures subject to the disciplines of the SPS Agreement.

The Panel found that India's AI measures are inconsistent with Article 3.1 of the SPS Agreement because they are not "based on" the relevant international standard, i.e. Chapter 10.4 of the Terrestrial Code of the World Organization for Animal Health (OIE), an intergovernmental organization that establishes health standards for international trade in animals and animal products. The Panel also concluded that India's AI measures do not "conform to" the Terrestrial Code, within the meaning of Article 3.2 of the SPS Agreement, and that, therefore, India is not entitled to benefit from the presumption of consistency of its AI measures with the other relevant provisions of the SPS Agreement and the GATT 1994. Further, the Panel found that India did not have a risk assessment as required by Article 5.1 of the SPS Agreement in respect of its AI measures. The Panel therefore concluded that India's AI measures are inconsistent with Articles 5.1 and 5.2.

The Panel also found India's measures to be inconsistent with Article 2.2 of the SPS Agreement because they are not based on scientific principles and are maintained without sufficient scientific evidence. In addition, the Panel found that India's AI measures are inconsistent with Article 2.3, first sentence, because they arbitrarily and unjustifiably discriminate between India and other Members in which the same or similar conditions prevail, and that India's AI measures are applied in a manner that constitutes a disguised restriction on international trade, and are therefore inconsistent with Article 2.3, second sentence.

The Panel found that India's AI measures are inconsistent with Articles 2.2 and 5.6 of the SPS Agreement because they are more trade-restrictive than required to achieve India's appropriate level of protection (ALOP). The Panel compared India's AI measures with the reasonably available alternative measures proposed by the United States, consisting of the Terrestrial Code. The Panel concluded that measures based on the Terrestrial Code would achieve India's very high or very conservative ALOP, and that such measures are significantly less restrictive to trade than India's AI measures.

The Panel also found that India's AI measures are inconsistent with Article 6.2, first sentence, of the SPS Agreement because they fail to recognize the concepts of disease-free areas and areas of low disease prevalence, and, as a consequence, also with Article 6.2, second sentence. Having found that India's AI measures fail to recognize the concepts of disease-free areas and areas of low disease prevalence, the Panel further found that India's AI measures are inconsistent with Article 6.1 of the SPS Agreement because they are not adapted to the SPS characteristics of the areas from which products originate.

Finally, the Panel found that India acted inconsistently with Annex B(2) of the SPS Agreement because it failed to allow a reasonable interval between the publication of India's measure and its entry into force. Moreover, the Panel found that India acted inconsistently with Annex B(5)(a), (b), and (d) of the SPS Agreement. Having found that India acted inconsistently with these provisions under Annex B, the Panel found that India also acted inconsistently with Article 7 of the SPS Agreement.

In the light of its findings that India's AI measures are inconsistent with several provisions of the SPS Agreement, the Panel exercised judicial economy regarding the United States' claim under Article XI of the GATT 1994 that India also breached Article XI of the GATT 1994.

4.4.1 Articles 2.2, 5.1, and 5.2 of the SPS Agreement

India appealed the Panel's findings that India's AI measures are inconsistent with Articles 2.2, 5.1, and 5.2 of the SPS Agreement. India claimed that the Panel erred in its interpretation and application of Article 2.2 of the SPS Agreement in finding India's AI measures to be inconsistent with that provision solely as a consequence of its finding that they are inconsistent with Articles 5.1 and 5.2. India also alleged that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU, by: (i) disregarding the arguments and evidence presented by India to establish that its AI measures are consistent with Article 2.2 because they are based on scientific principles and sufficient scientific evidence; (ii) ruling on a claim that was broader than the one put forward by the United States in its written submissions; and

(iii) failing to consider India's argument that, because its AI measures are based on scientific principles and are not maintained without sufficient scientific evidence, and are thus consistent with Article 2.2, India was not required to conduct a separate risk assessment under Articles 5.1 and 5.2.

4.4.1.1 The relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand

The Appellate Body began by considering the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand. Beginning with the general structure and logic of the SPS Agreement, the Appellate Body noted that Article 2 sets out basic rights and obligations for WTO Members, and several paragraphs of Article 5 elaborate upon many of the basic obligations set out in Article 2. Recalling its observations in past disputes emphasizing the close link between Article 2.2 and Article 5.1, as well as between Articles 2.2 and 5.6, and between Articles 2.3 and 5.5, the Appellate Body considered that the structure and logic of the SPS Agreement, as understood in the light of the relationship between the various provisions of Articles 5 and 2, is such that the preferred means for complying with the basic obligations under Article 2 is through the particular routes or specific obligations set out in Article 5.

Turning to the substantive obligations under the provisions at issue, the Appellate Body recalled that the obligation in Article 2.2 that an SPS measure not be maintained without sufficient scientific evidence requires that there be a rational or objective relationship between the SPS measure and the scientific evidence. Whether such a relationship exists will depend upon the particular circumstances of the case, including the characteristics of the measure at issue and the quality and quantity of the scientific evidence. As to Article 5.1, the Appellate Body recalled that the requirement under that provision that an SPS measure be "based on" a risk assessment is a substantive requirement that there be a rational relationship between the measure and the risk assessment. The Appellate Body pointed out that a list of factors that "shall" be taken into account in a risk assessment is provided in Article 5.2, beginning with "available scientific evidence", but also including: relevant processes and production methods; relevant inspection, sampling and testing methods; prevalence of specific diseases or pests; existence of pest- or disease-free areas; relevant ecological and environmental conditions; and quarantine or other treatment.

Addressing the relationship between Articles 2.2 and 5.1, the Appellate Body stated that Article 5.1 may be viewed as a specific application of the basic obligations contained in Article 2.2 of the SPS Agreement. The Appellate Body recalled its observations that these two provisions should constantly be read together and that Article 2.2 informs Article 5.1, since the elements that define the basic obligation set out in Article 2.2 impart meaning to Article 5.1. Although Articles 5.1 and 5.2 may be considered specific applications of the basic obligations in Article 2.2, the Appellate Body clarified that this does not imply that the obligations in Articles 5.1 and 5.2 limit the scope of application of the obligations in Article 2.2, or vice versa. Instead, all of these obligations apply together as neither Article 2.2, on the one hand, nor Articles 5.1 and 5.2, on the other hand, contain any language suggesting a limitation on the scope of their application *inter se*. The Appellate Body thus stressed that, other than in circumstances covered by Article 5.7, a WTO Member's SPS measures must conform with the obligations both in Article 5.1 and in Article 2.2.

The Appellate Body noted that a panel's task under Article 5.1 is linked to, and is informed by, the requirements of Article 2.2, in particular as such task encompasses a scrutiny of the scientific basis underlying a risk assessment and, ultimately, the SPS measure at issue. Thus, the findings that a panel makes with respect to claims that an SPS measure is inconsistent with Articles 5.1 and 5.2 have an important role to play in that panel's assessment of a claim that the same SPS measure is inconsistent with Article 2.2 because it is not based on scientific principles and is maintained without sufficient scientific evidence. The Appellate Body recalled that in previous disputes it has consistently held that an SPS measure found to be inconsistent with Articles 5.1 and 5.2 can be presumed, more generally, to be inconsistent with Article 2.2. Nonetheless, the Appellate Body noted that the terms used in Article 2.2 and Articles 5.1 and 5.2 are not identical, and that, therefore, their respective scopes may not be entirely coextensive. For the Appellate Body, this suggested

that, although it may give rise to a *presumption of inconsistency* with Article 2.2, a finding of a violation of Articles 5.1 and 5.2 might not *invariably l*ead to a finding of inconsistency with Article 2.2, because it cannot be excluded that there may be circumstances in which an SPS measure that violates Articles 5.1 and 5.2 will not be inconsistent with Article 2.2. Thus, according to the Appellate Body, the presumption that Article 2.2 is violated in cases of violation of Articles 5.1 and 5.2 cannot be irrebuttable.

The Appellate Body, however, stressed that the rebuttability of the presumption cannot have the effect of diluting the requirements under Articles 5.1 and 5.2 or undermining the structure and logic of the SPS Agreement. Referring to the definition of an SPS measure in Annex A(1) to the SPS Agreement, the Appellate Body noted that one key characteristic of SPS measures is that they seek to protect against identifiable "risks". As Article 2.2 lays down requirements with which Members adopting SPS measures must comply, and given that protection against risks to human, animal or plant life or health is a key characteristic of SPS measures, the Appellate Body observed that an assessment of the consistency of an SPS measure with Article 2.2 would, by definition, involve consideration of evidence relating to the specific risks against which the SPS measure seeks to protect, and to whom the risk is posed (e.g. humans, animals, plants, and/or the environment). The Appellate Body next addressed the quality and quantity of scientific evidence that needs to be taken into account in determining whether there is a rational and objective relationship between an SPS measure and the scientific evidence within the meaning of Article 2.2. Given the close relationship between Articles 2.2 and 5.1, the Appellate Body recalled that, in scrutinizing the underlying scientific basis under Article 5.1, the evidence presented must have the necessary scientific and methodological rigour to be considered reputable and legitimate science according to the standards of the relevant scientific community.

For these reasons, the Appellate Body was of the view that even though the presumption of inconsistency under Article 2.2 flowing from a violation of Articles 5.1 and 5.2 is rebuttable, establishing that there exists a rational or objective relationship between the SPS measure and the scientific evidence for purposes of Article 2.2 would, in most cases, be difficult without a Member demonstrating that such a measure is based on an assessment of the risks, as appropriate to the circumstances.

4.4.1.2 The Panel's interpretation and application of Article 2.2

India claimed that the Panel erred in interpreting and applying Article 2.2 of the SPS Agreement because, although the Panel correctly identified that an SPS measure that does not comply with Articles 5.1 and 5.2 is "presumed" to be inconsistent with Article 2.2, the Panel incorrectly ignored that the obligations under Article 2.2 can also be independently fulfilled without resorting to Article 5.1. Noting that, in the present case, it had based its "defense" under Article 2.2, India submitted that the Panel should therefore have started its analysis with Article 2.2.

Recalling its observation that SPS measures adopted by Members must comply with all of the requirements of Articles 2.2, 5.1, and 5.2, the Appellate Body disagreed with India's position that a WTO Member whose SPS measure is found to be consistent with Article 2.2 is under no obligation to conduct a risk assessment, as required by Articles 5.1 and 5.2. Given that a WTO Member's compliance with the basic obligations in Article 2.2 cannot exclude the application of Articles 5.1 and 5.2, the Appellate Body also disagreed with India that the Panel was required to start its analysis with Article 2.2, before proceeding to assess the United States' claims under Articles 5.1 and 5.2.

Turning to the Panel's interpretation of Articles 2.2, 5.1, and 5.2, the Appellate Body considered that the Panel's understanding, namely that SPS measures found to be inconsistent with Articles 5.1 and 5.2, can be presumed, more generally, not to be based on scientific principles and maintained without sufficient scientific evidence, within the meaning of Article 2.2, was consistent with the nature of the obligations under these provisions. With regard to the Panel's statement that, "[i]n practical terms, … a violation of Articles 5.1 and 5.2 entails a violation of the more general Article 2.2", the Appellate Body noted that although the use of

the verb "entails" by the Panel may be seen as suggesting that the Panel was of the view that Article 2.2 would necessarily be violated whenever a measure is found to be inconsistent with Articles 5.1 and 5.2, the Panel qualified its statement by using the language "[i]n practical terms". The Appellate Body was therefore not convinced that, merely by using the verb "entails" in interpreting the relationship between Article 2.2 and Articles 5.1 and 5.2, the Panel equated the presumption of inconsistency under Article 2.2 with a consequential violation. Thus, the Appellate Body found that the Panel did not err in its interpretation of Articles 2.2, 5.1, and 5.2 of the SPS Agreement, in particular, in its understanding of the relationship between Article 2.2, on the one hand, and Articles 5.1 and 5.2, on the other hand.

As to the Panel's application of Article 2.2 to India's AI measures, the Appellate Body noted that, before the Panel, India presented arguments and scientific evidence to establish that its import ban with respect to fresh meat of poultry and eggs from countries reporting low pathogenicity notifiable avian influenza (LPNAI) is not maintained without sufficient scientific evidence within the meaning of Article 2.2. Referring to the Panel's analysis, the Appellate Body noted that the Panel made no mention of the evidence and arguments put forth by India in support of its assertion that its import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI are based on scientific principles and are not maintained without sufficient scientific evidence, within the meaning of Article 2.2. Given that the Panel did not consider the rebuttability of the presumption of inconsistency under Article 2.2 before proceeding to its final conclusion under Article 2.2 on the sole ground that it had already found India's AI measures to be inconsistent with Articles 5.1 and 5.2, the Appellate Body was of the view that the Panel found that those measures violate Article 2.2 as an automatic consequence of its finding that those measures are inconsistent with Articles 5.1 and 5.2. The Appellate Body also contrasted the Panel's approach with its analysis of the presumption of inconsistency with respect to the first requirement under Article 2.2 flowing from a violation of Article 5.6. In that part of its Report, the Panel expressly considered the rebuttability of the presumed violation of Article 2.2 that flowed from its finding of a violation of Article 5.6, and noted that India had presented no arguments to rebut such a presumption.

For these reasons, the Appellate Body found that, by failing to consider whether the presumption of inconsistency with Article 2.2 that flowed from its finding that India's AI measures are inconsistent with Articles 5.1 and 5.2 was rebutted by the arguments and evidence presented by India, the Panel erred in its application of Article 2.2 to India's AI measures with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI. The Appellate Body thus reversed, in part, the Panel's findings that India's AI measures are inconsistent with Article 2.2 of the SPS Agreement, because they are not based on scientific principles and are maintained without sufficient scientific evidence, insofar as those findings concern India's import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI.

4.4.1.3 Article 11 of the DSU

India also claimed that the Panel acted inconsistently with its duty to make an objective assessment of the matter under Article 11 of the DSU for three reasons. First, India submitted that the Panel failed to make an objective assessment of the matter by disregarding India's arguments and evidence that sought to establish that India's AI measures are based on scientific principles and are not maintained without sufficient scientific evidence, as required by Article 2.2. Having reversed part of the Panel's ultimate finding under Article 2.2 relating to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI, the Appellate Body did not consider it necessary to rule on this claim by India.

Second, India asserted that the Panel failed to make an objective assessment of the matter because it ruled on a claim that was not argued by the United States, insofar as the Panel's finding of inconsistency under Article 2.2 covered the import prohibitions that India's AI measures impose on ten categories of products upon the occurrence of both highly pathogenic notifiable avian influenza (HPNAI) and LPNAI. According to India, the United States only made out its claim with respect to import prohibitions imposed on two

product categories upon occurrence of LPNAI. The Appellate Body did not consider that the case made by the United States was limited in the way that India asserted. The Appellate Body recalled that the Panel's finding of inconsistency with Article 2.2 flowed from its findings of inconsistency with Articles 5.1 and 5.2, which concerned all ten product categories covered by India's AI measures; and that India's AI measures impose prohibitions on the import of the relevant agricultural products from countries reporting NAI, that is, both HPNAI and LPNAI. Thus, the Appellate Body did not consider that the Panel erred by virtue of the fact that the scope of its finding under Article 2.2 extended to the ten product categories listed in India's AI measures, as they apply both to the occurrence of HPNAI and LPNAI.

Finally, India asserted that the Panel failed to make an objective assessment of the matter in its analysis under Articles 5.1 and 5.2 because it did not address India's argument that, because its AI measures are based on scientific principles and are not maintained without scientific evidence, they meet the requirements of Article 2.2, and India is therefore under no obligation to conduct a separate risk assessment under Article 5.1 in the present case. The Appellate Body considered India's Article 11 claim to be an allegation that the Panel erred in its interpretation and application of Articles 2.2, 5.1, and 5.2, rather than a challenge to the objectivity of the Panel's assessment of the matter before it. Accordingly, the Appellate Body rejected this claim of error by India.

4.4.1.4 India's request to complete the legal analysis

Having reversed, in part, the Panel's finding under Article 2.2, the Appellate Body considered India's request to complete the legal analysis and, based on the evidence adduced by India, to find that India's AI measures are based on scientific principles and maintained with sufficient scientific evidence and are therefore consistent with Article 2.2. In the absence of undisputed facts on the record or relevant factual findings by the Panel, the Appellate Body found that it was unable to complete the legal analysis and assess the consistency of India's AI measures with Article 2.2 of the SPS Agreement with respect to the import prohibitions on fresh meat of poultry and eggs from countries reporting LPNAI.

4.4.2 Article 3 of the SPS Agreement

India appealed the Panel's findings that India's AI measures are inconsistent with Article 3.1 of the SPS Agreement and that India is not entitled to benefit from the presumption of consistency of its AI measures with the other relevant provisions of the SPS Agreement and the GATT 1994, as provided for under Article 3.2 of the SPS Agreement. India claimed that the Panel exceeded the permissible scope of consultation with the OIE as prescribed by Article 11.2 of the SPS Agreement and Article 13.2 of the DSU, and that the Panel acted inconsistently with its duty to make an objective assessment of the matter within the meaning of Article 11 of the DSU by: (i) failing to conduct its own assessment of the meaning of the OIE Code, including by failing to do so in accordance with customary rules of treaty interpretation; (ii) disregarding arguments and evidence provided by India pertaining to the meaning of the OIE Code; and (iii) reaching findings regarding the meaning of the OIE Code that lack support in the evidence on the record.

4.4.2.1 Whether the Panel erred under Article 11.2 of the SPS Agreement and Article 13.2 of the DSU in its consultation with the OIE

India claimed that Article 11.2 of the SPS Agreement limits the permissible scope of a panel's consultation with an international organization to scientific and technical issues. According to India, because the Panel consulted with the OIE not only concerning the evidence submitted by the parties, but also regarding the interpretation of the OIE Code, the Panel exceeded the permissible scope of questioning allowed under Article 11.2 of the SPS Agreement and Article 13.2 of the DSU.

The Appellate Body observed that, as explained in prior Appellate Body jurisprudence, Article 13 confers broad discretion to panels in their consultations with experts. The Appellate Body further observed that, in the SPS context, there are special or additional rules set forth in Article 11.2 of the SPS Agreement. Although Article 11.2 indicates that the reason a panel "should seek advice from experts" is because the dispute "involve[s] scientific or technical issues", the Appellate Body understood this language as a reference to the types of issues common to SPS disputes, and not to suggest a limitation as to the scope or nature of questioning that would be permitted in such disputes. Thus, while the language of Article 11.2 indicates that experts should be consulted in disputes involving scientific or technical issues, it does not mandate that the advice sought be confined to such issues. The Appellate Body considered this to be consonant with the scope and nature of questioning permitted under Article 13 of the DSU. On that basis, the Appellate Body did not consider that either Article 11.2 of the SPS Agreement or Article 13 of the DSU imposes constraints on a panel's consultations with experts, including with any relevant international organization. Rather, the Appellate Body considered that these provisions apply cumulatively and harmoniously in SPS disputes, and reinforce the comprehensive nature of a panel's fact-finding powers. The Appellate Body therefore found that the Panel did not act inconsistently with Article 11.2 of the SPS Agreement or Article 13.2 of the DSU in consulting with the OIE regarding the meaning of the OIE Code.

4.4.2.2 Article 11 of the DSU

India also claimed that the Panel committed errors inconsistent with its duty to make an objective assessment of the matter under Article 11 of the DSU. India contended that the Panel failed to make an objective assessment of the matter because it simply relied on the interpretation provided by the OIE. The Appellate Body considered that, although the Panel referred to and accorded weight to the OIE's responses to its questions, it indicated in each instance that its conclusions were also based on an examination of the wording or text of the relevant recommendations of the OIE Code. The Appellate Body therefore found it clear that the Panel's conclusions were founded on its own assessment of the meaning of relevant provisions of the OIE Code. In addition, the Appellate Body noted that Annex A(3)(b) to the SPS Agreement provides that the relevant international standards for purposes of animal health and zoonoses are those developed under the auspices of the OIE. Because Chapter 10.4 of the OIE Code reflects the relevant international standard in respect of AI, and therefore serves as the benchmark against which India's AI measures had to be compared in order to determine whether they are "based on" or "conform to" that standard, it was incumbent on the Panel to discern the meaning of the OIE Code in order to determine whether India's AI measures satisfy Articles 3.1 and 3.2 of the SPS Agreement. The Appellate Body explained that, in conducting such an assessment, a panel may be guided by any relevant interpretative principles, including relevant customary rules of interpretation of public international law. In addition, a panel may find additional sources to be useful in discerning the meaning of the international standard. The Appellate Body did not consider that the Panel, in connection with its own assessment of the meaning of the OIE Code, could be faulted for engaging in a consultation with, and according weight to the views of, the very international organization under whose auspices that international standard was developed. The Appellate Body therefore did not consider that the Panel delegated its adjudicative function to the OIE in a manner inconsistent with its duties under Article 11 of the DSU.

India further argued that the Panel failed to conduct its assessment of the meaning of the OIE Code in accordance with customary rules of treaty interpretation. The Appellate Body considered this aspect of India's claim as an allegation that the Panel acted inconsistently with Article 11 of the DSU by failing explicitly to address the applicability of customary rules of treaty interpretation when it assessed the meaning of relevant provisions of the OIE Code. The Appellate Body did not see that India had demonstrated why or how the Panel's analysis departed from a proper application of the interpretative rules relied upon by India, or how, if properly applied, such rules would have produced a different outcome regarding the meaning of the OIE Code. Recalling its conclusions that the Panel expressly rejected India's proposed interpretation of Chapter 10.4, and that the Panel conducted its own assessment and did not err in according weight to the views of the OIE, the Appellate Body did not consider that India had demonstrated what interpretative error

the Panel allegedly committed that resulted in an incorrect understanding of Chapter 10.4 of the OIE Code. The Appellate Body therefore rejected India's claim that the Panel acted inconsistently with its duties under Article 11 of the DSU by failing to conduct its own assessment of the meaning of the OIE Code, including by failing to do so in accordance with customary rules of treaty interpretation.

India also contended that the Panel acted inconsistently with Article 11 of the DSU because it failed expressly to address India's arguments regarding inconsistencies in the OIE's answers in respect of the meaning of the OIE Code, and improperly disregarded other arguments and evidence submitted by India concerning the practice of other countries, as well as previous positions taken by the United States, with respect to AI. The Appellate Body considered that India had not explained why the Panel's failure expressly to address these arguments materially undermined the objectivity of the Panel's analysis. Rather, India seemed to be rearguing positions on appeal that it had put to the Panel, but which the Panel did not accept. Regarding the practice of other countries, the Appellate Body found that India had not explained why express consideration of the instances it identified before the Panel was necessary to ensure the objectivity of the Panel's assessment, and noted that the fact that one or several countries had adopted a particular measure does not mean that such measure is based on, or conforms to, the relevant international standard. Thus, the Appellate Body concluded that, even if the Panel did not expressly address all of India's arguments and evidence in this regard, this was not so material as to undermine the objectivity of the Panel's analysis.

Finally, the Appellate Body addressed India's claim that the Panel failed to make an objective assessment of the matter in accordance with Article 11 of the DSU by reaching findings regarding the meaning of the OIE Code that lacked support in the evidence on the record. The Appellate Body examined three instances cited by India in which the Panel allegedly failed to base its conclusions on certain evidence. The Appellate Body understood that India, by invoking these instances, maintained that the Panel's conclusion that the OIE Code does not envisage import prohibitions is not supported by evidence on the Panel record. The Appellate Body noted, however, that the fact that particular pieces of evidence may not support, or may even contradict, the reasoning or conclusions of the Panel does not suffice to make out a claim that the Panel's findings lacked a sufficient basis in the factual record. Furthermore, an appellant must demonstrate that the error or omission is so material that it undermines the objectivity of the Panel's assessment of the matter before it. The Appellate Body did not consider that, merely by pointing to such evidence, India had demonstrated that the Panel failed to conduct an objective assessment of the matter under Article 11 of the DSU. The Appellate Body noted, moreover, that India's contentions appeared to be premised on a misreading of the Panel's conclusion.

Having rejected each of India's claims regarding Article 11 of the DSU, the Appellate Body found that India had not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its assessment of the meaning of the OIE Code. On the basis of the foregoing reasons, the Appellate Body upheld the Panel's findings that India's AI measures are inconsistent with Article 3.1 of the SPS Agreement, and that India is not entitled to benefit from the presumption of consistency of its AI measures with other relevant provisions of the SPS Agreement and the GATT 1994 as provided for under Article 3.2 of the SPS Agreement.

4.4.3 Article 6 of the SPS Agreement

India appealed the Panel's findings that India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement. India claimed that the Panel: (i) erred in its interpretation of the relationship between Article 6.1 and Article 6.3 of the SPS Agreement; (ii) erred in its application of Article 6.2 of the SPS Agreement to India's AI measures; and (iii) failed to make an objective assessment of the matter, as required by Article 11 of the DSU.

4.4.3.1 General Interpretation

The Appellate Body began by considering the content and structure of Article 6 as a whole, and the relationship among its three paragraphs. The Appellate Body observed that Article 6 of the SPS Agreement establishes, through its three paragraphs, a series of obligations regarding the adaptation of SPS measures to regional conditions. The first sentence of Article 6.1 imposes on WTO Members a specific obligation to ensure that their SPS measures are "adapted" to the "sanitary or phytosanitary characteristics" of the areas from which the product originated and to which the product is destined. Among the regional conditions in respect of which adaptation is envisaged, the title to Article 6 refers to "Pest- or Disease-Free Areas and Areas of Low Pest or Disease Prevalence", which are addressed in the second and third paragraphs of this provision. The Appellate Body noted that the first sentence of Article 6.2 establishes that Members shall, "in particular", recognize the concepts of "pest- or disease-free areas and areas of low pest or disease prevalence." For the Appellate Body, "pest- or disease-free areas" and "areas of low pest or disease prevalence" are a subset of all the SPS characteristics of an area that may call for the adaptation of an SPS measure. In the Appellate Body's view, Articles 6.1 and 6.2 together accord prominence to the content of Article 6.2 as one particular way through which a Member can ensure that its SPS measures are "adapted", as required by Article 6.1.

The Appellate Body also indicated that Article 6 does not specify any particular manner in which a Member must "ensure" the adaptation of its SPS measures within the meaning of Article 6.1 or "recognize" the concepts set out in Article 6.2. This suggests that Members enjoy a degree of latitude in determining how to do so within their domestic SPS regime. Accordingly, assessing whether or not a Member has complied with the obligations in Articles 6.1 and 6.2 will necessarily be a function of the nature of the claims raised by the complainant and the circumstances of each case. At the same time, the Appellate Body noted that compliance with the obligations in Articles 6.1 and 6.2 will be facilitated in circumstances where WTO Members put in place a regulatory scheme or structure that accommodates the adaptation of SPS measures on an ongoing basis.

Moreover, the Appellate Body pointed out that SPS measures or regulatory schemes that explicitly foreclose the possibility of recognition of the concepts of pest- or disease-free areas and areas of low pest or disease prevalence cannot be found to be consistent with Article 6.2. According to the Appellate Body, there is a close nexus between a Member's satisfaction of the obligation to recognize the concepts set out in Article 6.2, on the one hand, and its satisfaction of the obligation to ensure that its SPS measures are adapted to the relevant SPS characteristics within the meaning of Article 6.1, on the other hand. The Appellate Body observed that Article 6.3 specifies what must be objectively demonstrated by a Member seeking recognition of a specific area within its territory as a pest- or disease-free area or an area of low pest or disease prevalence.

4.4.3.2 The relationship between Articles 6.1 and 6.3

India argued that the Panel committed legal error in interpreting the relationship between the first sentence of Article 6.1 and the first sentence of Article 6.3. For India, an importing Member's obligation, under Article 6.1, to adapt its SPS measures to the sanitary or phytosanitary characteristics of the area of the exporting Member arises only after an exporting Member makes a formal proposal under Article 6.3.

The Appellate Body began by expressing concerns regarding certain of the Panel's statements that were overly broad, such as the statement that Article 6.1, first sentence, creates a "free-standing obligation", and that there is "no conditional language" linking such obligation to Article 6.3 or to an extraneous event such as the request of an exporting Member to recognize a specific area as disease free. The Appellate Body considered that these statements may be seen as problematic to the extent that they suggest that each of the paragraphs of Article 6 is to be read in isolation. To the contrary, there are important common elements and interlinkages among the paragraphs of Article 6. All three paragraphs of Article 6 are interconnected,

addressing different aspects of the obligation to adapt SPS measures to regional conditions. The Appellate Body also had reservations about the Panel's statement that it "[did] not see how an SPS measure can be 'adapted' to the SPS characteristics of an area where that adaptation occurs only *after* a measure is taken pursuant to a specific request for recognition made by an exporting Member." The Appellate Body was of the view that this reasoning by the Panel seems to assume that the "adaptation" of an SPS measure can only occur a single time, and that this must be at the time that such measure is adopted. For the Appellate Body, however, the general obligation to ensure the "adaptation" of SPS measures in Article 6.1 encompasses both a requirement to adapt SPS measures appropriately at the time they are adopted, as well as a requirement to adapt them appropriately if and when relevant SPS characteristics in relevant areas in the territory of the importing or exporting Member change or are shown to warrant an adaptation of a specific SPS measure.

The Appellate Body emphasized that, while there is no *explicit* conditional language linking Article 6.1 and Article 6.3, Article 6.1 and the remainder of Article 6 need to be read together. The Appellate Body reiterated that assessing whether a Member has complied with the obligations in Articles 6.1 and 6.2 will necessarily be a function of the nature of the claims raised by the complainant and the circumstances of each case. In some cases, a panel may be called upon to scrutinize whether a Member has determined that a specific area is free of disease and adapted its SPS measures accordingly. This may involve examining whether the importing Member received a request from an exporting Member to recognize an area within its territory as "disease-free". In such cases, an exporting Member will be able to establish that the importing Member's failure to recognize the relevant concepts, make a determination in respect of that disease-free area, and adapt its SPS measure accordingly, is inconsistent with Articles 6.1 and 6.2 only if that exporting Member can also establish that it took the steps prescribed in Article 6.3. The Appellate Body thus understood the relationship of Article 6.3 with the remainder of Article 6 to mean that, in the context of WTO dispute settlement proceedings, an exporting Member claiming, for example, that an importing Member has failed to make a determination that a specific area within that exporting Member's territory is "pest- or disease-free" – and ultimately adapt its SPS measures to that area – will have difficulties succeeding in a claim that the importing Member has thereby acted inconsistently with Articles 6.1 or 6.2, unless that exporting Member demonstrates that it has provided the necessary evidence to objectively demonstrate that such area is and is likely to remain pest- or disease-free, as stipulated in Article 6.3.

However, the Appellate Body disagreed with India's argument that a Member adopting or maintaining an SPS measure can *only* be found to have breached the obligation in the first sentence of Article 6.1 after an exporting Member has made the objective demonstration provided for in Article 6.3. Rather, the Appellate Body emphasized that, even in the absence of such objective demonstration by an exporting Member, a Member may still be found to have failed to ensure that an SPS measure is adapted to regional conditions within the meaning of Article 6.1 in a situation where, for example, the concepts of pest- and disease-free areas are relevant, but such Member's regulatory regime precludes the recognition of such concept. The Appellate Body therefore agreed with the Panel that "the obligations in Articles 6.1 and 6.2 are not triggered by an invocation of Article 6.3, as argued by India".

The Appellate Body then noted that the paragraph in the Panel Report that India challenges on appeal was made in response to India's argument that the obligations in Articles 6.1 and 6.2 are contingent upon whether an exporting Member has made the objective demonstration provided for in Article 6.3, and should be understood in the light of the United States' claims, namely, that India's AI measures affirmatively preclude India from complying with the general obligations in Articles 6.1 and 6.2. Consequently, while the Appellate Body expressed some reservations about certain statements made by the Panel, it did not consider that they amount to a reversible error when understood in the context of this dispute. Therefore, the Appellate Body found that the Panel did not err in interpreting the relationship between Article 6.1 and Article 6.3 of the SPS Agreement.

4.4.3.3 The Panel's application of Article 6.2 to India's AI measures

India also argued that the Panel committed legal error in its application of the first sentence of Article 6.2 of the SPS Agreement by basing its conclusion on S.O. 1663(E) rather than on the Livestock Act. India contended that, given that the parent legislation – Sections 3 and 3A of the Livestock Act – could recognize the concepts set out in the first sentence of Article 6.2, the Panel should not have based its conclusion on S.O. 1663(E), which is the delegated legislation.

In assessing this claim of error, the Appellate Body began by recalling that the Panel defined the measures at issue in this dispute as "India's AI measures, which are those measures that 'prohibit the importation of various agricultural products into India from those countries reporting [NAI]'". The Appellate Body further recalled that the Panel found that India maintains its AI measures through, *inter alia*, the following legal instruments: (i) the Livestock Act; and (ii) S.O. 1663(E). The Appellate Body pointed out that, on appeal, India did not challenge the Panel's characterization of the measures at issue. Thus, given the manner in which the Panel defined the measures at issue, the Panel could not have properly answered the question of whether India's AI measures "recognize" the concepts of AI-free or low AI prevalence areas with reference to the Livestock Act *alone*. Rather, answering this question required the Panel to scrutinize the AI measures as a whole, *including t*he content of S.O. 1663(E). Therefore, the Appellate Body disagreed with India's argument that, given that the parent legislation – Sections 3 and 3A of the Livestock Act – could recognize the concepts set out in the first sentence of Article 6.2, the Panel should not have based its conclusion on S.O. 1663(E), which is the delegated legislation.

India additionally argued that the Panel should not have relied on the delegated legislation because, "pursuant to the Panel's own analysis", India is only required to "recognize" the concepts at issue and is thus not required to "implement" such concepts in its domestic measures. The Appellate Body considered that India was merely recasting two of its previous arguments with which the Appellate Body had already disagreed. The Appellate Body also examined certain passages from the Panel Report and concluded that the distinction between the obligation to "recognize" and the obligation to "implement" is one created by India, and not one that is reflected in the Panel's findings. The Panel did not find an inconsistency with Article 6.2 on the basis that India had failed to "implement" the concept of disease-free areas.

For the foregoing reasons, the Appellate Body found that the Panel did not err in its application of Article 6.2 of the SPS Agreement by not relying solely on Sections 3 and 3A of the Livestock Act in assessing whether India recognizes the concepts of disease-free areas and areas of low disease prevalence in respect of AI.

4.4.3.4 Article 11 of the DSU

India also claimed that the Panel acted inconsistently with its duty to make an objective assessment of the matter under Article 11 of the DSU. First, India argued that the Panel acted inconsistently with this provision by basing its conclusion on the "non-implementation" of the concepts listed in Article 6.2 and thereby ruling on a claim not argued by the United States.

The Appellate Body began by noting that India had not "clearly articulat[ed] and substantiat[ed] with specific arguments" why the alleged error has a bearing on the objectivity of the Panel's assessment. Moreover, the Appellate Body considered that India's claim of error rested on the premise that the Panel's finding of inconsistency with Article 6.2 was based on a failure by India to "implement" the concepts listed in that provision, an assertion also made by India in its claim that the Panel erred in applying Article 6.2 to India's AI measures. Yet, a claim that a panel failed to comply with its duties under Article 11 of the DSU must stand by itself and should not be made merely as a subsidiary argument in support of a claim that a panel failed to apply correctly a provision of the covered agreements. For these reasons, the Appellate Body rejected India's first claim of error under Article 11 of the DSU.

In its second claim under Article 11 of the DSU, India argued that the Panel acted inconsistently with this provision by disregarding critical evidence submitted by India. The evidence that India claimed had been disregarded by the Panel is a statement in Panel Exhibit IND-121 made by an Indian official to a US official in a letter dated 28 January 2010. The Appellate Body pointed out that India had not explained why the Panel's failure explicitly to discuss the content of Panel Exhibit IND-121 is so material that it has a bearing on the objectivity of the Panel's factual assessment. Moreover, the Appellate Body emphasized that, even if the statement in that letter could be understood as "recognition" of the concepts listed in Article 6.2 of the SPS Agreement – a point that the United States strongly contested – it was difficult to conceive how such a statement by an individual official of the DAHD could have any impact on the Panel's assessment of a regulatory instrument (i.e. S.O. 1663(E)) that was subsequently issued pursuant to the Livestock Act. For these reasons, the Appellate Body rejected India's second claim of error under Article 11 of the DSU.

For the foregoing reasons, the Appellate Body found that India had not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its analysis of the consistency of India's AI measures with Article 6.2.

Having found that India had not demonstrated that the Panel erred in its assessment of the United States' claims under Article 6 of the SPS Agreement, the Appellate Body upheld the Panel's findings that India's AI measures are inconsistent with Articles 6.1 and 6.2 of the SPS Agreement.

4.4.4 Articles 5.6 and 2.2 of the SPS Agreement

India appealed the Panel's findings that India's AI measures are inconsistent with Article 5.6 and Article 2.2. India claimed that the Panel erred in its application of Article 5.6 of the SPS Agreement to India's AI measures. Additionally, India claimed that the Panel failed to make an objective assessment of the matter, as required by Article 11 of the DSU.

4.4.4.1 Whether the United States had identified alternative measures that would achieve India's appropriate level of protection

India argued that, before the Panel, the United States failed to present a *prima facie* case to support its claim under Article 5.6 of the SPS Agreement. According to India, the United States identified India's appropriate level of protection based on India's domestic control measures, instead of based on the measures at issue. Therefore, the United States ultimately did not fulfil its burden of presenting an alternative measure that fulfils India's appropriate level of protection.

Before assessing the specific claim of error raised by India, the Appellate Body described how the issue of the identification of India's appropriate level of protection developed during the Panel proceedings. The Appellate Body noted that before the Panel the United States had argued, based on India's "domestic surveillance and control measures" (particularly, India's NAP 2012), that India's appropriate level of protection is "quite low". In response, India submitted that the United States' claim had no merit because the United States had identified the wrong appropriate level of protection by referring to the NAP 2012 rather than S.O. 1663(E). The Panel undertook a review of India's written and oral submissions, and noted that India had alluded to the "prevention of ingress of LPNAI and HPNAI" and to "country freedom from NAI" as its appropriate level of protection. As it was not convinced that either of these represented India's appropriate level of protection, the Panel proceeded to examine other evidence on the record, including the measures at issue, in order to determine India's appropriate level of protection with greater precision. Having done so, the Panel concluded that India's appropriate level of protection is "*very high* or *very conservative*". The Appellate Body highlighted that India did *not* challenge on appeal the specific level of protection identified by the Panel as India's appropriate level of protection.

In the light of these considerations, the Appellate Body considered that the Panel correctly decided not to limit its analysis under Article 5.6 to the United States' argumentation regarding India's appropriate level of protection. Rather, in line with the understanding that a responding Member has an obligation to specify the level of SPS protection it wishes to achieve, the Panel requested India to identify its appropriate level of protection. The Appellate Body also highlighted that the Panel correctly did not defer completely to India's characterization of its own appropriate level of protection, but, instead, decided to ascertain such level of protection on the basis of the totality of the evidence on the record. For the Appellate Body, these considerations showed that the Panel adopted a proper approach in adjudicating the claim under Article 5.6 of the SPS Agreement.

For the foregoing reasons, the Appellate Body found that the Panel did not err in finding that the United States had identified alternative measures that would achieve India's appropriate level of protection.

4.4.4.2 Whether the Panel erred by failing to identify the proposed alternative measures with precision

India argued that, since the Panel did not identify the proposed alternative measures with precision, it committed legal error under Article 5.6 of the SPS Agreement by concluding that the alternative measures would fulfil India's appropriate level of protection. India contended that the Panel should have identified the product specific recommendations in the OIE Code for the corresponding product in question and the applicability of the same in the event of the occurrence of HPNAI or NAI.

The Appellate Body understood India to be arguing that the Panel failed to specify the product-specific recommendations in the OIE Code that apply to each of the product categories for which importation is prohibited under S.O. 1663(E) upon the occurrence of HPNAI or LPNAI. With respect to this argument, the Appellate Body observed that the recommendations in the OIE Code that were identified by the United States as constituting the relevant alternative measures were reproduced by the Panel in a table in its Report, in which the United States set out the eight product categories in S.O. 1663(E) for which there are corresponding product-specific recommendations in Chapter 10.4 of the OIE Code. In respect of each product category, the United States identified the specific recommendation or recommendations that are potentially applicable, depending on the specific product and the particular disease condition at issue. Thus, the Appellate Body considered that the references to the product-specific recommendations in the table cover all of the applicable recommendations from Chapter 10.4 of the OIE Code, whether the imports emanate from a country, zone, or compartment, and whether that country, zone, or compartment is NAI free, HPNAI free (meaning that LPNAI may be present), or regardless of its NAI status. In these circumstances, the Appellate Body did not see grounds for India's claim that the Panel did not identify the proposed alternative measures with precision, and therefore found that the Panel did not fail to identify the alternative measures with precision.

4.4.4.3 Article 11 of the DSU

India also claimed that the Panel acted inconsistently with its duty to make an objective assessment of the matter under Article 11 of the DSU. First, India argued that the Panel failed to analyse India's defence under Article 5.6 of the SPS Agreement and therefore failed to make an objective assessment of the matter.

The Appellate Body considered that India's first claim under Article 11 of the DSU was premised on an argument that the United States failed to establish a *prima facie* case under Article 5.6 of the SPS Agreement because the United States sought to identify India's appropriate level of protection as being "quite low" on the basis of the NAP 2012. In the Appellate Body's view, India's claim under Article 11 was indistinguishable from its claim with respect to the Panel's application of Article 5.6 to India's AI measures, and did not "stand by itself". Therefore, the Appellate Body dismissed India's claim under Article 11 of the DSU.

In its second allegation, India argued that the Panel acted inconsistently with Article 11 of the DSU because it ruled on a claim that was not argued by the United States. According to India, the United States limited its arguments and evidence under Article 5.6 to countries notifying LPNAI and did not challenge the application of S.O. 1663(E) to countries notifying HPNAI.

The Appellate Body did not consider that India had substantiated its contention that the United States' claim under Article 5.6 with respect to India's AI measures was limited to the imposition of import prohibitions upon occurrence of LPNAI, and that the Panel erred under Article 11 of the DSU in finding otherwise. The Appellate Body pointed out that the product-specific recommendations in the OIE Code that the United States relied upon as reasonably available alternative measures included recommendations that apply not only in respect of occurrences of LPNAI, but also in respect of countries regardless of their NAI status, which could apply to imports from countries reporting HPNAI. Thus, these recommendations address situations in which both HPNAI and LPNAI may be present. The Appellate Body, therefore, did not see that the United States limited its claim in the way that India argued.

For the foregoing reasons, the Appellate Body found that India had not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its analysis of the consistency of India's AI measures with Article 5.6 of the SPS Agreement.

In the light of its analysis of India's appeal, the Appellate Body upheld the Panel's finding that India's AI measures are inconsistent with Article 5.6 of the SPS Agreement because they are significantly more trade restrictive than required to achieve India's appropriate level of protection, with respect to the products covered by Chapter 10.4 of the OIE Code. Having upheld the Panel's finding under Article 5.6, the Appellate Body found it unnecessary to address India's request for reversal of the Panel's finding that India's AI measures are consequentially inconsistent with Article 2.2 of the SPS Agreement.

4.4.5 Article 2.3 of the SPS Agreement

India raised three claims under Article 11 of the DSU challenging certain aspects of the Panel's assessment of the United States' claim under Article 2.3, first sentence, of the SPS Agreement. India requested reversal of the Panel's finding that there is insufficient evidence on the record to support a finding that LPNAI is exotic to India, as well as its finding that the discrimination that India maintains, through its AI measures, against foreign products on account of LPNAI is arbitrary and unjustifiable, contrary to Article 2.3, first sentence. Specifically, India asserted that the Panel acted inconsistently with Article 11 of the DSU in its consultations with individual experts on India's disease situation in respect of LPNAI as part of its assessment of the United States' claim concerning the second "form" of alleged discrimination, namely that India imposes bans on imported products on account of LPNAI, while India itself does not even maintain a domestic surveillance regime that would result in the detection of LPNAI in India.

Before addressing India's claims under Article 11 of the DSU, the Appellate Body noted that the Panel, following the analytical approach adopted by the compliance panel in *Australia – Salmon (Article 21.5 – Canada)*, analysed separately the three elements of a violation of the first sentence of Article 2.3 in a sequential order, beginning with an examination of whether India's AI measures discriminate against imported products, before considering whether such discrimination is arbitrary or unjustifiable, and concluding with an analysis of the issue of whether identical or similar conditions prevail in the territories of the United States and India. The Appellate Body observed that the three elements identified in the first sentence of Article 2.3 inform each other, such that the analysis of each element cannot be undertaken in strict isolation from the analysis of the other two elements. Thus, while a sequential analysis of distinct elements may provide a useful framework within which to scrutinize a particular measure's conformity with the first sentence of Article 2.3, the use of such a framework does not, in the Appellate Body's view, alter the content of the examination required or affect the overall burden of proof that is borne by a complainant under that provision. The Appellate Body also observed that the text of Article 2.3, first sentence, does not

mandate the particular order of analysis adopted by the Panel and that, logically, identifying the relevant conditions, and assessing whether they are identical or similar, will often provide a good starting point for an analysis under Article 2.3, first sentence.

India alleged, first, that the Panel acted inconsistently with Article 11 of the DSU because the "terms of reference" of the Panel's consultations with the individual experts went beyond the scope of the OIE Code. Specifically, India submitted that Article 1.6.1 of Chapter 1.6 of the OIE Code recognizes five diseases for which a country has to submit documentary evidence that is evaluated by the OIE in order to receive official recognition of disease-free status. Highlighting that this procedure is not applicable in respect of other OIE-listed diseases, including AI, India submitted that its assertion that it is free from LPNAI could not properly have been subject to any technical or scientific evaluation by the OIE or individual experts. By requiring the individual experts to review the evidence submitted by India to support its claim that it is free from LPNAI, India alleged that the Panel incorrectly interpreted and applied Chapter 1.6 of the OIE Code.

The Appellate Body recalled that a panel's duties are set out in Article 11 of the DSU, which requires a panel to make an objective assessment of the facts of the case, including an assessment of whether the evidence on the record supports a party's assertion. Noting that, in the context of these dispute settlement proceedings, it was India's assertion that it was LPNAI free, the Appellate Body considered that the Panel was required, by the terms of Article 11 of the DSU, to assess whether India's assertion was supported by the evidence on the record. The Appellate Body noted that Chapter 1.6 of the OIE Code does not prescribe duties and obligations for WTO panels, and it cannot override the text of Article 11 of the DSU, which sets out the function of WTO panels and requires a panel to, *inter alia*, make an objective assessment of the facts of the case. The Appellate Body, therefore, did not accept India's argument that, by virtue of the OIE Code, the Panel was required to accept as definitive India's self-assessment of being LPNAI free, and rejected India's first claim under Article 11 of the DSU.

India's second claim of error under Article 11 of the DSU related to the allocation of the burden of proof by the Panel. Specifically, India alleged that: the Panel's questions to the individual experts erroneously shifted the burden of proof onto India; the Panel erred in concluding that India had the burden of proving that LPNAI is exotic to India; and the Panel erred in failing to find that India had discharged any burden of proof that it bore by establishing that it has never reported to the OIE an occurrence of LPNAI within its territory. As to India's first ground, the Appellate Body was of the view that, given the broad discretion that panels enjoy in consulting with experts, the mere posing of questions to individual experts does not, in and of itself, constitute a panel's allocation of the burden of proof as between the parties to a dispute. Moreover, noting that the questions posed by the Panel to the individual experts concerned the arguments and evidence submitted by both India and the United States, the Appellate Body disagreed with India that the Panel's questions resulted in the United States' arguments and evidence with respect to this issue not being evaluated at all.

With respect to India's argument that the Panel erred in concluding that India had the burden of proving that LPNAI is exotic to India, the Appellate Body recalled that, with respect to claims under the SPS Agreement, the initial burden lies on the complaining party, which must establish a *prima facie* case that the respondent's SPS measure is inconsistent with a particular provision of the SPS Agreement. Once a *prima facie* case has been made, the defending party bears the burden of rebutting it. The Appellate Body thus agreed with the Panel that a responding party asserting a fact is responsible for providing proof thereof. In the present dispute, the Appellate Body recalled that the United States claimed before the Panel that India's measures arbitrarily or unjustifiably discriminate against imported products by banning them from India following detection of LPNAI in the exporting country, while India does not even maintain surveillance requirements that would result in detection of LPNAI cases occurring in India's domestic poultry flocks. The Appellate Body also recalled the United States' explanation that India's AI measures are discriminatory not because LPNAI incidents have occurred in India, but because India's surveillance regime for LPNAI is inadequate, resulting in a situation where controls on trade in domestic products due to domestic LPNAI will not be

imposed, because LPNAI will not be detected. The Appellate Body observed that India, on the other hand, did not make arguments in relation to whether or not its AI measures are discriminatory *per se*, but, instead, stressed that LPNAI is exotic to India and that, therefore, the risk associated with the introduction of LPNAI means that India is fully justified in prohibiting imports of poultry and poultry products from countries upon the occurrence of LPNAI.

Based on the parties' positions before the Panel, the Appellate Body considered that the factual assertion that LPNAI is exotic to India was the crux of India's rebuttal with respect to all three elements under the first sentence of Article 2.3, and not an element of the United States' *prima facie* case with respect to the second form of discrimination. In this regard, the Appellate Body also referred to several Panel findings in the course of its overall analysis, namely: that the risks against which India is protecting (i.e. LPNAI) constitute conditions that are similar in India and other Members (including the United States); that India treats domestic and imported products differently with respect to the risk of LPNAI, depending on whether that risk originates within India or in another Member; and that India's domestic surveillance regime is not adequate to detect reliably LPNAI. The Appellate Body noted that India did not appeal any of these findings, and that it did not take issue with the Panel's statement that, without a suitable surveillance system capable of reliably detecting LPNAI, it is difficult to establish conclusively the absence of LPNAI within the territory of India. Referring to the Panel's analysis, together with the unappealed findings by the Panel, the Appellate Body did not consider that the Panel acted inconsistently with Article 11 in concluding that the United States had discharged its burden of establishing its *prima facie* case. Noting that the central factual pillar of India's efforts to rebut this case was its assertion that LPNAI was exotic to its territory, the Appellate Body rejected India's argument that the Panel acted inconsistently with Article 11 of the DSU in finding that India has the burden of proving that LPNAI is exotic to India.

With respect to the third issue raised by India – i.e. whether the fact that India had never reported to the OIE an occurrence of LPNAI within its territory was sufficient for the Panel to conclude that LPNAI is exotic to India – the Appellate Body considered that this was a repackaging of India's argument that its own assertion of LPNAI freedom should have been accepted as a fact even in the absence of scientific evidence on the record to support it. Recalling its finding that the Panel was not obligated by Article 1.6.1 of the OIE Code to accept as conclusive India's alleged "self-declaration" of LPNAI freedom, the Appellate Body rejected India's argument.

India's third claim under Article 11 of the DSU was that the questions posed by the Panel to the individual experts amounted to an improper delegation to the experts of the factual determination of whether LPNAI is exotic to India. The Appellate Body noted that India's appeal was restricted to the scope of the Panel's consultations with the individual experts, i.e. the questions posed to the individual experts, and not the Panel's use of, or reliance upon, the responses provided by those experts. The Appellate Body did not see how the Panel's questions, in and of themselves, could be seen as a delegation by the Panel of its role as the assessor of facts under Article 11 of the DSU. Moreover, the Appellate Body observed that India had not explained how the mere posing of questions amounted to a lack of objectivity on the part of the Panel. Finally, although India's claim was that the Panel improperly "delegated" the factual determination of whether LPNAI is exotic to India, the Appellate Body observed that, ultimately, the Panel did not make a determination on this factual issue; instead, it simply ruled that India had not presented arguments and evidence to substantiate the factual assertion that it had made. The Appellate Body therefore rejected India's claim.

Having rejected each of the three claims of error put forth by India, the Appellate Body found that India had not established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU in its assessment and findings with respect to the United States' claim relating to the second "form" of discrimination under Article 2.3, first sentence, of the SPS Agreement and, more specifically, in its consultations with the individual experts regarding the issue of whether LPNAI is exotic to India, or by requiring India to prove that LPNAI is exotic to India. The Appellate Body thus

upheld the Panel's findings that India's AI measures are inconsistent with Article 2.3, first sentence, of the SPS Agreement because they arbitrarily or unjustifiably discriminate between WTO Members where identical or similar conditions prevail.

4.5 Appellate Body Report, *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/AB/R

This dispute concerned additional duties imposed by Peru on imports of certain agricultural products (certain types of imported rice, sugar, maize, and milk) as well as the relationship between WTO rules and the Peru – Guatemala free trade agreement (FTA) and the question of whether Guatemala acted contrary to its good faith obligations under the DSU when it initiated these proceedings.

The additional duties are determined using a mechanism known as the Price Range System (*Sistema de Franja de Precios*, PRS). The PRS operates on the basis of the difference between: (i) a floor price and a ceiling price, and (ii) a reference price. The floor and ceiling prices are, respectively, averages of international prices in a specified international market over a recent past period of 60 months. The reference price is an average of international price quotations in the same international market over a recent past period of two weeks. An additional duty is applied on the transaction value of imports when the reference price is below the floor price. The PRS also provides for tariff rebates when the reference price is higher than the ceiling price.

Before the Panel, Guatemala claimed that Peru maintains: (i) "variable import levies" and "minimum import prices", or "similar border measures", prohibited under footnote 1 of Article 4.2 of the Agreement on Agriculture; and (ii) "other duties or charges" inconsistent with Article II:1(b) of the GATT 1994. Moreover, Guatemala claimed that Peru acted inconsistently with Articles X:1 and X:3(a) of the GATT 1994, respectively, by: (i) failing to publish certain essential elements of the measure; and (ii) administering the PRS in a manner that is not reasonable. Guatemala raised alternative claims under Articles 1, 2, 3, 5, 6, and 7 of the Customs Valuation Agreement in the event the Panel considered the additional duties resulting from the PRS to be ordinary customs duties.

For its part, Peru requested the Panel to find that Guatemala did not initiate the dispute in good faith consistently with Articles 3.7 and 3.10 of the DSU because Guatemala allegedly accepted the maintenance of the PRS in the FTA signed between Peru and Guatemala on 6 December 2011. Peru further asserted that the additional duties resulting from the PRS are: (i) "ordinary customs duties" within the meaning of the first sentence of Article II:1(b) of the GATT 1994; and (ii) outside the scope of Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of the GATT 1994. Peru contended that it complied with the obligations under Articles X:1 and X:3(a) of the GATT 1994, and that Guatemala's claims under the Customs Valuation Agreement should be rejected because this agreement does not apply to specific duties. Finally, in the event the Panel found that the measure at issue is not WTO-consistent, Peru contended that this would generate an inconsistency between the WTO covered agreements and the FTA, and that, in such a case, the terms of the FTA should prevail.

The Panel found no evidence that Guatemala had engaged in the panel proceedings in a manner contrary to the good faith obligations contained in Articles 3.7 and 3.10 of the DSU. Regarding substantive aspects of the dispute, the Panel found that the additional duties resulting from the PRS are: (i) "variable import levies", or at least a "similar border measure", inconsistent with Article 4.2 of the Agreement on Agriculture; and (ii) "other duties or charges" inconsistent with Article II:1(b) of the GATT 1994. Having made these findings, the Panel exercised judicial economy with respect to Guatemala's claims under Articles X:1 and X:3(a) of the GATT 1994. The Panel also did not consider it appropriate to address Guatemala's alternative claims under the Customs Valuation Agreement, which were conditional on a finding that the duties resulting from the PRS were ordinary customs duties. Finally, with regard to Peru's "defence" that the parties had modified between themselves, by means of the 2011 FTA, any provision of the WTO covered agreements prohibiting

the PRS, the Panel noted that the FTA at issue had not yet entered into force, and therefore declined to rule on whether the parties could, by means of the FTA, modify as between themselves their rights and obligations under the covered agreements.

4.5.1 Articles 3.7 and 3.10 of the DSU

4.5.1.1 New arguments or claims raised on appeal

Guatemala alleged that Peru's arguments on appeal that Guatemala acted inconsistently with Articles 3.7 and 3.10 of the DSU constituted "new arguments" or "new claims". Guatemala asserted that Peru was not appealing an issue of law covered in the Panel Report or legal interpretations developed by the Panel within the meaning of Article 17.6 of the DSU, and that these new arguments or claims were, therefore, "outside the competence of the Appellate Body to consider".

Based on its review of the Panel Report and the participants' submissions on appeal, the Appellate Body found that the arguments or claims challenged by Guatemala as "new" in fact related to legal issues no different from those that were before the Panel and that were addressed by the Panel in its Report. These related to the scope of Guatemala's good faith obligations under the DSU, the legal significance of international instruments that had not yet entered into force, and the extent to which Members may waive their rights to institute WTO dispute settlement proceedings. The Appellate Body further found that Peru's arguments on good faith under Articles 3.7 and 3.10 did not require the Appellate Body to solicit, receive, and review new facts; did not adversely affect Guatemala's due process rights; and were thus properly raised on appeal.

4.5.1.2 Good faith

Peru appealed the Panel's conclusion that there was "no evidence that Guatemala brought these proceedings in a manner contrary to good faith". Peru argued that Guatemala *explicitly* waived its right to bring a case with respect to the PRS when it agreed in the FTA that Peru may maintain the PRS. Alternatively, Guatemala waived its rights by *necessary implication* since the WTO-consistency of the PRS had been the "subject of disagreement" between Peru and Guatemala, and they had agreed in the FTA that Peru may maintain its PRS, with the FTA prevailing over WTO agreements in the event of an inconsistency. Thus, Guatemala acted inconsistently with its good faith obligation under Articles 3.7 and 3.10 of the DSU when it initiated the present proceedings.

Guatemala responded that the Panel was correct in finding that the FTA does not contain a waiver – explicitly or by necessary implication – of Guatemala's right to challenge the PRS through dispute settlement. Guatemala contended, among other things, that: (i) the Panel correctly relied on the fact that the FTA is not in force, as agreements allegedly containing a waiver must be in force for such waiver to have any effect; (ii) ascertaining the proper interpretation of the FTA would go beyond the Panel's jurisdiction; and (iii) a waiver with respect to a particular dispute could only be made through a mutually agreed solution or through decisions by the appropriate organs of the WTO.

The Appellate Body stated that it was called upon to determine whether Guatemala acted contrary to good faith under Articles 3.7 and 3.10 of the DSU on account of the alleged relinquishment of its right to challenge the PRS before the WTO dispute settlement mechanism. In *EC – Bananas III (Article 21.5 – Ecuador II / Article 21.5 – United States*), the Appellate Body held that "the relinquishment of rights granted by the DSU cannot be lightly assumed", and that "the language in the Understandings [on Bananas] must clearly reveal that the parties intended to relinquish their rights". Thus, "if a WTO Member has not clearly stated that it would not take legal action with respect to a certain measure, it cannot be regarded as failing to act

in good faith if it challenges that measure." The Appellate Body further noted that, while Article 3.7 of the DSU acknowledges that parties may enter into a mutually agreed solution, Members cannot relinquish their rights and obligations under the DSU beyond the settlement of specific disputes.

In this dispute, the Appellate Body did not consider that, for purposes of the DSU, the FTA, and in particular paragraph 9 of Annex 2.3 thereof, constitutes a solution mutually acceptable to both parties within the meaning of Article 3.7 of the DSU. Aside from the fact that Peru and Guatemala negotiated the FTA before the initiation of the present dispute, the DSU emphasizes that "[a] solution mutually acceptable to the parties to a dispute" must be "consistent with the covered agreements". As the Appellate Body found elsewhere in its Report, however, the additional duties resulting from the PRS are inconsistent with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994. Moreover, the participants raised conflicting arguments on how to read paragraph 9 of Annex 2.3 to the FTA, which provides that "Peru may maintain its [PRS]", in the context of other relevant provisions of the FTA, so that there appears to be ambiguity as to whether even the FTA itself, regardless of its legal status as not yet being in force, allows Peru to maintain the PRS if it is found to be WTO-inconsistent.

The Appellate Body further noted that Peru recognizes that Guatemala is not "procedurally barred *from bringing a WTO claim against the PRS*". Moreover, Article 15.3 of the FTA provides that, "[i]n the event of any dispute that may arise under this Treaty … or the *WTO Agreement*, the complaining Party may choose the forum for settling the dispute." Thus, even from the perspective of the FTA, parties to the FTA have the right to bring claims under the WTO covered agreements to the WTO dispute settlement system.

On the basis of these reasons, the Appellate Body did not consider that a clear stipulation of a relinquishment of Guatemala's right to have recourse to the WTO dispute settlement system exists in relation to, or within the context of, the DSU. Consequently, Guatemala could not be considered as having acted contrary to its good faith obligations under Articles 3.7 and 3.10 of the DSU when it initiated these proceedings to challenge the consistency of the PRS with the WTO covered agreements. Therefore, the Appellate Body upheld the Panel's finding in paragraphs 7.96 and 8.1.a of the Panel Report that there is "no evidence that Guatemala brought these proceedings in a manner contrary to good faith".

4.5.2 Article 4.2 of the Agreement on Agriculture – variable import levies

Peru raised three main claims of error in connection with the Panel's finding that the additional duties resulting from the PRS are "variable import levies", namely that: (i) the Panel erred in its assessment of the "variability" of the measure at issue; (ii) the Panel erred in its assessment of the "additional features" of the measure at issue; and (iii) the Panel acted inconsistently with Article 11 of the DSU when examining Guatemala's claim under Article 4.2 of the Agreement on Agriculture.

4.5.2.1 Interpretation of Article 4.2 of the Agreement on Agriculture

Before examining Peru's claims, the Appellate Body set out its understanding of certain issues relating to the interpretation of Article 4.2 of the Agreement on Agriculture. The Appellate Body recalled that the preamble of the Agreement on Agriculture sets forth that it is necessary "to provide for substantial progressive reductions in agricultural support and protection … resulting in correcting and preventing restrictions and distortions in world agricultural markets". The Appellate Body observed that Article 4 of the Agreement on Agriculture is appropriately viewed as the legal vehicle for requiring the conversion into ordinary customs duties of certain market access barriers affecting imports of agricultural products.

Article 4.2 of the Agreement on Agriculture prohibits Members from maintaining, resorting to, or reverting to, "any measures of the kind which have been required to be converted into ordinary customs duties". Footnote 1 provides a list of measures covered by the obligation under Article 4.2. The fact that a measure results in the payment of duties that take the same form as ordinary customs duties does not, by itself,

mean that the measure falls outside the scope of footnote 1. Thus, the Appellate Body found that, in order to determine whether a measure is among the "measures of the kind which have been required to be converted into ordinary customs duties", it may be necessary to conduct an in-depth examination of the design and structure of the measure itself, as well as its operation, in the light of the language in Article 4.2 and footnote 1.

Turning to the term "variable import levies", the Appellate Body explained that measures constituting "variable import levies" are "inherently" variable because they incorporate a scheme or formula that causes and ensures that levies change automatically and continuously. The Appellate Body found that this is a necessary and key element of "variable import levies" that distinguishes "variable import levies" from "ordinary customs duties". According to the Appellate Body, this is because "ordinary customs duties" may also be subject to variation. The Appellate Body noted that this variation, however, arises from discrete changes in applied tariff rates that occur independently, and unrelated to such scheme or formula, and usually through separate and specific administrative or legislative action. The Appellate Body explained that "variable import levies" may also have certain "additional features", which include "a lack of transparency and a lack of predictability in the level of duties that will result from such measures" when compared to the level of transparency and predictability of "ordinary customs duties". These additional features are *not* independent or absolute characteristics that a measure must display in order to be considered a "variable import levy"; rather, they may serve to confirm that a measure is "inherently variable". Finally, the Appellate Body clarified that "variable import levies" may contribute to distorting the prices of imports by impeding the transmission of international prices to the domestic market.

4.5.2.2 The Panel's assessment of the "variability" of the measure

Peru argued that the Panel confused the measure at issue – i.e. the additional duties resulting from the PRS – with the PRS methodology to calculate the potential duty. Guatemala argued that drawing a distinction between the additional duties and their calculation methodology would be inconsistent with the Panel's terms of reference. The Appellate Body observed that both the additional duties and the PRS calculation methodology were included in Guatemala's request for the establishment of a panel, and that, as the additional duties result from the operation of the PRS, the PRS calculation methodology is a key component of the system. The Appellate Body also stated that "inherent variability" must be assessed on the basis of the overall configuration of a measure and the extent to which the changes are automatic, continuous, and based on an underlying mechanism or formula. Thus, the Appellate Body observed that the Panel was in fact required to examine the PRS calculation methodology when determining whether the additional duties resulting from the PRS are "variable import levies".

Peru also argued that the additional duties at issue do not vary with any regularity as a result of the PRS calculation. According to Guatemala, the fact that, in certain periods, the PRS did not give rise to a variable additional duty is not relevant to the examination of the PRS and the resulting additional duties during the periods when additional duties were imposed. Noting that Peru accepted that the operation of a formula to calculate the values for floor, ceiling and reference prices was inherent and automatic in the PRS, the Appellate Body stated that duties calculated based on an "inherently variable" system will themselves be "inherently variable". Moreover, the Appellate Body observed that the Panel's finding of "variability" was not based on the frequency of change in the duties. Rather, the Panel based its finding on the fact that the PRS contains a scheme or formula that causes and ensures automatic and continuous change of the applicable duties. The Panel also explicitly addressed the frequency of change, stating that the fact that the result of the PRS calculation may be the same for some two-week periods does not mean that the PRS, as a mechanism, does not impose variability of duties. According to the Appellate Body, the frequency of change effected by a measure may be relevant in determining whether such measure is "variable", but no specific frequency of change in resulting duties is required in order for a measure to be considered "variable" within the meaning of footnote 1 of the Agreement on Agriculture.

Peru also objected to the Panel's statement that the variability imposed by the PRS cannot be compared to the fact that "ordinary customs duties" may occasionally vary. Peru argued that changes of both the additional duties resulting from the PRS and "ordinary customs duties" are neither constant nor mechanical. Guatemala responded that the evidence submitted by Peru revealed that the variation of the additional duties resulting from the PRS is significantly greater than the variation of "ordinary customs duties". The Appellate Body observed that the fact that a levy is "variable" is not sufficient for characterizing a measure as a "variable import levy" because an "ordinary customs duty" could also fit this description. Rather, "variable import levies" are distinct from "ordinary customs duties" because of the presence of an underlying scheme or formula in the measure at issue that causes those levies to change automatically and continuously. Thus, the Appellate Body considered that the Panel was correct in stating that the variability imposed by the PRS, which is the result of rules and formulas that form part of the system and are applied automatically and continuously, cannot be compared to the normal variability of "ordinary customs duties".

In addition, Peru contended that the Panel relied "too heavily" on "inherent variability" in finding that the measure is a "variable import levy". Guatemala argued that the Panel did not rely entirely on the inherent variability of the measure and that, in any event, inherent variability *is* the key criterion for the finding of a "variable import levy". The Appellate Body considered that Peru's argument did not find support in the Panel Report, since the Panel examined certain "additional features" of the measure at issue to confirm its finding of "inherent variability". Furthermore, the Appellate Body noted that the Panel's finding of "variability" based on an underlying formula that causes and ensures that levies change automatically and continuously is a necessary and key element for a finding of "variable import levies". Thus, the Appellate Body disagreed with Peru's argument that the Panel erred by "relying too heavily" on this aspect in its analysis.

Finally, Peru argued that the legal standards for "variable import levies" and "minimum import prices" share common characteristics, in particular, the use of a minimum or threshold price. Thus, the Panel's finding, that the PRS floor price does not prevent the entry of imports priced below it, should have led the Panel to conclude that the additional duties resulting from the PRS are not "variable import levies", nor "similar border measures". Guatemala argued that the legal standard for "variable import levies" does not require a minimum-price component. The Appellate Body recalled that "variable import levies" have not been interpreted as necessarily comprising a minimum price threshold. Although a given measure may contain elements that are common to both "variable import levies" and "minimum import prices", a "variable import levy" need not necessarily contain a certain *minimum* threshold for it to be characterized as "inherently variable".

On the basis of the foregoing, the Appellate Body found that Peru had not established that the Panel erred in its assessment of the "inherent variability" of the measure at issue.

4.5.2.3 The Panel's assessment of the "additional features" of the measure

With respect to the Panel's assessment of the lack of transparency and predictability of the measure at issue, Peru first contended that the Panel erred by conflating the ability to forecast duties with transparency and predictability. Guatemala disagreed and pointed out that, while the rate of ordinary customs duties can change, such rates are fixed and thus predictable until such change. Given the structure, design, and operation of the PRS, and in particular the recalculation of the potential additional duties every two weeks, the Appellate Body saw no error in the Panel's explanation that the PRS lacks transparency and predictability regarding the level of the additional duties when compared to the transparency and predictability afforded by ordinary customs duties.

Peru contended that the Panel incorrectly found that the measure lacked transparency and predictability *because* of its alleged "inherent variability". Guatemala responded that Peru may not design import charges

whose level depends mathematically and automatically on international prices. The Appellate Body disagreed with Peru's argument that, in this part of the Panel's analysis, the Panel associated the lack of transparency and predictability of the PRS with the "inherent variability" of the measure at issue.

With respect to the Panel's assessment of whether the measure at issue distorts the transmission of international prices to Peru's market, Peru argued that the Panel failed to provide a reasonable basis for its finding because the Panel relied solely on a theoretical analysis. Guatemala responded that there is nothing "theoretical" about the Panel's analysis, and that the Panel was simply not convinced by the evidence presented by Peru. The Appellate Body disagreed with Peru's argument, since the Panel examined the declared objective of the PRS; the structure and design of the PRS, including the short-term and medium-term effects; and statistical evidence on sugar and maize. The Appellate Body noted that a panel is not required to focus its examination primarily on numerical or statistical data regarding the effects of the measure in practice. Rather, where it exists, evidence on the observable effects of the measure should be taken into consideration, along with information on the structure and design of the measure. The weight and significance to be accorded to such evidence will depend on the circumstances of each case.

In addition, Peru argued that the Panel's analysis appears to contradict the Panel's finding that the measure at issue is not a "minimum import price". Guatemala considered that a measure may neutralize the transmission of international prices regardless of whether it also qualifies as a "minimum import price". The Appellate Body considered that even if the examination of whether a measure is a "variable import levy" or a "minimum import price" is related to each other, whether a measure falls within the scope of one or of another measure listed in footnote 1 of the Agreement on Agriculture nonetheless remains a separate question. Thus, the Appellate Body saw no inconsistency in the Panel's analysis in this regard.

Peru also contended that the Panel overlooked the fact that the PRS is incapable of preventing the transmission of international prices to the domestic market for all products covered because it operates on the basis of only four "marker products". Guatemala argued that, also for "associated products", the PRS ensures that international price fluctuations are distorted. The Appellate Body considered that, even if prices of "associated products" and a "marker product" were unrelated, Peru's argument failed to explain how an import levy, varying according to the international price of another agricultural product, would not distort the transmission of international prices of "associated products" to Peru's market, or how the effects of such levy could nevertheless be considered equivalent to the impact of an "ordinary customs duty".

Finally, Peru contended that, in contrast to Chile's price band system, the PRS results in a close correlation between international and domestic prices. Guatemala responded that the differences between the PRS and Chile's price band system identified by Peru are inaccurate and irrelevant. The Panel examined in detail the elements of the PRS, and concluded that the short-term and medium-term effects of the PRS are to distort the transmission of international prices to the domestic market, differently from "ordinary customs duties". The Appellate Body observed that arguing that the PRS is less distortive than the Chilean measure is insufficient for a demonstration that the PRS does not distort the transmission of international prices to Peru's domestic market.

Overall, the Appellate Body noted that Peru's appeal assigned an important role to the assessments of a lack of transparency and predictability, and of transmission of international prices to the domestic market, within the context of an analysis of whether a measure is a "variable import levy". Given that the "additional features" are not independent or absolute characteristics that a measure must display in order to be considered a "variable import levy", their assessment should not be given more prominence in a panel's analysis than the determination of whether a measure can be characterized as "inherently variable", which is a necessary and key element for a finding of "variable import levy".

In the light of the foregoing, the Appellate Body found that Peru had not established that the Panel erred in its assessment of the "additional features" of the measure at issue within the context of the Panel's analysis of whether the measure constitutes a "variable import levy".

4.5.2.4 Article 11 of the DSU

Peru claimed that the Panel acted inconsistently with Article 11 of the DSU by failing to properly compare the measure at issue with "ordinary customs duties" and "variable import levies" when examining Guatemala's claim under Article 4.2 of the Agreement on Agriculture. Peru contended that the Panel failed to identify the relevant characteristics of an ordinary customs duty on a number of instances. Guatemala submitted that Peru's arguments address the legal standard applied by the Panel rather than any lack of objectivity in the Panel's assessment of the facts.

The Appellate Body recalled that a claim that a panel has failed to conduct an "objective assessment of the matter before it" is a very serious allegation, and that an appellant may not effectively recast its arguments before the panel under the guise of an Article 11 claim, but must identify specific errors that are so material that they undermine the objectivity of the panel's assessment of the matter before it. A challenge under Article 11 of the DSU must stand by itself and be substantiated with specific arguments, rather than merely being put forth as a subsidiary argument or claim in support of a claim of a panel's failure to construe or apply correctly a particular provision of a covered agreement.

The Appellate Body recalled that, although a panel may undertake a separate analysis of whether a measure is "other than ordinary customs duties", in order to confirm a finding of inconsistency with Article 4.2 of the Agreement on Agriculture, such analysis is not indispensable for reaching a conclusion on the categories listed in footnote 1. In the Appellate Body's view, Peru's challenge did not concern the Panel's proper weighing and appreciation of the evidence or the objectivity of the Panel's assessment of the matter before it. Rather, Peru's challenge related to the legal standard applied by the Panel under Article 4.2, and Peru had not explained the basis for requesting an *additional* examination of the Panel's assessment in the context of an Article 11 claim.

For the foregoing reasons, the Appellate Body found that the Panel did not act inconsistently with Article 11 of the DSU in its analysis under Article 4.2 of the Agreement on Agriculture.

4.5.3 Article II:1(b) of the GATT 1994

Peru raised two claims of error concerning the Panel's analysis of whether the additional duties resulting from the PRS are inconsistent with Article II:1(b), namely that: (i) the Panel erred in finding that the additional duties are not "ordinary customs duties" under Article II:1(b) of the GATT 1994; and (ii) the Panel acted inconsistently with Article 11 of the DSU by failing to examine certain evidence submitted by Peru in connection with Guatemala's claim.

4.5.3.1 The Panel's finding that the measure at issue is not an "ordinary customs duty" under Article II:1(b) of the GATT 1994

Peru claimed that the Panel erred in finding that the additional duties resulting from the PRS are not "ordinary customs duties" under Article II:1(b) of the GATT 1994 on the basis of the Panel's earlier finding under Article 4.2 of the Agreement on Agriculture. While Peru argued that the Panel should have examined separately whether the measure at issue is an "ordinary customs duty" under Article II:1(b), Guatemala contended that the Panel was correct to conclude that the measure is not an "ordinary customs duty" under Article II:1(b), having found that such measure falls within the scope of footnote 1 of Article 4.2 of the Agreement on Agriculture and, as such, required to be converted into "ordinary customs duties".

The Appellate Body observed that Article 4.2 of the Agreement on Agriculture and the first sentence of Article II:1(b) of the GATT 1994 contain different obligations. Article 4.2 of the Agreement on Agriculture provides that "Members shall not maintain, resort to, or revert to any measures of the kind which have been required to be converted into ordinary customs duties". The first sentence of Article II:1(b) of the GATT 1994 provides that certain products shall "be exempt from ordinary customs duties in excess of those set forth and provided" in the relevant Schedule of Concessions.

The Appellate Body recalled that the structure and logic of footnote 1 of the Agreement on Agriculture make clear that variable import levies and minimum import prices cannot be ordinary customs duties. The Appellate Body also recalled that, as agreed by both Peru and Guatemala, "ordinary customs duties" should be interpreted in the same way in both Article 4.2 of the Agreement on Agriculture and the first sentence of Article II:1(b) of the GATT 1994. Given the Panel's finding that the additional duties resulting from the PRS fall within footnote 1 of the Agreement on Agriculture and that "variable import levies" cannot be "ordinary customs duties" within the meaning of Article 4.2, the Appellate Body considered that the Panel was correct in finding that such additional duties are also not "ordinary customs duties" within the meaning of the first sentence of Article II:1(b) of the GATT 1994.

The Appellate Body considered that, contrary to Peru's argument, the Panel's approach and reasoning did not suggest that the Panel found an inconsistency with Article II:1(b) of the GATT 1994 merely "by implication" from a finding of inconsistency with Article 4.2 of the Agreement on Agriculture. The second sentence of Article II:1(b), read together with the Understanding on the Interpretation of Article II:1(b) of the GATT 1994, prohibits the imposition of "other duties or charges" in excess of those recorded in the relevant Member's Schedule of Concessions. In line with the understanding that Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 contain distinct legal obligations, the Panel examined both provisions separately in different sections of its Report, and did not merely make a consequential finding of inconsistency with the second sentence of Article II:1(b) based on its earlier finding under Article 4.2.

On the basis of the foregoing, the Appellate Body found that Peru had not established that the Panel erred in finding that the measure at issue is not an "ordinary customs duty" under the first sentence of Article II:1(b) of the GATT 1994.

4.5.3.2 Article 11 of the DSU

Peru claimed that the Panel acted inconsistently with Article 11 of the DSU by failing to examine evidence relevant to the determination of whether Peru correctly scheduled the additional duties resulting from the PRS as "ordinary customs duties" within the meaning of Article II of the GATT 1994. Guatemala argued that, to the extent that the Panel did not consider certain evidence, this was a result of the Panel's use of the correct legal standard, rather than any failure to conduct an objective assessment within the meaning of Article 11 of the DSU.

The Panel considered that: (i) the term "ordinary customs duties" must have the same meaning in both Article 4.2 of the Agreement on Agriculture and the first sentence of Article II:1(b) of the GATT 1994; and (ii) the structure and logic of footnote 1 make clear that variable import levies and minimum import prices cannot be ordinary customs duties. Thus, the Panel concluded that examination of further evidence presented by Peru was not necessary for its analysis of whether the measure at issue is an "ordinary customs duty". The Appellate Body considered that Peru's claim did not challenge any lack of objectivity in the Panel's assessment of the evidence, but the correctness of the Panel's legal analysis. The Appellate Body noted that Peru put forward an analogous claim of error concerning the legal standard applied by the Panel in its analysis of Guatemala's claim under the second sentence of Article II:1(b) of the GATT 1994; a claim that the Appellate Body had already rejected. Finally, the Appellate Body recalled that a challenge under Article 11 of the DSU should not merely be put forth as a subsidiary argument or claim in support of a claim that a panel failed to construe or apply correctly a particular provision.

On the basis of the foregoing, the Appellate Body found that the Panel did not act inconsistently with Article 11 of the DSU in its examination of Guatemala's claim under the second sentence of Article II:1(b) of the GATT 1994.

4.5.4 Relationship between WTO and FTA provisions

4.5.4.1 New arguments raised on appeal

Guatemala contended that Peru's arguments that the Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 by failing to take into account Article 31(3)(a) and (c) of the Vienna Convention, either with respect to the FTA or ILC Articles 20 and 45, were not raised before the Panel and were accordingly not properly within the scope of the appeal because they required consideration of new facts or issues different from those covered in the Panel Report. The Appellate Body rejected Guatemala's claim that Peru's arguments regarding the interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in accordance with Article 31(3)(a) and (c) of the Vienna Convention could not be raised on appeal. The Appellate Body considered that these arguments concerned issues of law covered in the Panel Report and legal interpretation developed by the Panel.

The Appellate Body was also not persuaded that consideration of Peru's arguments on appeal would require it to review new facts. The Appellate Body was of the view that the consideration of the provisions of the FTA and of ILC Articles 20 and 45 to determine the consistency of the PRS with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 would not require it to review new facts.

The Appellate Body concluded that to the extent Peru's new arguments on appeal related to "issues of law covered in the panel report" or "legal interpretations developed by the panel" and did not require it to review new facts, they were properly raised on appeal and did not adversely affect Guatemala's due process rights.

4.5.4.2 The relevance of the Guatemala-Peru Free Trade Agreement and certain provisions of the ILC under Article 31(3) of the Vienna Convention

The Appellate Body found that Peru's arguments, that the Panel erred in its interpretation of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 because it failed to take into account under Article 31(3) of the Vienna Convention the FTA and ILC Articles 20 and 45, went beyond the interpretation of Article 4.2 and Article II:1(b) in accordance with Article 3.2 of the DSU and Article 31 of the Vienna Convention and amounted to arguing that, by means of the FTA, Peru and Guatemala actually modified these WTO provisions between themselves.

Peru argued on appeal that, by relying on paragraph 9 of Annex 2.3 to the FTA (which states that Peru may maintain the PRS) and on ILC Articles 20 (consent precluding the wrongfulness of an act) and 45 (loss of the right to invoke responsibility), the Panel should have interpreted the terms "shall not maintain" in Article 4.2 of the Agreement on Agriculture as meaning "may maintain" in the relationship between Peru and Guatemala. The Appellate Body recalled that under Article 31 of the Vienna Convention treaty terms should be interpreted in accordance with their ordinary meaning in their context and in the light of the object and purpose of the treaty and observed that while context is a necessary element of an interpretative analysis under Article 31, its role and importance in an interpretative exercise depends on the clarity of the plain textual meaning of the treaty terms. If the meaning of treaty terms is difficult to discern, determining the ordinary meaning under Article 31 may require more reliance on the context and the object and purpose of the treaty and possibly other elements considered "together with the context" and the tools mentioned in Article 32. However, the Appellate Body did not consider that Article 31 can be used to develop interpretations based on asserted subsequent agreements or asserted relevant rules of international law applicable in the relations between the parties under Article 31(3)(a) and (c) that appear to

subvert the common intention of the treaty parties as reflected in the text of Article 4.2 and Article II:1(b). In particular, the Appellate Body did not consider that in an interpretative exercise under Article 31, elements considered "together with the context", such as subsequent agreements or rules of international law, can be used to reach the conclusion that the textual terms "shall not maintain" in Article 4.2 of the Agreement on Agriculture should be read as meaning "may maintain" based on a particular provision found in the FTA (or on ILC Article 20 or 45).

The Appellate Body also rejected the notion that under Article 31 of the Vienna Convention it is possible to develop interpretations of a multilateral treaty that would be applicable only to some of the parties to that treaty. Article 31(1) states that "[a] treaty shall be interpreted" such that the function of the interpretative exercise is the treaty as a whole, not the treaty as it may apply between some of its parties. The Appellate Body explained that, with multilateral treaties such as the WTO covered agreements, the "general rule of interpretation" in Article 31 is aimed at establishing the ordinary meaning of treaty terms reflecting the common intention of the parties to the treaty, and not just the intentions of some of the parties. While an interpretation of the treaty may in practice apply to the parties to a dispute, it must serve to establish the common intentions of the parties to the treaty being interpreted.

Turning to Article 31(3) of the Vienna Convention, the Appellate Body considered that both the FTA and ILC Articles 20 and 45 are not "relevant" to the interpretation of Article 4.2 and Article II:1(b), within the meaning of Article 31(3)(c) and that the FTA was not an agreement "regarding the interpretation" of these WTO provisions within the meaning of Article 31(3)(a). In particular, the Appellate Body recalled its jurisprudence that in order to be "relevant" for purposes of interpretation, rules of international law within the meaning of Article 31(3)(c) must concern the same subject matter as the treaty terms being interpreted. The Appellate Body also recalled that it had held in previous disputes that agreements "regarding the interpretation of the treaty or the application of its provisions" within the meaning Article 31(3)(a) are "agreements bearing specifically upon the interpretation of a treaty".

The Appellate Body observed that Paragraph 9 of Annex 2.3 to the FTA stated that "Peru may maintain its Price Range System". ILC Article 20 addressed the issue of validity of consent by a State that precludes the wrongfulness of a given act by another State within the limits of that consent. ILC Article 45, paragraph (a) concerns the loss of right to invoke responsibility of a State, in circumstances where the injured State has validly waived the claim. In contrast, the specific interpretative issues arising under Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 in question in this dispute were not whether Peru "may maintain" its PRS with regard to designated products, or whether Guatemala had consented to the maintenance of the PRS or waived its right to challenge it. Rather, in order to determine whether Peru could maintain its PRS, the Panel had to interpret the meaning of the terms in Article 4.2 and footnote 1 of the Agreement on Agriculture, and find whether the additional duties resulting from the PRS could be characterized as "variable import levies", "minimum import prices" or "similar border measures" rather than "ordinary customs duties" within the meaning of footnote 1. Paragraph 9 of Annex 2.3 to the FTA and ILC Articles 20 and 45 did not provide "relevant" interpretative guidance in this respect. Accordingly, the Appellate Body did not consider that the FTA and ILC Articles 20 and 45 could be considered as rules concerning the same subject matter as Article 4.2 and Article II:1(b), or as bearing specifically upon the interpretation of these provisions. The Appellate Body thus disagreed with Peru that the FTA and ILC Articles 20 and 45 are "relevant" rules of international law within the meaning of Article 31(3)(c) and that the FTA is a subsequent agreement "regarding the interpretation" of Article 4.2 and Article II:1(b) within the meaning of Article 31(3)(a) of the Vienna Convention.

Finally, while not ruling on the meaning of the term "parties" in Article 31(3)(a) and (c) of the Vienna Convention, the Appellate Body expressed reservations as to whether the provisions of the FTA (in particular paragraph 9 of Annex 2.3), which could arguably be construed as to allow Peru to maintain the PRS in its bilateral relations with Guatemala, could be used under Article 31(3) of the Vienna Convention in establishing the *common* intention of WTO Members underlying the provisions of Article 4.2 of the Agreement on

Agriculture and Article II:1(b) of the GATT 1994. The Appellate Body considered that such an approach would suggest that WTO provisions can be interpreted differently, depending on the Members to which they apply and on their rights and obligations under an FTA to which they are parties.

Having concluded that Peru's arguments concerned *modifications* rather than *interpretations* of Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994, the Appellate Body further considered that such alleged modifications would not be subject to Article 41 of the Vienna Convention about *inter se* modifications of multilateral treaties, but rather to the specific WTO provisions of Article XXIV of the GATT 1994.

The Appellate Body noted in particular that the WTO agreements contain specific provisions addressing amendments, waivers, or exceptions for regional trade agreements[26], which prevail over the general provisions of the Vienna Convention, such as Article 41. In the case of FTAs the Appellate Body observed that Article XXIV of the GATT 1994 specifically permits departures from certain WTO rules. The Appellate Body stated that the proper routes to assess whether a provision in an FTA that may depart from certain WTO rules is nevertheless consistent with the covered agreements are the WTO provisions that permit the formation of regional trade agreements – namely: Article XXIV of the GATT 1994, or the Enabling Clause as far as agreements between developing countries are concerned, in respect of trade in goods; and Article V of the General Agreement on Trade in Services (GATS), in respect of trade in services.

In addressing the issue of whether a WTO-inconsistent measure in an FTA can nonetheless be justified under Article XXIV of the GATT 1994, the Appellate Body recalled its ruling in *Turkey – Textiles*. In that dispute the Appellate Body had held that Article XXIV of the GATT 1994 may provide justification for measures that are inconsistent with certain other GATT 1994 provisions, provided that two cumulative conditions are fulfilled: (i) the party claiming the benefit of this defence must demonstrate that the measure at issue is introduced upon the formation of a customs union or FTA that fully meets the requirements of Article XXIV; and (ii) that party must demonstrate that the formation of that customs union or FTA would be prevented if it were not allowed to introduce the measure at issue. The Appellate Body also recalled that in setting out the above-cited conditions for a GATT 1994-inconsistent measure to be justified as part of a customs union or FTA under paragraph 5 of Article XXIV of the GATT 1994, it had relied also on paragraph 4 of this provision, which states that the purpose of a customs union or FTA is "to facilitate trade" between the constituent members and "not to raise barriers to the trade" with third countries. The Appellate Body further noted that references in paragraph 4 to "facilitat[ing] trade" and "closer integration" are not consistent with an interpretation of Article XXIV as a broad defence for measures in FTAs that roll back on Members' rights and obligations under the WTO covered agreements.

Nevertheless, the Appellate Body did not rule on whether the PRS is consistent with the requirements set forth in Article XXIV, considering that Peru had not invoked Article XXIV of the GATT 1994 in order to justify the inconsistency of the PRS with Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 and that an agreement that is not yet in force, such as the FTA, cannot benefit from the defence of Article XXIV.[27] Moreover, the Appellate Body noted that it was neither undisputed nor clear from reading the provisions of the FTA whether the FTA actually allowed Peru to maintain a WTO-inconsistent PRS.

[26] Article X of the WTO Agreement sets out detailed procedures "to amend the provisions of this Agreement or the Multilateral Trade Agreements". Article IX of the WTO Agreement gives the Ministerial Conference and the General Council the exclusive authority to adopt interpretations of the WTO Multilateral Trade Agreements and to waive obligations imposed on Members under these agreements. Importantly, Article XXIV of the GATT 1994 and Article V of the GATS provide for regional trade exceptions, allowing WTO Members to depart from specific rights and obligations under the WTO covered agreements when they form customs unions, free trade areas or agreements liberalizing trade in services. Developing countries entering into regional trade agreements covering trade in goods with other developing countries may also avail themselves of the exception provided by the Enabling Clause. We note, however, that neither participant has invoked or relied upon the Enabling Clause in respect of the FTA at issue.

[27] The Article XXIV defence applies also in respect of "an interim agreement necessary for the formation of a customs union or of a free-trade area". However, the Appellate Body noted that also such "interim agreement" would need to be in force for the defence to apply.

In the light of the above, the Appellate Body found that the Panel did not commit an error by not interpreting Article 4.2 of the Agreement on Agriculture and Article II:1(b) of the GATT 1994 taking into account the provisions of the FTA and ILC Articles 20 and 45 under Article 31(3) of the Vienna Convention. The Appellate Body also found that the Panel did not err in declining to make findings as to whether the FTA modified the WTO rights and obligations between Peru and Guatemala.

4.5.5 Guatemala's other appeal: Article 4.2 of the Agreement on Agriculture – "minimum import prices"

Guatemala questioned the Panel's interpretation and application of the terms "minimum import prices" and "similar border measures" in footnote 1 of Article 4.2 of the Agreement on Agriculture. In case the Appellate Body were to reverse the Panel's findings, Guatemala requested that the Appellate Body complete the legal analysis and find that Peru's measure is inconsistent with Article 4.2 of the Agreement on Agriculture.

4.5.5.1 The Panel's interpretation and application of "minimum import prices"

Guatemala claimed that the Panel erred in its interpretation of "minimum import prices", in footnote 1 of Article 4.2 of the Agreement on Agriculture, by adopting an excessively narrow legal standard, requiring that such a measure must impose duties based on the transaction value of imports, and must prevent each and every import from entering below a specified threshold. Peru contended that the Panel neither stated that, under such a measure, each and every import must be prevented from entering the market below a specified threshold, nor suggested that a measure relying on reference prices, instead of transaction values, cannot be considered a "minimum import price" scheme.

The Appellate Body recalled that the term "minimum import price" refers generally to the lowest price at which imports of a certain product may enter a Member's domestic market. While the Appellate Body has noted that "minimum import price" schemes "generally operate" in relation to the actual transaction value of imports and that a "typical" minimum import price scheme would involve such a comparison, the Appellate Body considered that these qualifications suggest that there can be other examples of benchmarks for determining "the lowest price at which imports … may enter a … market". Such an assessment would have to be made on the basis of the total configuration of the measure. Thus, the Appellate Body considered that a panel's examination of whether a measure is a "minimum import price" within the meaning of footnote 1 of the Agreement on Agriculture should be based on evidence, where available, concerning the operation and impact of the measure, as well as an analysis of the design and structure of the measure.

Contrary to Guatemala's submission, the Appellate Body considered that the Panel did not interpret the term "minimum import prices" to mean that a measure must necessarily operate in relation to the transaction values of imports. The Appellate Body also did not consider the Panel to have interpreted "minimum import prices" as implying that a measure requires that "each and every import" enter at or above a specified threshold. Rather, the Panel noted statistical evidence submitted by Peru showing that certain transactions entered Peru's market at a price below the PRS floor price. The Panel also noted that there was no evidence at all that the additional duties resulting from the PRS directly impede the entry of products at prices below a certain threshold, in a way different from what would occur with ordinary customs duties.

On the basis of the foregoing, the Appellate Body found that Guatemala had not established that the Panel erred in its interpretation of "minimum import prices" in footnote 1 of Article 4.2 of the Agreement on Agriculture.

Guatemala claimed that the Panel erred in finding that Peru's measure is not a "minimum import price" despite the existence of an implicit or *de facto* threshold. According to Guatemala, the PRS contains an implicit or *de facto* threshold, which consists of the lowest international price of the relevant product in the

previous two-week period plus the additional duty resulting from the PRS. Guatemala contended that, since basically no import can enter the Peruvian market below the implicit threshold, the measure at issue qualifies as a "minimum import price", and is thus inconsistent with Article 4.2 of the Agreement on Agriculture.

Peru submitted that the implicit threshold identified by Guatemala is based upon a calculation that is not part of the PRS, and that the Panel was correct to find that there is no *de facto* or implicit threshold in the PRS. Peru contended that operators are free to transact at any price, and, if transaction prices are unlikely to be below the lowest international price contemplated in the PRS reference price, this is a result of the tendency of import prices to follow international prices, and not a result imposed by the PRS.

The Appellate Body observed that, where available, statistical evidence concerning the impact of the measure is relevant to a panel's examination. There may be, however, additional elements relevant to a panel's examination of whether a measure is a "minimum import price" within the meaning of footnote 1 of the Agreement on Agriculture. For purposes of such examination, a panel should also analyse the design, structure, and operation of a measure. In this case, the Panel's finding was based on the statistical evidence submitted by Peru. The Panel stated that, taking into account the structure and design of the measure at issue, as well as the details concerning its operation, there is no evidence that the measure ensures that imports will not enter below a certain threshold. Beyond this sentence, the Panel did not explain any further how it had analysed the design and structure of the measure at issue. Thus, the Appellate Body concluded that the Panel did not sufficiently engage with the relevant elements of the design, structure, and operation of the measure at issue that could have supported the conclusion the Panel drew. In particular, the Panel did not properly examine to what extent the implicit threshold, as identified by Guatemala, can be said to form part of the design and structure of the PRS. Furthermore, the Panel did not determine whether the reference price of the PRS serves as an appropriate proxy for transaction values of imports entering the Peruvian market.

On the basis of the foregoing, the Appellate Body found that the Panel erred in its analysis of whether the measure at issue is a "minimum import price" within the meaning footnote 1 of Article 4.2 of the Agreement on Agriculture. Consequently, the Appellate Body reversed the Panel's finding, in paragraphs 7.371 and 8.1.c of the Panel Report, that the additional duties resulting from the PRS do not constitute "minimum import prices" within the meaning of footnote 1 of Article 4.2.

4.5.5.2 The Panel's interpretation and application of "similar border measures"

Guatemala claimed that the Panel erred in its interpretation of "similar border measures", in footnote 1 of Article 4.2 of the Agreement on Agriculture, by conflating the legal standard for "minimum import prices" with the legal standard for border measures "similar" to minimum import prices. Peru contended that the Panel applied the correct legal test in determining that the additional duties are not "similar" to "minimum import prices".

The Appellate Body observed that footnote 1 of the Agreement on Agriculture includes a category of "similar border measures other than ordinary customs duties". A measure need not be identical to one of the prohibited categories of measures in footnote 1 to fall nevertheless within the scope of this provision. Rather, in order to be a "similar border measure", a measure must, in its specific configuration, have sufficient "resemblance or likeness to" or be "of the same nature or kind" as at least one of the specific categories of measures listed in footnote 1. Thus, according to the Appellate Body, a measure is "similar" to a "minimum import price" scheme when it shares a sufficient number of characteristics with, and has a design, structure, operation, and impact similar, to a minimum import price, even if it is not "identical" to such a scheme in all respects.

In the Appellate Body's view, the Panel did not find that, for a measure to qualify as a "similar border measure", within the meaning of footnote 1 of the Agreement on Agriculture, it must share all necessary

attributes with "minimum import prices". Rather, the Panel stated that a measure is "similar" to a "minimum import price" when it shares a sufficient number of characteristics with, and has a design, structure, and effects similar to, a minimum import price, even if it is not "identical" to such a scheme in all respects. In this regard, the Appellate Body concluded that the Panel's interpretation of "similar border measures" is an accurate rendering of the meaning of this expression, as interpreted by the Appellate Body.

On the basis of the foregoing, the Appellate Body found that Guatemala had not established that the Panel erred in its interpretation of "similar border measures" in footnote 1 of Article 4.2 of the Agreement on Agriculture.

Guatemala claimed that the Panel erred in finding that Peru's measure is not "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. Guatemala argued that the measure contains two mechanisms preventing imports from entering the Peruvian market at prices below certain thresholds, namely, the explicit threshold and the implicit threshold. Thus, in Guatemala's view, Peru's measure is at least similar to a minimum import price. Peru responded that Guatemala failed to submit examples of any shared characteristics that would make the Peruvian measure "similar" to a minimum import price.

The Appellate Body observed that, where available, statistical evidence concerning the impact of the measure is relevant to a panel's examination. There may be, however, additional elements relevant to a panel's examination of whether a measure is a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. For purposes of this examination, a panel should also analyse the design, structure, and operation of a measure. A measure is "similar" to a minimum import price scheme when it shares a sufficient number of characteristics with, and has a design, structure, operation and impact similar to, a minimum import price, even if it is not "identical" to such a scheme in all respects. The Panel's finding was based essentially on the statistical evidence submitted by Peru. Thus, the Appellate Body considered that, by failing to analyse sufficiently the design, structure and operation of the measure at issue, the Panel did not conduct a proper analysis as to whether the additional duties resulting from the PRS, even if not identical to a "minimum import price" scheme, may nonetheless constitute a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. The Panel did not sufficiently examine the explicit or the implicit thresholds identified by Guatemala. The Panel also failed to determine whether the reference price of the PRS serves as an appropriate proxy for transaction values of imports entering the Peruvian market.

On the basis of the foregoing, the Appellate Body found that the Panel erred in its analysis of whether the measure at issue is a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture. Consequently, the Appellate Body reversed the Panel's finding, in paragraphs 7.370 and 8.1.c of the Panel Report, that the measure at issue does not share sufficient characteristics with "minimum import prices" to be considered a border measure "similar" to a "minimum import price" within the meaning of footnote 1 of Article 4.2.

4.5.5.3 Completion of the legal analysis

Guatemala requested that the Appellate Body complete the legal analysis and find that Peru's measure is inconsistent with Article 4.2 of the Agreement on Agriculture because the measure is either a "minimum import price" or a measure "similar" to a minimum import price. Guatemala submitted that the measure prevents imports from entering the Peruvian market at prices below the explicit threshold of the PRS, namely, the floor price, or alternatively, the *de facto* or implicit threshold, consisting of the sum of the lowest relevant international price and the additional duty resulting from the PRS. Having reversed the Panel's findings concerning "minimum import prices" and "similar border measures", the Appellate Body considered whether it could complete the legal analysis.

The Appellate Body noted that, in previous disputes, it had completed the legal analysis with a view to facilitating the prompt settlement and effective resolution of the dispute. The Appellate Body has, however, held that it can do so only if the factual findings of the panel and the undisputed facts on the panel record provide it with a sufficient basis for its own analysis. Reasons that have prevented the Appellate Body from completing the legal analysis include the absence of full exploration of the issues before the panel, and considerations for parties' due process rights.

The Appellate Body recalled that it had found that the Panel did not sufficiently examine the explicit or the implicit threshold identified by Guatemala. The Panel record also did not contain undisputed facts concerning to what extent, in the light of the design, structure and operation of the measure, either of these thresholds serves, even if not in all instances, as a minimum price threshold for imports entering the Peruvian market, so as to qualify the measure as at least a "similar border measure" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

Moreover, the Appellate Body considered that the Panel record did not contain undisputed facts concerning whether the reference price of the PRS serves as an appropriate proxy for transaction values of imports entering the Peruvian market. The Appellate Body noted that the floor and reference prices, and ultimately the additional duty resulting from the PRS, are calculated only for the four "marker products" at issue. The same additional duty applicable for each "marker product" is then also applied to the respective "associated products". The Appellate Body considered that there was no undisputed evidence on the Panel record concerning the relationship between the prices of "marker products" and the prices of "associated products". In addition, the reference price is calculated on the basis of only a particular specified international market. Moreover, the Appellate Body saw no undisputed evidence on the Panel record concerning to what extent such market can be said to adequately reflect global prices of a particular "marker product". Furthermore, the Appellate Body found that there was no evidence on the Panel record concerning the impact, if any, of the two-week gap in time between the international prices used to calculate the reference price and the transaction values of imports entering the Peruvian market. Without these factual elements, the Appellate Body concluded that it is not possible to consider, on the basis of the Panel record, whether, and to what extent, the reference price serves as an appropriate proxy for transaction values of imports entering the Peruvian market. The Appellate Body observed that this consideration is also relevant for examining the *de facto* or implicit threshold identified by Guatemala. The Appellate Body noted that this is because one of the two components of the implicit threshold is the additional duty resulting from the PRS, which is, in turn, dependent on the reference price.

Thus, the Appellate Body considered that it was not possible to determine whether either of the thresholds identified by Guatemala constitutes a "minimum import price" threshold, referring generally to the lowest price at which imports of a certain product may enter the Peruvian market. Being unable to undertake such an examination, the Appellate Body was also unable to determine whether the measure at issue shares a sufficient number of characteristics with, and has a design, structure, operation and impact similar to, a "minimum import price" to make it "similar" to a "minimum import price".

In the light of the above, the Appellate Body was unable to complete the legal analysis as to whether the additional duties resulting from the PRS constitute "minimum import prices" or "similar border measures" within the meaning of footnote 1 of Article 4.2 of the Agreement on Agriculture.

4.6 Appellate Body Reports, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/AB/R, *and China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/AB/R

These disputes arose from complaints brought by Japan and the European Union concerning several aspects of the investigation leading to China's measures imposing anti-dumping duties on imports of certain high performance stainless steel seamless tubes (HP-SSST). The investigation at issue was initiated on 8 September 2011 and resulted in a final determination by the Ministry of Commerce of the People's Republic of China (MOFCOM) on 8 November 2012.

Before the Panel, Japan and the European Union challenged several aspects of the investigation leading to the imposition of these duties, claiming that China acted contrary to its obligations under the Anti-Dumping Agreement and the GATT in its: (i) determination of injury; (ii) treatment of certain confidential information provided by the applicants; (iii) alleged failure to disclose certain essential facts; (iv) application of provisional measures; and (v) alleged provision of inadequate information in its Final Determination Notice. In addition, the European Union requested the Panel to find that China acted inconsistently with the Anti-Dumping Agreement in arriving at its determination of dumping, with particular respect to MOFCOM's determination of the amount for selling, general, and administrative (SG&A) costs for one of the EU producers, Salzgitter Mannesmann Stainless Tubes GmbH (SMST).

In its Reports, the Panel found that MOFCOM's injury determination is inconsistent with Articles 3.1, 3.2, 3.4 and 3.5 of the Anti-Dumping Agreement, *inter alia*, because of MOFCOM's failure properly to account for differences in quantities of domestic and imported goods in its price effects analysis, as well as MOFCOM's improper reliance on the market share of subject imports in determining a causal link between subject imports and material injury to the domestic industry. However, the Panel rejected claims by Japan and the European Union under these provisions to the extent they relied on the arguments concerning MOFCOM's findings of price undercutting, and MOFCOM's alleged failure to undertake a segmented analysis of the impact of imports of different grades of the subject product on the domestic industry.

As regards China's treatment of certain information supplied by the petitioners, the Panel found that MOFCOM allowed such information to remain confidential without objectively assessing "good cause" or scrutinizing the petitioners' showing of "good cause", contrary to Article 6.5 of the Anti-Dumping Agreement. The Panel also found that China acted inconsistently with Article 6.5.1 of the Anti-Dumping Agreement by failing to require petitioners to provide sufficiently detailed non-confidential summaries of information treated as confidential, or explanations as to why summarization was not possible.

The Panel rejected Japan's claim that China's reliance on facts available to calculate the dumping margin for Japanese exporters/producers of the subject product other than Sumitomo Metal Industries, Ltd. (SMI) and Kobe Special Tube Co., Ltd. (Kobe), is inconsistent with Article 6.8 and paragraph 1 of Annex II to the Anti-Dumping Agreement. The Panel also rejected the European Union's claim that China acted inconsistently with Article 6.8 and paragraphs 3 and 6 of Annex II to the Anti-Dumping Agreement by applying facts available in respect of certain information that SMST, an exporter/producer of the subject product based in the European Union, sought to rectify at verification.

The Panel found that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing adequately to disclose essential facts in connection with: (i) import prices, domestic prices, and price comparisons considered by MOFCOM in its injury determination; and (ii) the methodology used to calculate the margins of dumping for SMST and Tubos Inoxidables, S.A (Tubacex) (another exporter/producer of the subject product based in the European Union). However, the Panel rejected the complainants' claims that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing adequately to disclose essential facts in connection with: (i) the data underlying MOFCOM's determination of dumping;

and (ii) the determination and the calculation of the dumping margins for all Japanese producers/exporters of the subject product other than SMI and Kobe, and for all European Union producers/exporters other than SMST and Tubacex.

The Panel also found that China acted inconsistently with Articles 12.2 and 12.2.2 of the Anti-Dumping Agreement by failing to set forth in sufficient detail in its Final Determination notice or a separate report the reasons why MOFCOM considered it appropriate to apply the highest margin of dumping calculated for cooperating exporters as the all others rate for Japanese companies other than SMI and Kobe, and for European Union companies other than SMST and Tubacex.

As regards the European Union's claims regarding MOFCOM's dumping determination, the Panel found that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an administrative, selling and general costs (SG&A) amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product. The Panel also upheld the European Union's claim that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I of the Anti-Dumping Agreement by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification.

China, Japan and the European Union each appealed different aspects of the Panel's analysis and findings. Having provided the participants and third parties an opportunity to comment, the Appellate Body decided to consolidate the appellate proceedings in these disputes due to the significant overlap in the content of these disputes for which the appeals were filed on the same date. A single Appellate Body Division was selected to hear both appeals, and a single oral hearing was held by the Division.

4.6.1 Data for SG&A amounts – Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement

China appealed the Panel's assessment, in the EU Panel Report, of MOFCOM's determination of dumping for SMST. MOFCOM had calculated the margin of dumping for a particular type of HP-SSST, referred to in the Panel Reports as Grade B, on the basis of a comparison between SMST's export prices to China and a constructed "normal value", that is, the sum of: (i) the cost of production (COP) in the country of origin; and (ii) amounts for SG&A costs and profits.

China claimed that the Panel erred in concluding that the European Union's panel request, as it related to Articles 2.2.1 and 2.2.2 of the Anti-Dumping Agreement, provides a "brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU. China also claimed that the Panel erred in its interpretation and application of Article 2.2.2 of the Anti-Dumping Agreement, and acted inconsistently with its duties under Articles 11 and 12.7 of the DSU, and under Article 17.6(i) of the Anti-Dumping Agreement, when it found that MOFCOM had failed to determine an amount for SG&A costs for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

With respect to the Panel's terms of reference, the Appellate Body recalled that the European Union's panel request includes specific references to Articles 2.2, 2.2.1, 2.2.1.1, and 2.2.2 of the Anti-Dumping Agreement, and a specific listing of the grounds for the European Union's claims. The Appellate Body found it relevant to assess the nature of the provisions cited by the European Union in its panel request, including whether they contain a single obligation, or multiple distinct obligations.

As regards Article 2.2.1, the Appellate Body considered that provision to set out a *single* obligation whereby an investigating authority may disregard below-cost sales of the like product *only if* it determines that "such" below-cost sales display the three specific characteristics mentioned above. The Appellate Body further considered that the fact that the European Union did not include statements in its panel request

foreshadowing the arguments it would make in order to substantiate its claim under Article 2.2.1 did not mean that the European Union's panel request did not comply with the standard set out in Article 6.2 of the DSU. Accordingly, the Appellate Body upheld the Panel's finding that the European Union's panel request complies with the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in respect of the European Union's claim under Article 2.2.1 of the Anti-Dumping Agreement.

As regards Article 2.2.2, the Appellate Body considered that, read as a whole, Article 2.2.2 imposes a single obligation, set out in the chapeau, for investigating authorities to determine an amount for SG&A costs and profits on the basis of actual data that relates to production and sales in the ordinary course of trade. The Appellate Body found that the fact that the European Union did not include further language from the text of Article 2.2.2 did not limit or reduce the scope of the European Union's claim to "actual data". Accordingly, the Appellate Body upheld the Panel's finding that the European Union's panel request complies with the requirement in Article 6.2 of the DSU to "provide a brief summary of the legal basis of the complaint sufficient to present the problem clearly" in respect of the European Union's claim under Article 2.2.2 of the Anti-Dumping Agreement.

With respect to China's claims under Articles 11 and 12.7 of the DSU, the Appellate Body considered that China's arguments, in fact, concerned the proper construction and application of the requirement in Article 2.2.2 of the Anti-Dumping Agreement to determine constructed normal value on the basis of "actual data pertaining to production and sales in the ordinary course of trade". Having addressed China's arguments pertaining to the interpretation and application of Article 2.2.2, the Appellate Body did not consider there to be a basis to find that the Panel failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU, or that the Panel failed to provide the basic rationale for its findings as required under Article 12.7 of the DSU.

China further challenged the Panel's finding under Article 2.2.2 on several other grounds. The Appellate Body rejected all these grounds and upheld the Panel's finding, in the Panel Report, *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*, WT/DS460/R (EU Panel Report), that China acted inconsistently with Article 2.2.2 of the Anti-Dumping Agreement by failing to determine an SG&A amount for SMST on the basis of actual data pertaining to production and sales in the ordinary course of trade of the like product.

4.6.2 MOFCOM's alleged failure to take into account certain information provided during the verification visit

China claimed that the Panel erred in finding, in the EU Panel Report, that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's request for rectification of information relating to SMST's financial expenses on the sole basis that it had not been provided before the verification visit started. China argued that, by creating the obligation to act in line with the main purpose of the verification visit, the Panel read into Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement words that are not there.

The Appellate Body recalled that Article 6.7 of the Anti-Dumping Agreement grants Members a right "to carry out investigations in the territory of other Members". Regarding the relationship between Article 6.7 and Annex I to the Anti-Dumping Agreement, the Appellate Body observed that, while Article 6.7 lays out the basic framework for verifications in the territory of another Member, Annex I, including paragraph 7, sets out further parameters for the conduct of such investigations.

Turning to the immediate context of Article 6.7, the Appellate Body noted that Article 6.6 of the Anti-Dumping Agreement stipulates that investigating "authorities shall during the course of an investigation satisfy themselves as to the accuracy of the information supplied by interested parties upon which their

findings are based". The Appellate Body noted that this requirement does not mean, however, that investigating authorities are under an obligation to accept and use all information that is submitted to them. Rather, they have some degree of latitude in deciding whether to accept and use information submitted by an interested party during an on-the-spot investigation or thereafter. This latitude is limited, however, by the investigating authority's obligation under Article 6.6 to ensure that the information on which its findings are based is accurate, and by the legitimate due process interests of the parties to an investigation. The Appellate Body added that, throughout the investigation, an investigating authority must balance these due process interests with the need to control and expedite the investigating process, including during on-the-spot investigations.

As to the factors that bear upon the latitude of an investigating authority to accept or reject information submitted during an on-the-spot investigation, the Appellate Body stated that these may include, for example, the timing of the presentation of new information; whether the acceptance of new information would cause undue difficulties in the conduct of the investigation; whether the interested party has submitted voluminous amounts of information or merely seeks to have an arithmetical or clerical error corrected; whether the information at issue relates to facts that are "essential" within the meaning of Article 6.9 of the Anti-Dumping Agreement; and whether the information supplied by an interested party relates to the information specifically requested by the investigating authority.

Turning to the circumstances of the present dispute, the Appellate Body recalled that MOFCOM had requested SMST to prepare documents relating to Table 6-5, and that SMST sought to correct information contained in Tables 6-6 and 6-8, which were summarized in Table 6-5, and that the Panel, therefore, found a "clear and direct connection" between the information that SMST sought to correct and the information expressly requested by MOFCOM. The Appellate Body noted that China had not contested this finding, nor the finding that SMST's request for rectification concerned one specific piece of information, that is, the financial expenses of SMST's headquarters. Moreover, China had not contested that the only reason for the rejection of SMST's rectification request given by MOFCOM in the final determination was that "SMST did not raise this matter before the verification started". In these circumstances, and in the absence of any further explanation by MOFCOM, the Appellate Body saw no error in the Panel's finding that there had been no valid reason why MOFCOM did not accept the corrected information provided by SMST. The Appellate Body agreed with the Panel that, while MOFCOM expressly requested SMST to prepare certain information for the on-the-spot investigation, it then refused to take into account corrected information even though it had a "clear and direct connection" to the information that had been requested, and did so solely on the basis that it was not provided prior to the verification visit, and without providing other reasons.

For these reasons, the Appellate Body upheld the Panel's finding, in the EU Panel Report, that China acted inconsistently with Article 6.7 and paragraph 7 of Annex I to the Anti-Dumping Agreement by rejecting SMST's request for rectification only on the basis that it was not provided prior to verification.

4.6.3 Showing of "good cause" under Article 6.5 of the Anti-Dumping Agreement

China claimed that the Panel erred in its interpretation and application of Article 6.5 of the Anti-Dumping Agreement in finding that China acted inconsistently with its obligations under that provision. In particular, China argued that the Panel erred in construing Article 6.5 of the Anti-Dumping Agreement as imposing an obligation on an investigating authority to explain why it considers that confidential treatment is warranted.

The Appellate Body recalled that whenever information is treated as confidential, "transparency and due process concerns will necessarily arise because such treatment entails the withholding of information from other parties to an investigation". It further noted that an investigating authority "must objectively assess the 'good cause' alleged for confidential treatment, and scrutinize the party's showing in order to determine whether the submitting party has sufficiently substantiated its request". The Appellate Body added that a panel tasked with reviewing whether an investigating authority has objectively assessed the "good cause"

alleged by a party must examine this issue on the basis of the investigating authority's published report and its related supporting documents, and in the light of the nature of the information at issue and the reasons given by the submitting party for its request for confidential treatment. The Appellate Body noted that the type of evidence and the extent of substantiation the investigating authority must require will depend on the nature of the information at issue and the particular "good cause" alleged. However, the Appellate Body stressed that, in reviewing whether an investigating authority has assessed and determined objectively that "good cause" for confidential treatment has been shown to exist, it is not for the panel to engage in a *de novo* review of the record of the investigation and determine for itself whether the existence of "good cause" has been sufficiently substantiated by the submitting party.

Turning to the present case, the Appellate Body recalled that, in finding that there was no evidence that MOFCOM objectively assessed the "good cause" alleged for confidential treatment, the Panel stressed that it was not concluding that MOFCOM could *not* have treated the full text of the reports contained in appendix V and the appendix to the petitioners' supplemental evidence of 29 March 2012 as confidential information. Rather, the Panel found that there was "no evidence that MOFCOM ever considered whether good cause had been shown for such treatment", and thus no evidence of an objective assessment. The Appellate Body saw no error in the Panel's finding that, in the absence of any evidence that MOFCOM objectively assessed the "good cause" alleged, it had no basis to conclude that MOFCOM undertook an objective assessment and properly determined that the petitioners had shown "good cause" for their requests for confidential treatment. The Appellate Body also saw no error in the Panel's conclusion that there was no basis for it to find that "MOFCOM properly determined that the petitioners had shown 'good cause' for their requests for confidential treatment from the fact that MOFCOM ultimately granted their request for confidential treatment."

China also claimed that the Panel applied an erroneous standard of review and failed to make an objective assessment of the facts before it, contrary to the requirements of Article 11 of the DSU and Article 17.6(i) of the Anti-Dumping Agreement by: (i) erroneously limiting its review to assessing whether MOFCOM had explained why it considered that the full text of the reports at issue warranted confidential treatment; (ii) applying internally inconsistent reasoning in its analysis of the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement; and (iii) making the case for the complainants with regard to their claims under Article 6.5 of the Anti-Dumping Agreement.

First, the Appellate Body rejected China's claim that the Panel applied an incorrect standard of review because it failed to take into account the information on the record. The Appellate Body did not consider that the Panel would have complied with the applicable standard of review if, in the absence of any evidence of the objective assessment of the "good cause" by MOFCOM, it had engaged in a *de novo* review of evidence on the record of the investigation and determined for itself, or on the basis of subjective concerns of the petitioners, whether the request for confidential treatment was sufficiently substantiated and that "good cause" for such treatment objectively existed.

The Appellate Body next turned to examine China's claim that, contrary to Article 11 of the DSU, the Panel applied internally inconsistent reasoning in its analysis of the complainants' claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement. China contended that, unlike under Article 6.5, in its analysis under Article 6.5.1 of the Anti-Dumping Agreement, the Panel did not take issue with the absence of explanations by MOFCOM, and focused its examination, instead, on the non-confidential summaries provided by the petitioners, as well as the statements provided by the petitioners as to why summarization was not possible. Having examined the text of Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement, the Appellate Body noted that, although the subject matter of Article 6.5 and Article 6.5.1 is similar, the nature of the obligations that apply under the two provisions is different. The Appellate Body did not consider that the Panel's approach to addressing the complainants' claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement was "internally inconsistent". Rather, the Panel, in its approach, properly reflected the distinct nature of the substantive legal obligation at issue in each case. The Appellate Body, therefore, disagreed

with China that, contrary to Article 11 of the DSU, the Panel failed to make an objective assessment of the matter before it by applying an "internally inconsistent" reasoning in its examination of the claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement.

Finally, the Appellate Body turned to China's claim that the Panel acted inconsistently with Article 11 of the DSU by finding that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement on grounds not alleged by the complainants in their first written submissions contrary to paragraph 7 of the Joint Working Procedures of the Panel. The Appellate Body recalled that, in their panel requests, the complainants had alleged that China acted inconsistently with Article 6.5 because MOFCOM treated information supplied by the applicants as confidential "without good cause shown". The Appellate Body considered this language to have been sufficient to put China on notice that the question of whether MOFCOM objectively assessed the "good cause" alleged by the petitioners would be an issue in these disputes. The Appellate Body did not consider that the language of Paragraph 7 of the Joint Working Procedures of the Panel precluded the complainants from further elaborating on the claims identified in their panel requests in response to the Panel's questioning. Moreover, the Appellate Body recalled that panels are entitled to ask questions that they deem relevant to the consideration of the issues before them, and to "freely use arguments submitted by any of the parties – or to develop its own legal reasoning – to support its own findings and conclusions on the matter under its consideration". The Appellate Body therefore disagreed with China's argument that the Panel made the case for the complainants and thereby acted inconsistently with Article 11 of the DSU.

On the basis of the foregoing reasons, the Appellate Body upheld the Panel's findings, in both Panel Reports, that China acted inconsistently with Article 6.5 of the Anti-Dumping Agreement because MOFCOM permitted the full text of the four reports at issue to remain confidential without objectively assessing whether the petitioners had shown "good cause" for such treatment.

4.6.4 Disclosure of the essential facts – Article 6.9 of the Anti-Dumping Agreement

The European Union appealed the Panel's rejection, in the EU Panel Report, of the European Union's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to adequately disclose the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex. The European Union argued that, contrary to what the Panel's analysis appeared to suggest, the "[m]ere possession of the data set from which the facts have been selected is clearly insufficient for the interested party to defend its interests". The Appellate Body noted that essential facts are, therefore, "those that are salient for a decision to apply definitive measures, as well as those that are salient for a contrary outcome." In order to apply a definitive measure, an investigating authority must find dumping, injury to the domestic industry, and a causal link between dumping and injury; these findings, in turn, are based on various intermediate findings and conclusions reached by the investigating authority. Whether a particular fact is essential or "significant in the process of reaching a decision" depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, and the factual circumstances of each case, including the arguments and evidence submitted by the interested parties. The Appellate Body explained that it did not see how the mere fact that the investigating authority may be referring to data that are in the possession of an interested party would mean that it has disclosed the essential facts in a coherent way, so as to permit an interested party to understand the basis for each of the intermediate findings and conclusions reached by the authority and the decision whether or not to apply definitive measures such that it is able properly to defend its interests.

With regard to the disclosure of essential facts in the context of the determination of dumping, the Appellate Body stated that an investigating authority would be expected to disclose, *inter alia*, the home market and export sales being used, the adjustments made thereto, as well as the calculation methodology applied by the investigating authority to determine the margin of dumping. The Appellate Body pointed out that, while Article 6.9 does not prescribe a particular form for the disclosure of the essential facts, it does require that

the investigating authority discloses those facts in such a manner that an interested party can understand clearly what data the investigating authority has used, and how that data was used to determine the margin of dumping.

In the present case, the Appellate Body understood the Panel to have considered that a determination of whether an investigating authority has complied with its obligations under Article 6.9 hinges largely on whether the essential facts under consideration by the investigating authority were in the possession of an interested party affected by the determination. The Appellate Body disagreed with the Panel's proposition that a narrative description of the data used would constitute sufficient disclosure simply because the essential facts the authority is referring to "are in the possession of the respondent". The Appellate Body did not see how the mere fact that the investigating authority may be referring to data that is in the possession of an interested party would mean that it has disclosed the essential facts in a coherent way, so as to permit an interested party to understand the basis for the decision whether or not to apply definitive measures and to defend its interests.

In the light of the above, the Appellate Body found that the Panel erred in its interpretation of Article 6.9 of the Anti-Dumping Agreement, and subsequently relied on this erroneous interpretation in its findings. The Appellate Body, therefore, reversed the Panel's finding, in the EU Panel Report, rejecting the European Union's claim that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the essential facts in connection with the data underlying MOFCOM's determination of dumping concerning SMST and Tubacex.

The Appellate Body then turned to complete the analysis under Article 6.9 of the Anti-Dumping Agreement. Having reviewed MOFCOM's preliminary and final dumping disclosures, the Appellate Body considered that MOFCOM did not disclose the essential facts underlying its dumping determinations so as to permit the companies concerned to understand clearly what data MOFCOM had used, and how that data had been used to determine the margins of dumping for SMST and Tubacex. Hence, the Appellate Body found that China acted inconsistently with Article 6.9 of the Anti-Dumping Agreement because MOFCOM failed to disclose adequately the data underlying its determination of dumping concerning SMST and Tubacex.

4.6.5 MOFCOM's injury determination

Each of the three participants appealed different aspects of the Panel's findings relating to MOFCOM's injury determination. Hence, the Appellate Body began by summarizing the relevant obligations under Articles 3.1, 3.2, 3.4, and 3.5 of the Anti-Dumping Agreement regarding the conduct of injury investigations.

The Appellate Body recalled that Article 3.1 of the Anti-Dumping Agreement is an overarching provision that sets forth a Member's fundamental, substantive obligation concerning the injury determination, and informs the more detailed obligations in the succeeding paragraphs. Several of the remaining paragraphs of Article 3 then elaborate on the elements that must be objectively examined, based on positive evidence, pursuant to Article 3.1. The Appellate Body reiterated its statement in *China – GOES* that these paragraphs of Article 3 contemplate a logical progression in the investigating authority's examination leading to an ultimate determination of whether dumped imports are causing material injury to the domestic industry. The Appellate Body also emphasized that Article 3 does not prescribe a specific methodology to be relied on by an investigating authority in its determination of injury, and that there is no prescribed template or format that an investigating authority must adhere to in making its determination of injury, provided that its determination comports with the disciplines that apply under the discrete paragraphs of Article 3.

4.6.5.1 Price effects – Articles 3.1 and 3.2 of the Anti-Dumping Agreement

Japan and the European Union claimed that the Panel erred in rejecting their claim that MOFCOM's determination of price undercutting in respect of Grade C imports was inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to consider whether Grade C dumped imports had any price undercutting effect on domestic Grade C products, in the sense of placing downward pressure on those domestic prices by being sold at lower prices. The European Union also appealed the Panel's finding rejecting the European Union's claim that MOFCOM acted inconsistently with Articles 3.1 and 3.2 by extending its finding of price undercutting in respect of imports of Grades B and C HP-SSST to the domestic like product as a whole, including Grade A HP-SSST.

As regards the claim on appeal by both complainants, the Appellate Body considered that a proper reading of "price undercutting" suggests that the inquiry under Article 3.2 requires a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of domestic like products over the entire duration of the POI. An examination of such developments and trends includes assessing whether import and domestic prices are moving in the same or contrary directions, and whether there was a sudden and substantial increase in the domestic prices. The Appellate Body noted that what amounts to *significant* price undercutting, that is, undercutting is important, notable, or consequential, will necessarily depend on the circumstances of each case. In order to assess whether the observed price undercutting is significant, an investigating authority may, depending on the case, rely on all positive evidence relating to the nature of the product or product types at issue, how long the price undercutting has been taking place and to what extent, and, as appropriate, the relative market shares of the product types with respect to which the authority has made a finding of price undercutting. An investigating authority must, pursuant to Article 3.1, objectively examine all positive evidence, and may not disregard relevant evidence suggesting that prices of dumped imports have no, or only a limited, effect on domestic prices.

In the light of the above, the Appellate Body found that the Panel erred in its interpretation of Article 3.2 in finding that, when considering whether there has been significant price undercutting, an investigating authority may simply consider whether subject imports sell at lower prices than comparable domestic products. The Panel's finding rejecting the complainants' claims regarding MOFCOM's analysis of whether there was a significant price undercutting by Grade C dumped imports was based on the Panel's erroneous interpretation of Article 3.2. Therefore, the Appellate Body reversed the Panel's conclusions, in both Panel Reports, regarding MOFCOM's finding of price undercutting with respect to Grade C HP-SSST. The Appellate Body then completed the legal analysis and found that MOFCOM's assessment of whether there had been a significant price undercutting by Grade C imports from Japan and the European Union, as compared with the price of the domestic Grade C HP-SSST, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

With respect to the European Union's appeal that the Panel erred, in the EU Panel Report, in its assessment of MOFCOM's finding of price undercutting for the domestic product as a whole, the Appellate Body agreed with the Panel that an investigating authority is not required, under Article 3.2, to establish the existence of price undercutting for each of the product types under investigation, or with respect to the entire range of goods making up the domestic like product. The Appellate Body found, however, that with respect to its consideration of whether there has been significant price undercutting, an investigating authority must undertake a dynamic assessment of price developments and trends in the relationship between the prices of the dumped imports and those of the domestic like product over the duration of the POI, taking into account all relevant evidence including, where appropriate, the relative market shares of each product type. Furthermore, an investigating authority's consideration of price effects under Article 3.2 must provide a meaningful basis for subsequently determining whether the dumped imports are causing injury to the domestic industry, within the meaning of Article 3.5. The Appellate Body therefore disagreed with the Panel that MOFCOM was not required to assess price undercutting in relation to the proportion of

domestic production for which no price undercutting was found. Accordingly, the Appellate Body reversed the Panel's finding in the EU Panel Report, and found instead that MOFCOM's assessment of whether there had been a significant price undercutting by the dumped imports, as compared with the price of the domestic like product, is inconsistent with Articles 3.1 and 3.2 of the Anti-Dumping Agreement.

4.6.5.2 MOFCOM's impact analysis – Articles 3.1 and 3.4 of the Anti-Dumping Agreement

Japan claimed that the Panel erred in finding, in *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan*, WT/DS454/R (Japan Panel Report), that Japan's claim regarding MOFCOM's failure to examine whether dumped imports had explanatory force for the state of the domestic industry fell outside the Panel's terms of reference. In addition, Japan and the European Union claimed that the Panel erred, in both Panel Reports, in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in rejecting their claims that MOFCOM was required to undertake a segmented analysis of the impact of dumped imports on the state of the domestic industry, having found no significant increase in the volume of dumped imports, and having found price effects with respect to Grades B and C only.

With respect to Japan's claim regarding the Panel's terms of reference, the Appellate Body found that Japan's *arguments* regarding "explanatory force" did not constitute a separate "claim" under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. Accordingly, there was no basis for the Panel to consider, as it did, whether such "claim" was properly within the scope of its terms of reference. Consequently, the Appellate Body declared the Panel's findings with respect to such "claim", in the Japan Panel Report, to be moot and of no legal effect.

The Appellate Body then addressed the complainants' claims that the Panel erred, in both Panel Reports, in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement in rejecting their claims that MOFCOM was required to undertake a segmented analysis of the impact of dumped imports on the state of the domestic industry, having found no significant increase in the volume of dumped imports, and having found price effects with respect to Grades B and C only. The Appellate Body did not agree with the Panel that because the results of the inquiry under Article 3.2 are relevant for an investigating authority's causation and non-attribution analyses under Article 3.5, they are not relevant for the impact analysis under Article 3.4. Furthermore, the Appellate Body recalled that Article 3.4 does not merely require an examination of the state of the domestic industry, but contemplates that an investigating authority derive an understanding of the impact of subject imports on the basis of such an examination. The Appellate Body clarified that, similar to the consideration under Article 3.2, the examination under Article 3.4 contributes to, rather than duplicates, the overall determination required under Article 3.5. The Appellate Body added that, depending on the particular circumstances of each case, an investigating authority may therefore be required to take into account, as appropriate, the relative market shares of product types with respect to which it has made a finding of price undercutting; and the duration and extent of price undercutting, price depression or price suppression, that it has found to exist.

Hence, the Appellate Body found that the Panel erred in its interpretation of Articles 3.1 and 3.4 of the Anti-Dumping Agreement to the extent it found that the results of the inquiries under Article 3.2 are not relevant to the impact analysis under Article 3.4. The Appellate Body understood the Panel to have relied on its erroneous interpretation of Articles 3.1 and 3.4 in rejecting the complainants' claims that China acted inconsistently with Articles 3.1 and 3.4 of the Anti-Dumping Agreement because MOFCOM was required to, but did not, undertake a segmented impact analysis. Accordingly, the Appellate Body reversed these findings by the Panel. Having found that China acted inconsistently with its obligations under Articles 3.1 and 3.2 of the Anti-Dumping Agreement, and in the light of the Panel's finding that MOFCOM's analysis of the impact of dumped imports on the domestic industry is inconsistent with China's obligations under

Articles 3.1 and 3.4 because MOFCOM failed to evaluate properly the magnitude of the margin of dumping, the Appellate Body did not consider that additional findings under Articles 3.1 and 3.4 were required to resolve these disputes.

4.6.5.3 MOFCOM's causation analysis – Articles 3.1 and 3.5 of the Anti-Dumping Agreement

Each of the three participants appealed different aspects of the Panel's findings on causation. In respect of the Japan Panel Report, China alleged that the Panel erred in concluding that Japan's panel request, as it relates to MOFCOM's reliance on the market share of dumped imports in order to determine causation, provides a "brief summary of the legal basis of the complaint sufficient to present the problem clearly", as required by Article 6.2 of the DSU. In respect of both Panel Reports, China submitted that the Panel incorrectly interpreted and applied Article 3.5 of the Anti-Dumping Agreement in finding that MOFCOM improperly relied on the market share of dumped imports in determining that such imports, through price undercutting, caused injury to the domestic industry. China also asserted that the Panel acted inconsistently with Article 11 of the DSU by ruling on a claim for which the complainants failed to make a *prima facie* case. For their part, Japan and the European Union contended that the Panel acted inconsistently with Article 11 of the DSU in finding that the complainants had not brought independent claims under Article 3.5 – other than those concerning MOFCOM's reliance on the market share of dumped imports and MOFCOM's non-attribution analysis.

With respect to China's claim regarding Japan's panel request, the Appellate Body found that the language in Japan's panel request, when read together with the reference to Articles 3.1 and 3.5 of the Anti-Dumping Agreement, was sufficiently clear to present, in a manner consistent with Article 6.2 of the DSU, the problem concerning MOFCOM's analysis of whether "the dumped imports are, through the effects of dumping, as set forth in paragraphs 2 and 4, causing injury" to the domestic industry, as required under Article 3.5 of the Anti-Dumping Agreement. Hence, the Appellate Body found that the Panel did not act inconsistently with Article 6.2 of the DSU by addressing Japan's claims under Article 3.5 of the Anti-Dumping Agreement regarding MOFCOM's reliance on the market share of subject imports, in the Japan Panel Report.

In respect of both Panel Reports, China argued that, in making findings regarding "MOFCOM's reliance on the market share of subject imports", the Panel acted inconsistently with Article 11 of the DSU by ruling on a claim that had not been articulated by the complainants, and in relation to which the complainants had raised no arguments. In the alternative, China argued that the Panel deprived China of its due process rights and "made the case" for both Japan and the European Union by ruling on a claim in respect of which the complainants had failed to make a *prima facie* case. The Appellate Body considered that the complainants put forward sufficient evidence *and* legal argument to support their claims under Article 3.5 of the Anti-Dumping Agreement. Accordingly, the Appellate Body found that the Panel did not act inconsistently with Article 11 of the DSU.

China further alleged that the Panel erred in its interpretation and application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement, and acted inconsistently with Article 11 of the DSU, in concluding that MOFCOM's reliance on the market share of dumped imports was not sufficient to establish that these imports had a relatively big impact on the price of the domestic like products, and that they caused injury to the domestic industry through their price effects. The Appellate Body recalled that the task of a WTO panel is to examine whether the investigating authority has adequately performed its investigative function, and has adequately explained how the evidence supports its conclusions. The Appellate Body stated that it follows from the requirement that the investigating authority provide a "reasoned and adequate" explanation for its conclusions that the entire rationale for the investigating authority's decision must be set out in its report on the determination. This is not to say that the meaning of a determination cannot be explained or buttressed by referring to evidence on the record. Yet, in all instances, it is the explanation provided in the report of the investigating authorities and its related supporting documents that is to be

assessed in order to determine whether the determination was sufficiently explained and reasoned. For this, and a variety of other reasons, the Appellate Body upheld the Panel's findings, in both Panel Reports, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM improperly relied on the market share of dumped imports, and its flawed price effects and impact analyses, in determining that a causal link existed between dumped imports and material injury to the domestic industry, and made no finding regarding cross-grade price effects whereby price undercutting by Grade B and C imports might be shown to affect the price of domestic Grade A HP-SSST.

China argued that the Panel's findings relating to MOFCOM's non-attribution analysis relied entirely on MOFCOM's alleged failure to properly determine whether a causal link between dumped imports and material injury to the domestic industry existed. Referring to its contention that the Panel's findings in relation to MOFCOM's determination of the causal link (including those made in respect of MOFCOM's finding of price correlation) should be reversed, China contended that the Panel's finding that MOFCOM's non-attribution analysis is inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement should, as a consequence, also be reversed.

The Appellate Body observed that China's claims on appeal challenging the Panel's non-attribution analysis were purely consequential in the sense that they relied on China's arguments made in the context of challenging the Panel's finding regarding MOFCOM's causation determination which the Appellate Body had already rejected. The Appellate Body therefore upheld the Panel's findings, in both Panel Reports, that China acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement because MOFCOM failed to ensure that the injury caused by the decrease in apparent consumption and the increase in domestic production capacity was not attributed to the dumped imports.

Finally, Japan and the European Union submitted that the Panel failed to make an objective assessment of the matter before it as required by Article 11 of the DSU by failing to examine the complainants' claims of independent violations of Articles 3.1 and 3.5 of the Anti-Dumping Agreement arising from MOFCOM's price effects and impact analyses. In the light of the language in the complainants' panel requests, the Appellate Body understood the complainants to have sought to challenge MOFCOM's causation analysis on several grounds, including on the basis of alleged flaws in MOFCOM's price effects and impact analyses. The Appellate Body noted that the complainants raised many of the same arguments in support of their claims under Article 3.5 as they did in support of their claims under Articles 3.2 and 3.4 of the Anti-Dumping Agreement, but saw no error in the Panel's finding that the complainants had not claimed, before the Panel, that MOFCOM's price effects and impact analyses, taken alone, resulted in *independent* violations of Article 3.5 of the Anti-Dumping Agreement. The Appellate Body therefore upheld the Panel's finding that the complainants had not advanced any independent Article 3.5 claims – other than those concerning MOFCOM's reliance on market shares and MOFCOM's non-attribution analysis – concerning MOFCOM's price effects and impact analyses.

4.6.6 Additional panel working procedures concerning the protection of business confidential information (BCI)

With respect to the EU Panel Report, the European Union claimed that the Panel erred in its interpretation and application of Articles 17.7 and 6.5 of the Anti-Dumping Agreement, and Article 18.2 of the DSU, when ruling on certain preliminary issues raised by the European Union regarding the additional working procedures adopted by the Panel to protect business confidential information (BCI).

The Appellate Body found that the Panel conflated: (i) the confidentiality obligations under Anti-Dumping Agreement setting the framework for confidential treatment of information that is applicable in the context of domestic anti-dumping proceedings; and (ii) the confidentiality obligations applicable in WTO dispute settlement proceedings. In addition, the Panel conflated: (i) confidentiality requirements generally applicable in WTO proceedings or in anti-dumping proceedings as foreseen in the

above-mentioned provisions of the DSU and the Anti-Dumping Agreement; and (ii) the additional layer of protection of sensitive business information provided under special procedures adopted by a panel for the purposes of a particular dispute. The Appellate Body further stated that, contrary to what the Panel appears to have suggested, whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI, is to be determined in each case by a panel. It rests upon the panel to adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential. In addition, where necessary, a panel must draw appropriate inferences from a party's failure to provide requested information to the panel. The Appellate Body also clarified that any additional procedures adopted by a panel to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the relevant provisions of the DSU and other covered agreements (including the Anti-Dumping Agreement).

For these reasons, the Appellate Body declared moot and of no legal effect the Panel's findings and legal reasoning concerning its adoption of BCI procedures in the EU Panel Report. The Appellate Body did not consider it necessary to make further findings on this matter in order to resolve the present disputes.

4.7 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico,* WT/DS381/AB/RW

These proceedings under Article 21.5 of the DSU arose from certain challenges brought by Mexico against the United States' labelling regime for "dolphin-safe" tuna products and the implementation by the United States of the DSB's recommendations and rulings in *US – Tuna II (Mexico)*.

Commercial tuna fishing can have harmful effects on marine mammals, including dolphins. In the Eastern Tropical Pacific Ocean (ETP), there is a regular association between tuna and dolphins, in that schools of tuna tend to swim beneath dolphins. Certain vessels operating in this ocean area thus employ the fishing technique known as "setting on" dolphins, which involves chasing and encircling the dolphins with a purse-seine net in order to catch the tuna swimming beneath them. Mexico's tuna fishing fleet consists primarily of large purse-seine vessels operating in the ETP using the method of setting on dolphins. By contrast, the United States' and other tuna fishing fleets catch tuna primarily outside the ETP using other fishing methods.

In order to ensure that consumers are not misled about whether tuna products contain tuna caught in a manner that adversely affects dolphins, and thereby to contribute to the protection of dolphins, the United States established a domestic regime for labelling tuna products as "dolphin-safe". The United States' measure (the original tuna measure) consisted of: the Dolphin Protection Consumer Information Act ("DPCIA"); the regulations implementing the DPCIA; and a ruling by a US Federal Appeals Court in *Earth Island Institute v. Hogarth* relating to the application of the DPCIA (Hogarth ruling). In the original proceedings, the Appellate Body found, *inter alia*, that the US dolphin-safe labelling regime treated Mexican tuna products less favourably than like products of US and other origins, thus being inconsistent with Article 2.1 of the TBT Agreement. As a result, on 9 July 2013, the United States adopted a legal instrument entitled "Enhanced Document Requirements to Support Use of the Dolphin Safe Label on Tuna Products" (2013 Final Rule), which made certain changes to the regulations implementing the DPCIA, while leaving the DPCIA and the Hogarth ruling unchanged. Mexico considered that the United States had not brought its dolphin-safe labelling regime into compliance with the covered agreements, and that its measure (the amended tuna measure) remains inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994.

The amended tuna measure sets out several conditions for access to the dolphin-safe label. First, it disqualifies from that label all tuna products derived from tuna caught by setting on dolphins. Second, all other tuna products – i.e. those containing tuna caught by other fishing methods – are eligible for the label only if no dolphins were killed or seriously injured in the sets in which the tuna were caught. In order to verify that these conditions are met, the measure prescribes a number of certification and tracking and verification requirements, which distinguish among three categories of fisheries: (i) large purse-seine vessels in the ETP (the ETP large purse-seine fishery); (ii) purse-seine vessels outside the ETP (the non-ETP purse-seine fishery); and (iii) other fisheries, which include non-purse-seine vessels in any ocean area and small purse-seine vessels in the ETP (all other fisheries). In order to obtain the dolphin-safe label, all tuna products must be accompanied by a certification that no dolphins were killed or seriously injured in the sets in which the tuna were caught. In addition, tuna products derived from tuna caught by purse-seine vessels in the first two categories of fisheries must be accompanied by a certification that no setting on dolphins occurred during the voyage on which the tuna were caught. For tuna products originating in the ETP large purse-seine fishery, the relevant certifications must be provided by both the vessel captain and an observer approved by the International Dolphin Conservation Program (IDCP). For tuna products originating in other fisheries, the relevant certifications have to be provided by the vessel captain only. However, certain provisions in the amended tuna measure (the determination provisions) authorize the US National Marine Fisheries Service (NMFS) Assistant Administrator to impose observer certification in any such other fishery upon determining that the risks to dolphins in that fishery are similar to those arising in the ETP large purse-seine fishery. At the time of the Article 21.5 proceedings, the NMFS Assistant Administrator had not made any such determination. Finally, access to the dolphin-safe label requires documentary proof that dolphin-safe tuna has been segregated from non-dolphin-safe tuna from the moment of the catch through the entire processing chain. This requirement applies to all categories of fisheries. However, tuna caught in the ETP large purse-seine fishery is subject to more detailed requirements, as tracking and verification of tuna caught in this fishery must be conducted consistently with the international Agreement on the International Dolphin Conservation Program (AIDCP), to which both the United States and Mexico are parties. In particular, the AIDCP requires that tuna products originating in the ETP large purse-seine fishery be accompanied by Tuna Tracking Forms (TTFs), used to separately record dolphin-safe and non-dolphin-safe sets on a particular fishing trip.

Preliminarily, the Panel disagreed with the United States that only the 2013 Final Rule, adopted in response to the DSB's rulings and recommendations in the original proceedings, was at issue in these Article 21.5 proceedings. The Panel found, instead, that the measure properly at issue before it was the amended tuna measure *as a whole* – i.e. all the legal instruments constituting the original tuna measure as amended by the 2013 Final Rule. The Panel also observed that even if the 2013 Final Rule left some elements of the original measure unchanged, it may have altered their legal import and significance by amending other elements of the US dolphin-safe labelling regime.

The Panel considered that Mexico had identified three regulatory distinctions, drawn by the amended tuna measure, whose design and application give rise to less favourable treatment within the meaning of Article 2.1 of the TBT Agreement, namely: (i) the "eligibility criteria", i.e. the disqualification from the label of tuna products derived from tuna caught by setting on dolphins, coupled with the eligibility for such a label of tuna products deriving from tuna caught by other fishing methods; (ii) the "certification requirements", i.e. the observer certification requirements in the ETP large purse-seine fishery, coupled with the absence of such requirements in other fisheries; and (iii) the "tracking and verification requirements", i.e. the different record-keeping and verification requirements for tuna caught in the ETP large purse-seine fishery and for tuna caught in other fisheries. Thus, the Panel proceeded to undertake separate analyses, and to make separate findings, in respect of each of the three elements of the amended tuna measure.

With respect to the eligibility criteria, the Panel expressed the view that the Appellate Body had, in the original proceedings, definitively established that the United States can disqualify tuna caught by setting on dolphins from accessing the dolphin-safe label. The Panel thus reaffirmed the Appellate Body's finding that,

to the extent that they modify the conditions of competition to the detriment of Mexican tuna products, the eligibility criteria are not inconsistent with Article 2.1. As regards the certification requirements, the Panel found that observer coverage involves the expenditure of significant resources. It therefore held that the certification requirements impose a greater burden on tuna products originating in the ETP large purse-seine fishery than on like products originating in other fisheries. Since the Mexico catches tuna primarily in the ETP large purse-seine fishery, the Panel concluded that the certification requirements measure modifies the conditions of competition to the detriment of Mexican tuna products. The Panel also found that certifying the dolphin-safe status of tuna catch is a highly complex task, and that the United States had not sufficiently explained why it assumed that captains would be capable of carrying it out. The Panel concluded that the certification requirements are not even-handed, and are therefore inconsistent with Article 2.1.[28] The Panel further found that the "determination provisions" also lacks even-handedness, as they are designed in a manner whereby like tuna products may be subject to different requirements even where the risks to dolphins in fisheries outside the ETP large purse-seine fishery are the same as those inside that fishery. Finally, the Panel found that the tracking and verification requirements applicable to tuna caught in the ETP large purse-seine fishery are significantly more burdensome than those applicable to tuna caught in other fisheries, thus modifying the conditions of competition to the detriment of Mexican tuna products. In the Panel's view, the United States had failed to explain sufficiently how the different tracking and verification requirements relate to the policy objectives pursued by the amended tuna measure. The Panel thus found that the tracking and verification requirements are not even-handed, and are therefore inconsistent with Article 2.1.

In addressing the consistency of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994, the Panel considered it appropriate to refer back to its findings made in the context of its detrimental impact analysis under Article 2.1. It thus found that, by modifying the conditions of competition to the detriment of like Mexican tuna products, the eligibility criteria, the certification requirements, and the tracking and verification requirements are inconsistent with Articles I:1 and III:4. With respect to the United States' defence under Article XX, the Panel found that the three sets of requirements relate to the conservation of exhaustible natural resources and are therefore provisionally justified under subparagraph (g) of Article XX of the GATT 1994. It exercised judicial economy on the question of whether such requirements are necessary to protect animal life or health under subparagraph (b). Turning to the issue of whether the three sets of requirements are applied in a manner consistent with the chapeau of Article XX, the Panel relied on its reasoning concerning whether such requirements are even-handed under Article 2.1 of the TBT Agreement. Thus, the Panel held that the eligibility criteria are applied consistently with the chapeau. Conversely, it found that the certification requirements and the tracking and verification requirements are not applied consistently with the chapeau, and are therefore not justified under Article XX.[29]

4.7.1 Business confidential information

The Panel redacted certain text from its Report, which it characterized as containing business confidential information (BCI). On appeal, Mexico also redacted certain portions of its appellee's submission. The European Union, as a third participant, asserted that its ability to comment on the Panel Report had been impaired by the Panel's redactions. The Appellate Body saw no indication in the Panel record suggesting that either Mexico or the United States requested the adoption of special procedures to protect BCI, or that the Panel had adopted such special procedures. Also, the Panel did not indicate the criteria used to identify the information considered to constitute BCI. Therefore, the Appellate Body did not see the legal basis for

[28] One panelist issued a separate opinion stating that, even assuming that captain certification is less accurate than observer certification, the United States may legitimately "calibrate" its measure so as to tolerate a larger margin of error in fisheries outside the ETP, which present a lower rate of tuna-dolphin association and therefore a lower risk to dolphins.

[29] For the same reasons outlined in fn 25 above, one panelist issued a separate opinion stating that the certification requirements are calibrated to the different risks to dolphins arising in different fisheries.

the Panel to redact portions of its reasoning from its Report. The Appellate Body observed that, absent any request from the participants, procedures for additional protection of BCI did not apply in the appellate proceedings.

4.7.2 The amended tuna measure as a whole

Mexico claimed that the Panel erred in reaching findings of inconsistency in a narrow manner rather than concluding that the amended tuna measure, as a whole, is inconsistent with Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994. Specifically, Mexico considered that the Panel erred in finding that only two of the three elements of the amended tuna measure – the "certification requirements" and the "tracking and verification requirements", but not the "eligibility criteria" – are inconsistent with the covered agreements. According to Mexico, it is the amended tuna measure that violates WTO provisions and not its individual elements considered in isolation.

The Appellate Body noted that the Panel segmented its analysis and separately addressed the three elements of the amended tuna measure at every stage of its analysis under the substantive obligations contained in Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994, as well as the exceptions contained in Article XX of the GATT. In addition, the Panel made *discrete findings* regarding the conformity of *each element* with the applicable legal obligation. At no point in its Report did the Panel reach a finding of consistency or inconsistency of the amended tuna measure *as a whole* with a substantive obligation of the WTO covered agreements.

Referring to its decisions in *EC – Asbestos* and *EC – Seal Products*, the Appellate Body highlighted that analysing a measure in a segmented manner may raise concerns when the constituent parts of the measure are interrelated and operate in an integrated way, particularly in cases where the inclusion or exclusion of certain elements in the definition of the measure can affect the legal characterization, or substantive analysis of the measure. The Appellate Body indicated that, as a general matter, it is not necessarily inappropriate for a panel, in analysing the conformity of a measure with obligations under the WTO covered agreements, to proceed by assessing different elements of the measure in a sequential manner. In scenarios where the elements of a measure are interrelated, however, and certain elements cannot be properly understood without reference to other elements of the measure, a segmented approach may create artificial distinctions constituting legal error. Furthermore, depending on the nature of the legal obligation at issue, such a segmented approach may raise concerns when a panel fails to make an overall assessment that synthesizes its reasoning or intermediate conclusions concerning related elements of a measure at issue so as to reach a proper finding of consistency or inconsistency in respect of that measure.

The Appellate Body noted that various "connections" between the different elements of the amended tuna measure were relevant to the regulatory distinctions examined by the Panel. First, the measure establishes a labelling regime consisting of various components that are aimed at fulfilling the same objectives of providing information to consumers and contributing to the protection of dolphins. Moreover, the two substantive conditions for access to the dolphin-safe label – "no setting on dolphins" and "no dolphins killed or seriously injured" – are both defined by, and verified through, the associated certification and tracking and verification requirements. Thus, for all covered fisheries, compliance with these substantive conditions is demonstrated through the provision of certain certifications. Finally, the rules regarding the tracking of tuna are also based on the substantive conditions and depend, *inter alia*, on the certifications accompanying tuna products. The Appellate Body thereby concluded that the substantive conditions for gaining access to the dolphin-safe label cannot be properly understood without reference to the certification and tracking and verification requirements that define, and demonstrate compliance with, those very conditions.

The Appellate Body expressed concern with the Panel's decision to conduct its analysis in a segmented manner. For instance, in its consideration of the "eligibility criteria", the Panel examined only the substantive condition of "no setting on dolphins", thereby, excluding consideration of *the other* substantive condition

for access to the dolphin-safe label, namely the "no dolphins killed or seriously injured" condition. Similarly, in its analysis of the certification and tracking and verification requirements, the Panel considered that such requirements are relevant only to tuna eligible for the dolphin-safe label, that is, only to tuna *not* caught by setting on dolphins. In so proceeding, the Panel did not assess how the certification and tracking and verification requirements interrelate with each other and with the other substantive condition for access to the label. The Appellate Body observed that, while the amended tuna measure introduced certain changes in the original measure, these did not alter the overall architecture of the US dolphin-safe labelling regime by somehow undermining the existence of interrelationships among its constituent elements, but rather reinforced the nature of those interrelationships. The Panel, however, did not adopt an analytical approach to the measure similar to the one used by the panel and the Appellate Body in the original proceedings, and did not, in its reasoning, discuss how the various findings that it made regarding the separate sets of requirements related to one another, or the basis on which it proceeded to make discrete findings of consistency and inconsistency notwithstanding the interrelationships among the various elements of the measure.

The Appellate Body saw no merit in analysing the consequences of the Panel's segmented approach in the abstract. Rather, the Appellate Body recognized that a proper appreciation of the extent to which the interrelationships are relevant, and the extent to which a segmented analysis had a bearing on the outcome of the legal analysis, would be a function of the particular legal obligations under examination – in this case, those set out in Article 2.1 of the TBT Agreement and Articles I:1, III:4, and XX of the GATT 1994. Therefore, the Appellate Body decided to analyse whether the Panel's segmented approach amounted to, or led it to commit, legal error when it examined the specific claims raised on appeal.

4.7.3 Article 2.1 of the TBT Agreement

The Appellate Body began by recalling that the inquiry into whether a technical regulation accords less favourable treatment to imported products than to like domestic products or like products imported from other countries consists of a two-step analysis. The first step of the analysis focuses on whether the technical regulation at issue modifies the conditions of competition to the detriment of such imported products vis-à-vis like products of domestic origin and/or like products originating in any other country. The second step of the analysis focuses on whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction.

As for the burden of demonstrating these elements, the Appellate Body recalled that the burden of proof rests upon the party, whether complaining or defending, who asserts a particular claim or defence. Under Article 2.1, this means that a complainant must show that, under the technical regulation at issue, the treatment accorded to imported products is less favourable than that accorded to like domestic products or like products originating in any other country. Provided that it has shown detrimental impact, a complainant may, therefore, make a *prima facie* showing of less favourable treatment by, for example, adducing evidence and arguments showing that the measure is not even-handed, which would suggest that the measure is inconsistent with Article 2.1. If, however, the respondent shows that the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction, it follows that the challenged measure is not inconsistent with Article 2.1.

The Appellate Body cautioned that these rules and principles must not be applied in an unduly formalistic or mechanistic fashion, nor inhibit the substantive analysis that must be undertaken by a panel. In seeking to make out a claim of *de facto* discrimination, a complainant may elect to rely on some or all of the same regulatory distinctions and evidence as to how they are designed and operate in the relevant market both to establish *de facto* detrimental impact and to show that the regulatory distinctions drawn under the technical regulation involve a lack of even-handedness. While the complaining party bears the burden of making its *prima facie* case, the responding party must prove the case it seeks to make in response, and each party bears the burden of substantiating the assertions that it makes. Having promulgated the technical

regulation containing the regulatory distinctions that result in the detrimental impact, the responding Member will be best situated to adduce the arguments and evidence needed to explain why, contrary to the complainant's assertions, the technical regulation *is* even-handed and thus why the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. The Appellate Body observed that, as noted in the original proceedings, although the burden of proof to show that the US dolphin-safe labelling provisions were inconsistent with Article 2.1 was on Mexico as the complainant, it was for the United States to support its assertion that its regime was "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans.

4.7.3.1 Less favourable treatment – Detrimental impact on Mexican tuna products

On appeal, the United States claimed that the Panel erred in its analysis and findings concerning whether the certification and tracking and verification requirements under the amended tuna measure modify the conditions of competition to the detriment of Mexican tuna products in the US market. The United States argued, first, that by grounding its findings on the difference in costs and burdens imposed on tuna products originating inside and outside the ETP large purse-seine fishery, the Panel improperly made the case for Mexico. This is because Mexico had not presented arguments and evidence concerning such costs and burdens in its written submissions, but had instead asserted that the different certification and tracking and verification requirements would lead to greater inaccuracies in the dolphin-safe label for tuna products derived from tuna caught outside the ETP large purse-seine fishery. Second, according to the United States, the Panel failed to explain how any difference in costs and burdens flowing from the certification and tracking and verification requirements modifies the conditions of competition to the detriment of Mexican tuna products in the light of the relevant features of the US market. Third, the United States submitted that the Panel did not properly establish a genuine relationship between, on the one hand, the certification and tracking and verification requirements and, on the other hand, any detrimental impact on the competitive opportunities for Mexican tuna products. In the United States' opinion, any detriment to Mexican tuna products is attributable to Mexico's own fishing practices and international obligations under the AIDCP rather than to the amended tuna measure.

The Appellate Body began by noting that, in the original proceedings, both the panel and the Appellate Body had assessed the detrimental impact of the original tuna measure by focusing on that measure's effect on relative access to the dolphin-safe label for Mexican, US, and other tuna products. In the original proceedings, the Appellate Body had concluded that the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods had a detrimental impact on Mexican tuna products, because this distinction excluded most Mexican products from access to the dolphin-safe label, while allowing most like products of US and other origins to access the label.

The Appellate Body noted that the findings made in the original proceedings took account of the operation of all the labelling conditions under the original tuna measure considered together. The Appellate Body further considered that those original findings of detrimental impact constituted relevant background informing the assessment of the detrimental impact of the amended tuna measure. The Appellate Body observed, however, that, in its detrimental impact analysis, the Panel did not take into account the interrelationship between the different labelling conditions under the amended tuna measure, but rather conducted segmented analyses for each of the "eligibility criteria", the "certification requirements", and the "tracking and verification requirements". After having conducted these three segmented analyses, the Panel did not seek to synthesize them, or to examine more holistically the implications that the combined operation of the different sets of requirements might have had for its analysis of the detrimental impact of the amended tuna measure. The Appellate Body held that, by carrying out isolated assessments of the detrimental impact associated with discrete sets of requirements under that measure, the Panel failed to ascertain the manner in which the different labelling conditions operate together and affect the conditions of competition for Mexican tuna products in the US market.

Moreover, the Appellate Body considered that the Panel's analysis, being conducted in the context of Article 21.5 proceedings, should have also encompassed consideration of whether the different labelling conditions under the amended tuna measure operate in a way that produces the same, or that modifies, the detrimental impact that was found to exist in the original proceedings. For instance, the Panel could have examined the extent to which the certification and tracking and verification requirements introduced by the 2013 Final Rule for tuna products originating outside the ETP large purse-seine fishery had the effect of reducing (or increasing) access to the dolphin-safe label for such tuna products, thereby narrowing (or broadening) the detrimental impact of the regulatory differences in treatment of Mexican tuna products *as compared to* like products of US or other origin in terms of access to the dolphin-safe label. The Appellate Body noted, however, that the Panel did not conduct such an examination, despite the parties' arguments that the detrimental impact of the amended tuna measure remains substantially unchanged from that of the original tuna measure.

Turning to the specifics of the Panel's discrete analyses of detrimental impact based on the costs and burdens associated with the certification and tracking and verification requirements, the Appellate Body noted the Panel's statement that such requirements are relevant only to tuna eligible to receive the dolphin-safe label, i.e. only to tuna not caught by setting on dolphins. Thus, the Appellate Body understood the Panel to have compared the costs and burdens that the different certification and tracking and verification requirements entail for, on the one hand, Mexican tuna products derived from tuna caught other than by setting on dolphins, and, on the other hand, tuna products of US or other origin derived from tuna caught other than by setting on dolphins. In other words, even though the Panel had found *all* tuna products to be "like" for the purposes of this dispute, its analyses of the detrimental impact of the certification and tracking and verification requirements focused on a *subset* of the relevant like products – namely, tuna products eligible for the dolphin-safe label.

The Appellate Body referred to its previous jurisprudence indicating that once the relevant "like" products have been identified, Article 2.1 of the TBT Agreement requires a panel to compare, on the one hand, the treatment accorded under the measure at issue to the group of like products imported from the complaining Member with, on the other hand, that accorded to the group of like domestic products and/or the group of like products originating in all other countries. The Appellate Body expressed the view that, in doing so, a panel should not artificially limit its analysis to only subsets of the relevant groups of like products in a manner that risks skewing the proper comparison for purposes of determining detrimental impact. In the light of the above, the Appellate Body considered that the Panel was called upon to compare the treatment that the amended tuna measure accords to the *group* of Mexican tuna products with the treatment accorded to the *groups* of like products from the United States and other countries.

The Appellate Body added that, in order to reach its conclusions, the Panel was not required to find that the certification and tracking and verification requirements impose additional costs and burdens on *every* Mexican tuna product as compared to *every* like product from the United States and other countries. However, it noted the Panel's acknowledgment that, under the amended tuna measure, most Mexican tuna products are still excluded from access to the dolphin-safe label because they are derived from tuna caught by setting on dolphins. To the Appellate Body, this finding suggests that very few, if any, Mexican tuna products are eligible for the dolphin-safe label and thus subject to any additional costs and burdens flowing from the certification and tracking and verification requirements. In the Appellate Body's view, the Panel's analysis of the treatment that such requirements accord to this category of tuna products did not have sufficient explanatory force to support a finding that the *group* of Mexican tuna products is detrimentally affected by the certification and tracking and verification requirements. Accordingly, the Appellate Body found that the Panel artificially skewed the proper comparison for purposes of determining detrimental impact, rather than grounding its analysis on a full comparison of the relevant groups of like products in the light of the particular facts and circumstances of this dispute.

Based on the foregoing, the Appellate Body concluded that the Panel erred in its analysis of whether the amended tuna measure modifies the conditions of competition of Mexican tuna products in the US market within the meaning of Article 2.1 of the TBT Agreement. Having so found, the Appellate Body did not consider it necessary to rule on the claims of error raised on appeal by the United States regarding the Panel's analysis of the detrimental impact of the certification and tracking and verification requirements.

4.7.3.2 Less favourable treatment – Stemming exclusively from a legitimate regulatory distinction

The United States challenged the Panel's articulation of the legal test under Article 2.1 of the TBT Agreement for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction. In addition, the United States and Mexico each raised certain claims of error under this second step of the analysis of less favourable treatment in connection with the Panel's application of the law to the facts.

4.7.3.2.1 The legal standard for determining whether the detrimental impact stems exclusively from a legitimate regulatory distinction

The United States argued that the Panel articulated an incorrect legal standard for determining whether the detrimental impact on imported products stems exclusively from a legitimate regulatory distinction. In particular, the United States contended that the Panel wrongly indicated that the question in the second step of the analysis of less favourable treatment under Article 2.1 is whether detrimental treatment is explained by, or at least reconcilable with, the objectives pursed by the measure at issue.

The Appellate Body indicated that the context provided by Annex 1.1, Article 2.2, and the second, fifth, and sixth recitals of the preamble of the TBT Agreement informs the interpretation of the second step of the "less favourable treatment" analysis under Article 2.1. In particular, the sixth recital makes clear that technical regulations may pursue legitimate objectives, but must not be applied in a manner that would constitute a means of arbitrary or unjustifiable discrimination. Since this language has important parallels with the chapeau of Article XX of the GATT 1994, the Appellate Body expressed the view that the jurisprudence under the chapeau of Article XX is relevant to understanding the content of the second step of the "less favourable treatment" standard under Article 2.1. Notwithstanding these important parallels, the Appellate Body cautioned that there are also significant differences between the analyses under Article 2.1 and the chapeau of Article XX of the GATT 1994, as the legal standards applicable under the two provisions differ. In the Appellate Body's view, the Panel properly recognized both these similarities and differences.

As regards the specific insight that the Panel drew from the jurisprudence under the chapeau of Article XX, the Appellate Body recalled that one of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective with respect to which the measure has been provisionally justified under one of the subparagraphs of Article XX. Given, in particular, the reference in the sixth recital of the preamble of the TBT Agreement to "arbitrary and unjustifiable discrimination", the Appellate Body did not consider the Panel's adoption of this test as part of its "less favourable treatment" analysis to be problematic.

At the same time, the Appellate Body emphasized that, depending on the nature of the measure at issue and the circumstances of the case at hand, additional factors – beyond the question of whether the discrimination can be reconciled with the policy objective – could also be relevant to the analysis of whether the discrimination is arbitrary or unjustifiable. In this connection, the Appellate Body also indicated that an examination of whether a measure is designed or applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination is not the *only* way to assess whether a measure lacks even-handedness. Therefore, the Appellate Body stated that a panel does not err by assessing whether the detrimental impact

can be reconciled with, or is rationally related to, the policy pursued by the measure at issue, so long as, in doing so, it does not preclude consideration of other factors that may also be relevant to the analysis. In the present case, the Appellate Body did not see that the Panel's *articulation* of the legal standard precluded such consideration.

On the basis of the foregoing discussion, the Appellate Body found that the United States had not established that the Panel erred in recognizing the relevance of the concept of "arbitrary or unjustifiable discrimination" in the chapeau of Article XX of the GATT 1994, or in identifying an examination of whether the detrimental treatment can be reconciled with, or is rationally related to, the measure's objectives as potentially useful for purposes of the second step of the analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement.

4.7.3.2.2 Whether the detrimental impact of the amended tuna measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction

The Appellate Body made certain preliminary observations regarding the analytical approach taken by the Panel in its assessment of whether the detrimental impact of the amended tuna measure on Mexican tuna products stems exclusively from a legitimate regulatory distinction. The Appellate Body recalled that the Panel separately considered the consistency with Article 2.1 of the TBT Agreement of: (i) the eligibility criteria; (ii) the certification requirements; and (iii) the tracking and verification requirements. The Appellate Body observed that the amended tuna measure comprises various elements that work together towards the objectives pursued by the measure. The Appellate Body reiterated that due cognizance must be accorded to the recommendations and rulings made by the DSB in the original proceedings. It also noted that, in their submissions to the Panel, both the United States and Mexico advanced arguments relating to the respective risks to dolphins associated with different methods of fishing inside and outside the ETP.

4.7.3.2.2.1 The eligibility criteria

Mexico asserted that the Panel erred in finding that the Appellate Body had already "settled" in the original dispute the issue of "even-handedness" concerning the granting of eligibility for the dolphin-safe label to tuna products containing tuna caught by fishing methods other than setting on dolphins. According to Mexico, the Appellate Body did not make the findings of even-handedness or consistency with Article 2.1 that the Panel imputed to it.

The Appellate Body observed that its main findings in the original proceedings reveal that it did *not* make the findings attributed to it by the Panel. In particular, the Appellate Body noted that, the Appellate Body report contains no statement that the United States is "entitled" to disqualify tuna caught by setting on dolphins from ever being labelled as dolphin-safe, much less that the eligibility criteria are "even-handed", and, accordingly, are not inconsistent with Article 2.1 of the TBT Agreement. In fact, in the original proceedings the original tuna measure was found to *lack* even-handedness and, for that reason, to be *inconsistent* with Article 2.1 of the TBT Agreement.

The Appellate Body emphasized that "even-handedness" is a relational concept that must be tested through a comparative analysis. In the Appellate Body's view, whether a regulatory distinction that involves a denial of access to the dolphin-safe label in respect of setting on dolphins is even-handed depends not only on how the risks associated with this method of fishing are addressed, but also on whether the risks associated with other fishing methods in other fisheries are addressed, commensurately with their respective risk profiles, in the labelling conditions that apply in respect of tuna caught in such other fisheries. The Appellate Body thus indicated that, by finding that the even-handedness of disqualifying setting on dolphins had been "settled" in the original proceedings, the Panel precluded a proper relational and comparative analysis of the regulatory distinctions and the treatment of both groups of products (i.e. those that are ineligible for access to the dolphin-safe label and those that are eligible for such access).

For the foregoing reasons, the Appellate Body found that the Panel erred in finding that the Appellate Body "settled" the issue of the even-handedness of the eligibility criteria in the original proceedings.

4.7.3.2.2.2 The different certification and tracking and verification requirements

The United States argued that the Panel applied an incorrect legal standard in failing to consider whether the different sets of certification and tracking and verification requirements are each "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the ocean. For the United States, the central question for the Appellate Body in the original proceedings was whether the relevant regulatory distinction is even-handed in the manner in which it addressed the risks to dolphins arising from different fishing methods in different areas of the ocean. The United States added that the Panel erred in not similarly taking the Appellate Body's guidance on calibration into account.

The Appellate Body began by recalling that, in the original proceedings, its analysis of whether the detrimental impact of the amended tuna measure stemmed exclusively from a legitimate regulatory distinction focused on the question of whether the original tuna measure was, as asserted by the United States, "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans. This question was answered through an examination of the conditions of access to the dolphin-safe label for tuna products derived from tuna caught by setting on dolphins within the ETP large purse-seine fishery, on the one hand, with those applied to tuna products derived from tuna caught outside that fishery by fishing methods other than setting on dolphins, on the other hand. Accordingly, the Appellate Body stated that the Panel's inquiry in these Article 21.5 proceedings should have included an assessment of whether, under the amended tuna measure, the differences in labelling conditions for tuna products originating in the ETP large purse-seine fishery, on the one hand, and for tuna products originating in other fisheries, on the other hand, are "calibrated" to the risks to dolphins arising from tuna fishing operations in different fisheries. In the Appellate Body's view, the Panel did not expressly conduct such an assessment.

Having reached this preliminary conclusion, the Appellate Body then turned to examine more specifically the inquiry that the Panel did undertake. In the Appellate Body's view, the manner in which the Panel applied its legal test to ascertain the even-handedness of the certification and tracking and verification requirements presented certain difficulties. The first and most important of these arose from the segmented analysis adopted by the Panel. Since the certification and tracking and verification requirements work together with the substantive conditions of the amended tuna measure to limit access to the dolphin-safe label, it is only when the conditions of access are viewed together that the nexus between the regulatory distinctions found in the measure and the measure's policy objectives can be understood. The Appellate Body therefore considered that the Panel's decision to adopt a segmented analytical approach prevented it from properly applying the legal standard that it had articulated.

The Appellate Body then turned to consider whether, albeit not expressly assessing the "calibration" of the amended tuna measure, the Panel's analyses of the even-handedness of the respective sets of certification and tracking and verification requirements in fact took due account of the different risks to dolphins associated with tuna fishing in different fisheries.

In its analysis of the eligibility criteria, the Panel found that there is a difference in the nature of the risks posed to dolphins by the fishing method of setting on dolphins, as opposed to other fishing methods. The Appellate Body observed that, in reaching this finding, the Panel appeared to have focused solely on its understanding that the *unobserved* harms differed as between setting on dolphins and other fishing methods. As a result, the Panel did not consider the relative risks posed by the different fishing methods in different areas of the oceans in respect of *observed* mortality or serious injury, and therefore did not resolve the questions of the overall levels of risk in the different fisheries and how they compare to each other.

The Appellate Body noted that, in examining the different certification requirements, the Panel focused on a comparison of the different tasks carried out by observers in the ETP large purse-seine fishery and by captains in other fisheries, as well as their respective expertise, training, and education for purposes of providing certifications. Conversely, the Panel's analysis did not encompass a clear identification of the respective risks arising to dolphins inside and outside the ETP large purse-seine fishery, or an assessment of whether such relative risks were tackled in an even-handed manner by the different certification requirements.

Next, the Appellate Body observed that, in analysing the even-handedness of the tracking and verification requirements, the Panel dismissed the United States' argument that differences in such requirements are justified or explained in the light of the higher degree of risk to dolphins in the ETP large purse-seine fishery. The Panel opined that any higher risk does not explain why the tracking and verification requirements, which by their very nature concern the movement of fish *subsequent to the time of catch*, differ between fisheries to the detriment of like Mexican tuna products. The Appellate Body was not convinced that considerations of the similarities and differences in risks may not be reflected in and relevant to all stages of the capture and subsequent transport and processing of tuna. For the Appellate Body, it was clear that the Panel did not seek to identify the risks in respect of eligible tuna caught both inside and outside the ETP large purse-seine fishery in this part of its analysis. Nor did the Panel compare the different tracking and verification requirements in the light of those risks and the amended tuna measure's objectives concerning the protection of dolphins and providing accurate consumer information.

In sum, the Appellate Body considered that the Panel's analysis failed to encompass consideration of the relative risks to dolphins in different fisheries, and of whether the distinctions that the amended tuna measure draws in terms of the different conditions of access to the dolphin-safe label are explained in the light of the those risks. Accordingly, the Appellate Body found that, in assessing Mexico's claim that the certification requirements and the tracking and verification requirements are not "even-handed", the Panel erred in its application of the second step of the "treatment no less favourable" test under Article 2.1 of the TBT Agreement.

The United States raised two challenges to the Panel's findings regarding the "determination provisions". First, the United States claimed that, in finding that the determination provisions lack even-handedness, the Panel erred by improperly making the case for Mexico. Second, the United States contended that the Panel erred in making its findings on the determination provisions based solely on their design, and not on their application.

The Appellate Body began by indicating that, like the Panel, it saw the determination provisions as an integral part of the certification system put in place by the amended tuna measure. As such, they are relevant to the analysis of whether the United States brought its dolphin-safe labelling regime into conformity with the recommendations and rulings of the DSB. For the Appellate Body, the United States could not have been unaware of the legal issues relating to the role of the determination provisions during the present Article 21.5 proceedings. In particular, the original panel and Appellate Body reports contain several references to such provisions and their content. In the present compliance proceedings, the determination provisions are within the terms of reference of the Panel since they were identified by Mexico in its request for the establishment of a panel. The Appellate Body further observed that, in its first written submission, Mexico identified the determination provisions in its arguments concerning the lack of even-handedness of the certification requirements and highlighted key features relating to the design of the determination provisions in responses to the Panel's questions and in its comments on the United States' responses to the Panel's questions. In addition, the Appellate Body noted that the United States had an opportunity to counter Mexico's allegations and to put forward its own arguments on the design of such provisions. However, the United States chose not to do so, instead simply maintaining that Mexico had made no *prima facie* case with regard to the determination provisions.

Based on its review of the Panel record, viewed against the backdrop of the original proceedings, the Appellate Body found that the United States failed to establish that the Panel improperly made the case for Mexico by finding that, by virtue of the determination provisions, the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction.

Concerning the United States' second claim, the Appellate Body recalled its prior jurisprudence that the relevant inquiry under the second step of Article 2.1 probes the legitimacy of regulatory distinctions through careful scrutiny of whether they are *designed and applied* in an even-handed manner. The Appellate Body explained, however, that this does not preclude that, depending on the relevant circumstances of a particular case, it may be appropriate for a panel's examination of the measure at issue to focus on its design, rather than also examining its application.

In criticizing the Panel for not examining how the determination provisions are *applied*, the United States appeared to be taking issue with the fact that the Panel never assessed whether the *evidence on the record* established that there is currently regular and significant association or regular and significant mortality or serious injury in any fishery other than the ETP large purse-seine fishery. However, in the Appellate Body's view, the Panel was rather focusing on the content, structure, and expected operation of the measure at issue with a view to delineating the scope of application of each of the relevant determinations that can be made by the NMFS Administrator under the amended tuna measure and that, when made, trigger an additional requirement to provide observer certification for tuna caught in the specific fishery concerned.

On this basis, the Appellate Body found that the United States had not established that the Panel erred in its assessment of whether the determination provisions are even-handed under Article 2.1 of the TBT Agreement.

4.7.3.2.3 Article 11 of the DSU

Mexico raised several claims that the Panel acted inconsistently with Article 11 of the DSU in its analysis of the eligibility criteria and both participants raised Article 11 claims regarding the Panel's analysis of the certification requirements.

With respect to the Panel's analysis of the eligibility criteria, Mexico claimed, first, that the Panel erred in "changing" the factual findings regarding setting on dolphins from the original proceedings. The Appellate Body did not agree with Mexico that the Panel's findings regarding the unobserved harms to dolphins due to setting on dolphins are somehow "stronger" than in the original proceedings, or that the Panel breached Article 11 of the DSU in reaching them. Mexico submitted that the Panel erred in finding that fishing methods other than setting on dolphins have no unobservable adverse effects. The Appellate Body noted that this was not an accurate characterization of the findings made by the Panel. Accordingly, the Appellate Body considered that Mexico had not properly substantiated its claim under Article 11 of the DSU, nor established that the Panel found that fishing methods other than setting on dolphins have no unobservable adverse effects. Third, Mexico asked the Appellate Body to reverse the Panel's finding that the Appellate Body made a factual finding that dolphin sets under the rules of the AIDCP are more harmful to dolphins than other fishing methods. The Appellate Body was not persuaded that the Panel had made such a finding, and considered that Mexico's arguments in support of this claim of error were not sufficiently substantiated to establish a breach of Article 11 of the DSU.

With respect to the Panel's analysis of the certification requirements, the United States contended that the Panel acted inconsistently with Article 11 of the DSU by arriving at a finding that is unsupported by the evidence on the record. In the United States' view, there was no evidence on which to base a finding that there are two "gaps" in the determination provisions. The Appellate Body recalled that it had examined

and rejected this argument in the context of the United States' challenge to the Panel's application of Article 2.1 to the determination provisions. Consequently, the Appellate Body found that the Panel had not acted inconsistently with its duties under Article 11.

The Appellate Body then turned to Mexico's claims under Article 11. In its first claim, Mexico asserted that the Panel erred in rejecting Mexico's arguments and evidence that fishing vessel captains have an economic self-interest in not reporting that dolphins were killed or seriously injured. The Appellate Body highlighted that Mexico did *not* single out any particular exhibit that the Panel misinterpreted or failed to take into consideration. Nor did Mexico point to any specific mistakes regarding the Panel's objectivity in its assessment of the evidence. Consequently, the Appellate Body considered that Mexico had not established that the Panel acted inconsistently with Article 11 of the DSU. Mexico's second claim under Article 11 of the DSU was that the Panel failed to address the evidence contained in Exhibit MEX-161, which, in Mexico's view, indicates that dolphins associate with tuna and are intentionally set upon in the Indian Ocean. While the Panel did not expressly discuss Exhibit MEX-161 in the section of the Panel Report addressing the certification requirements, the Appellate Body highlighted that the content of this exhibit is entirely compatible with the Panel's findings, which acknowledged the existence of association between tuna and dolphins in the Indian Ocean.

For the above reasons, the Appellate Body found that neither participant had established that the Panel acted inconsistently with its duty to conduct an objective assessment of the matter pursuant to Article 11 of the DSU.

4.7.3.2.4 Overall conclusions under Article 2.1 of the TBT Agreement

The Appellate Body found that, taken together, the errors that it had identified in the two steps of the Panel's analysis of "treatment no less favourable" under Article 2.1 of the TBT Agreement constituted error in the application of that provision to the amended tuna measure. Accordingly, the Appellate Body reversed the Panel's discrete findings, in paragraph 8.2 of the Panel Report, that:

a. the eligibility criteria in the amended tuna measure do not accord less favourable treatment to Mexican tuna products than that accorded to like products from the United States and to like products originating in any other country, and are thus consistent with Article 2.1 of the TBT Agreement;

b. the different certification requirements in the amended tuna measure accord less favourable treatment to Mexican tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement; and

c. the different tracking and verification requirements in the amended tuna measure accord less favourable treatment to Mexican tuna products than that accorded to like products from the United States and to like products originating in any other country, in violation of Article 2.1 of the TBT Agreement.

4.7.3.3 Completion of the legal analysis

The Appellate Body then turned to consider whether it could complete the legal analysis and rule on whether the amended tuna measure had brought the United States into compliance with the DSB's recommendations and rulings in the original proceedings.

The Appellate Body began by examining whether the labelling conditions under the amended tuna measure, taken together, modify the conditions of competition to the detriment of Mexican tuna

products in the US market. The Appellate Body highlighted that, as the original panel found and as both participants acknowledged in these compliance proceedings, access to the dolphin-safe label constitutes an "advantage" on the US market for tuna products by virtue of that label's "significant commercial value". The Appellate Body further recalled that, in the original proceedings, the Appellate Body relied on the following factual findings by the original panel: (i) the Mexican tuna cannery industry is vertically integrated, and the major Mexican tuna products producers and canneries own their vessels, which operate in the ETP; (ii) at least two thirds of Mexico's purse-seine tuna fleet fishes in the ETP by setting on dolphins and is therefore fishing for tuna that would not be eligible to be contained in a "dolphin-safe" tuna product under the US dolphin-safe labelling provisions"; (iii) the US fleet currently does not practice setting on dolphins in the ETP; and (iv) as the practices of the US and Mexican tuna fleets currently stand, most tuna caught by Mexican vessels, being caught in the ETP by setting on dolphins, would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna caught by US vessels is potentially eligible for the label. The Panel did not make any factual findings that go against those original findings, and, at the oral hearing in the present appellate proceedings, both Mexico and the United States confirmed that the relevant factual situation had not changed since the original proceedings.

Since the amended tuna measure maintains the overall architecture and structure of the original tuna measure – in particular, in terms of the regulatory distinction between tuna products derived from tuna caught by setting on dolphins and tuna products derived from tuna caught by other fishing methods – and given the participants' agreement that the relevant factual situation has not changed from the original proceedings, the Appellate Body found that, by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the amended tuna measure, similar to the original measure, modifies the conditions of competition to the detriment of Mexican tuna products in the US market.

Having made this finding, the Appellate Body turned to address whether the detrimental impact on Mexican tuna products stems exclusively from a legitimate regulatory distinction. In particular, the Appellate Body indicated that, in order to assess whether the amended tuna measure is adequately calibrated to the relative adverse effects on dolphins arising outside the ETP large purse-seine fishery as compared to those inside that fishery, it should examine whether there are relevant factual findings by the Panel or undisputed evidence on the record regarding the different risk profiles in these different fisheries.

The Appellate Body observed that the Panel had before it considerable evidence concerning the nature and scope of the relative risks associated with different fishing practices in different areas of the oceans. The Appellate Body, however, did not see that the Panel in these proceedings set out to examine the extent of mortality or serious injury arising from fishing methods in different areas of the oceans, so as to enable itself to gauge properly the overall relative risks or levels of harm to dolphins arising in those fisheries. In the absence of such an assessment, the Panel limited its ability to determine whether the discriminatory aspects of the amended tuna measure can be explained as being properly tailored to, or commensurate with, the differences in such risks in the light of the objective of protecting dolphins from adverse effects arising in different fisheries. For similar reasons, the Panel's limited analysis in respect of the relative risk profiles in turn constrained the Appellate Body's ability to complete the legal analysis in this regard.

However, the Appellate Body indicated that there are other features of the amended tuna measure that are not dependent on an assessment of the relative risks associated with different fishing methods in different areas of the oceans. The Appellate Body referred, in particular, to the "determination provisions", whereby the NMFS Assistant Administrator may require observer certification for specific fisheries upon masking certain determinations. In particular, observer certification is required if the Administrator determines: (i) within the non-ETP purse-seine fishery, that there is regular and significant tuna-dolphin association, similar to the tuna-dolphin association in the ETP; or (ii) within "all other fisheries", that there is a regular and significant mortality or serious injury of dolphins. The Appellate Body noted that, by design, the determination provisions apply to all fisheries other than the ETP large purse-seine fishery where the risk of

harm to dolphins approximates that existing in the ETP large purse-seine fishery. Like the Panel, however, the Appellate Body observed that the determination provisions do not address *all* scenarios in which there may be heightened risks of harm to dolphins associated with particular fishing methods in fisheries other than the ETP large purse-seine fishery.[30] In other words, the determination provisions do not provide for the substantive conditions of access to the dolphin-safe label to be reinforced by observer certification in *all* circumstances of comparably high risks.

Because of the above findings concerning the determination provisions, the Appellate Body considered that it had not been demonstrated that the differences in the dolphin-safe labelling conditions under the amended tuna measure are calibrated to, or commensurate with, the risks to dolphins arising from different fishing methods in different areas of the oceans. Since it therefore followed that the detrimental impact of the amended tuna measure does not stem exclusively from a legitimate regulatory distinction, the Appellate Body found that the amended tuna measure is inconsistent with Article 2.1 of the TBT Agreement.

4.7.4 Articles I:1 and III:4 of the GATT 1994

The United States claimed on appeal that, for the same reasons as those expressed with respect to the Panel's detrimental impact analysis under Article 2.1 of the TBT Agreement, the Panel erred in finding that the certification and tracking and verification requirements under the amended tuna measure: (i) provide an "advantage, favour, privilege, or immunity" to tuna products from other Members that is not "accorded immediately and unconditionally" to like products from Mexico, in a manner inconsistent with Article I:1; and (ii) accord "less favourable treatment" to Mexican tuna products than that accorded to like domestic products, in a manner inconsistent with Article III:4.

The Appellate Body noted that, similar to its analysis of detrimental impact under Article 2.1 of the TBT Agreement, the Panel carried out three discrete assessments of consistency with Articles I:1 and III:4 of the GATT 1994 for each of the "eligibility criteria", the "certification requirements", and the "tracking and verification requirements". With respect to the eligibility criteria, the Panel assessed the extent to which the disqualification of tuna products derived from tuna caught by setting on dolphins affects the relative competitive conditions of Mexican, US, and other tuna products in the US market. As to the certification and tracking and verification requirements, the Panel focused its examination on the different costs and burdens that such requirements impose on tuna products derived from tuna caught inside and outside the ETP large purse-seine fishery. In conducting these analyses, the Panel expressly referred to its legal and factual findings of detrimental impact made in the context of Article 2.1 of the TBT Agreement.

The Appellate Body stated that Article 2.1 of the TBT Agreement and Articles I:1 and III:4 of the GATT 1994 differ in their textual formulations and in the legal standards they embody. Yet, it agreed with the Panel that the relevant inquiry under all those provisions hinges on the question of whether the measure at issue modifies the conditions of competition in the responding Member's market to the detriment of products imported from the complaining Member vis-à-vis like domestic products or like products imported from any other country. Accordingly, the Appellate Body considered that the Panel's reliance, in its analyses under Articles I:1 and III:4 of the GATT 1994, on its reasoning and on certain findings that it had made in analysing detrimental impact under Article 2.1 of the TBT Agreement was not, in itself, inappropriate.

[30] For example, the determination provision applicable to the non-ETP purse-seine fishery does not provide for a determination of "regular and significant mortality or serious injury" to be made. The Appellate Body thus expressed concern that this determination provision does not allow for comparable regulation of a risk scenario where there is regular and significant mortality or serious injury in respect of practices other than setting on dolphins by purse-seine vessels inside as compared to outside the ETP. The Appellate Body also highlighted concerns in respect of the determination provision applicable to "all other fisheries". The Appellate Body indicated that it would expect that any determination outside the ETP large purse-seine fishery would entail not only the heightened certification requirements, but also tracking and verification requirements that work together with and reinforce certification in addressing this heightened risk.

However, the Appellate Body took the view that the concerns it had identified with respect to the Panel's analysis of detrimental impact under Article 2.1 of the TBT Agreement applied with equal force to the Panel's analysis under Articles I:1 and III:4 of the GATT 1994. First, by conducting segmented analyses of each of the three sets of requirements under the amended tuna measure, the Panel failed to take account of the interlinkages between such requirements and to conduct a holistic assessment of how those various labelling conditions adversely affect the conditions of competition for Mexican tuna products in the US market. Because it adopted such a segmented approach, the Panel failed to assess meaningfully the extent to which the detrimental impact that was found to exist in the original proceedings might have been altered by the new requirements introduced by the amended tuna measure. Second, in analysing the consistency with Articles I:1 and III:4 of the certification and tracking and verification requirements, the Panel engaged in a comparison of the treatment accorded to subsets of the relevant groups of like products, instead of comparing the treatment accorded to the group of Mexican tuna products with that accorded to the groups of like products of US or other origin, without identifying a proper basis for doing so.

Thus, the Appellate Body concluded that the Panel erred in its analysis of the consistency of the amended tuna measure with Articles I:1 and III:4 of the GATT 1994, and reversed the Panel's findings that the eligibility criteria, the different certification requirements, and the different tracking and verification requirements are each inconsistent with Articles I:1 and III:4 of the GATT 1994. Having done so, the Appellate Body did not consider it necessary to address the other claims of error on appeal raised by the United States'.

4.7.5 The chapeau of Article XX of the GATT 1994

Mexico and the United States each appealed certain aspects of the Panel's analysis under the chapeau of Article XX of the GATT 1994. With respect to the Panel's assessment of whether the eligibility criteria entail discrimination between countries where the same conditions prevail, Mexico appealed the Panel's finding that the conditions prevailing in fisheries where tuna is caught by setting on dolphins and in fisheries where that method is not used are not the same. In Mexico's view, the Panel's finding was in error because there are observable and unobservable mortalities and injuries in tuna fisheries other than the ETP large purse-seine fishery, and the relevant conditions are therefore the same. The United States, for its part, submitted that the Panel erred in finding that the conditions prevailing inside and outside the ETP large purse-seine fishery are the same for purposes of the certification and tracking and verification requirements. According to the United States, the relevant condition in this dispute is the relative harm (both observed and unobserved) suffered by dolphins in different fisheries, and the findings in the original proceedings affirmed that this condition is not the same in the ETP large purse-seine fishery as compared to other fisheries.

The Appellate Body noted that, in its analysis of the eligibility criteria under the chapeau of Article XX, the Panel found that the relevant condition was the harms to dolphins arising from the unobservable effects of fishing methods. Specifically, highlighting the harms that dolphins suffer as a result of being chased and encircled with nets – even when this does not result in death or serious injury – the Panel expressed the view that the conditions prevailing in fisheries where tuna is caught by setting on dolphins and fisheries where that method is not used are not the same. By contrast, in its analysis of the certification requirements, the Panel considered that the relevant condition was the harms to dolphins arising from death or serious injury. The Panel opined that, for the purposes of this element of the measure, the conditions prevailing among Members are the same, because dolphins may be killed or seriously injured by all fishing methods in all oceans, and accordingly accurate certification is necessary regardless of the particular fishery in which tuna is caught. The Panel did not make any statement regarding conditions prevailing between countries in its analysis of the tracking and verification requirements.

The Appellate Body recalled that the chapeau of Article XX requires that the measure at issue not be applied in a manner that constitutes arbitrary or unjustifiable discrimination between countries where the same conditions prevail. Accordingly, the Appellate Body expressed concern with the Panel's findings that different sets of conditions are relevant for different aspects of the amended tuna measure, and with

the Panel's ultimate conclusion that the relevant conditions are not the same for some aspects, but are the same for others. For the Appellate Body, the Panel's approach was a consequence of its segmented analysis, which led it to isolate its consideration of different elements of the measure without examining the manner in which those elements are interrelated, and without reconciling the different conclusions it drew in respect of these elements. The Appellate Body did not see a basis for the Panel to find that the conditions relevant for the certification or tracking and verification requirements would differ from those relevant for the eligibility criteria, given that access to the dolphin-safe label is conditioned on the satisfaction of all of the labelling conditions that are contained in the amended tuna measure.

The participants further appealed certain aspects of the Panel's analysis of whether the discrimination entailed by the amended tuna measure between countries where the same conditions prevail is "arbitrary or unjustifiable". In respect of the Panel's examination of the eligibility criteria, Mexico claimed that the Panel erred by not focusing its assessment on the objectives of the measure rather than on the policy objective reflected in Article XX(g) of the GATT 1994. In Mexico's opinion, the Panel improperly grounded its analysis on the different type, nature, quality, magnitude, or regularity of the adverse effects resulting from the different fishing methods. According to Mexico, there is no basis to "calibrate" between different levels of dolphin mortalities or serious injuries in achieving the policy objective under Article XX(g). The United States, for its part, claimed that the Panel misunderstood the analysis of whether discrimination is "arbitrary or unjustifiable" to consist of a single-factor test focused on the connection between the discrimination and the objectives of the measure at issue, rather than a cumulative analysis of all factors that could be relevant such a determination. Further, according to the United States, the Panel erroneously relied entirely on its Article 2.1 analysis. Finally, the United States claimed that the Panel erred by failing to take account of the different risks to dolphins arising inside and outside the ETP large purse-seine fishery.

The Appellate Body stated, based on past jurisprudence, that the analysis of whether discrimination is arbitrary or unjustifiable should focus on the cause of the discrimination or the rationale put forward to explain its existence, and that one of the most important factors in conducting such an analysis is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective pursued by the measure at issue. Therefore, the Appellate Body disagreed with the United States that the Panel had set out an overly narrow articulation of the relevant legal standard. It also disagreed with Mexico that the Panel erred by focusing on whether there is a rational relationship with the objectives of the amended tuna measure, rather than the objective reflected in Article XX(g). The Appellate Body highlighted that, by virtue of an examination of whether a measure is provisionally justified under one of the subparagraphs, the objective of the measure will already have been tested against one of the objectives set out in Article XX. Finally, the Appellate Body took the view that it was appropriate for the Panel to rely on and refer to the legal standard it articulated under Article 2.1 of the TBT Agreement in the context of its reasoning under the chapeau of Article XX of the GATT 1994. The Appellate Body stressed that the Panel did not merely import its findings under Article 2.1, but rather relied on a similar analytical process under the two provisions by focusing on the existence of arbitrary or unjustifiable discrimination, while also examining other dimensions of the chapeau analysis that were not developed in the context of its analysis under Article 2.1.

The Appellate Body then turned to the Panel's application of the legal standard in this dispute. The Appellate Body noted that, in its examination of the eligibility criteria under the chapeau of Article XX, the Panel relied on what it understood to be the Appellate Body's settled conclusion that the United States is entitled to disqualify tuna products containing tuna caught by setting on dolphins from accessing the dolphin-safe label, while not disqualifying tuna caught by other fishing methods. The Appellate Body recalled its finding that the Panel misread the Appellate Body's findings in the original proceedings. Because of this misreading, the Panel failed to conduct a proper relational and comparative analysis of the treatment of the group of products that are ineligible for access to the dolphin-safe label, as compared to the group of products. This

also prevented the Panel from engaging in the central question in these compliance proceedings, namely, whether the changes introduced by the United States to the amended tuna measure bring this measure into compliance with the recommendations and rulings of the DSB.

In respect of the Panel's analysis of the certification and tracking and verification requirements, the Appellate Body held that while one of the most important factors in the assessment of arbitrary or unjustifiable discrimination is the question of whether the discrimination can be reconciled with, or is rationally related to, the policy objective of the measure at issue, this factor may not be dispositive of the entire inquiry. Depending on the nature of the measure at issue and the circumstances of the case at hand, there could be additional factors that may also be relevant to the overall assessment. According to the Appellate Body, in the circumstances of this dispute, an additional relevant factor is the question of whether the different requirements of the amended tuna measure can be justified or explained in the light of the likelihood that dolphins would be adversely affected in the course of tuna fishing operations in the respective fisheries. The Appellate Body restated its view, summarized in paragraph 4.42 above, that the Panel did not sufficiently consider the relative risks of harm to dolphins in different fisheries, or whether the different conditions of access to the dolphin-safe label under the amended tuna measure are explained in the light of the relative risk profiles.

Based on the foregoing, the Appellate Body found that the Panel erred in its analyses of the eligibility criteria, the certification requirements, and the tracking and verification requirements under the chapeau of Article XX. The Appellate Body therefore reversed the Panel's finding that the eligibility criteria are applied consistently with the chapeau of Article XX of the GATT 1994, as well as the Panel's separate findings that the certification requirements and the tracking and verification requirements are each applied inconsistently with the chapeau of Article XX of the GATT 1994.

4.7.6 Completion of the legal analysis under the GATT 1994

Having reversed the Panel's findings under Articles I:1, III:4, and XX of the GATT 1994, the Appellate Body proceeded to complete the legal analysis under those provisions.

Beginning with the consistency of the amended tuna measure with Articles I:1 and III:4, the Appellate Body held that the relevant question is whether that measure modifies the conditions of competition in the US market to the detriment of Mexican tuna products vis-à-vis US tuna products or tuna products imported from any other country. The Appellate Body recalled the finding in the original proceedings that, under the original tuna measure, most Mexican tuna products would not be eligible for inclusion in a dolphin-safe product under the US dolphin-safe labelling provisions, while most tuna products of US and other origins were potentially eligible for the label. The Appellate Body further noted the Panel's factual finding that the disqualification from the dolphin-safe label of tuna products containing tuna caught by setting on dolphins, which remains unchanged from the original tuna measure, still has the effect of denying most Mexican tuna products access to the label. The Appellate Body did not see any Panel findings or uncontested evidence on the record indicating that the positions of tuna products from the United States or other countries in terms of access to the dolphin-safe label have changed as a result of the certification and tracking and verification requirements introduced by the 2013 Final Rule. It observed, moreover, that the participants agreed that the amended tuna measure modifies the conditions of competition to the detriment of Mexican tuna products in a manner similar to the original tuna measure.

Based on the foregoing, the Appellate Body found that, by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the amended tuna measure: (i) provides an "advantage, favour, privilege, or immunity" to tuna products from other countries that is not "accorded immediately and unconditionally"

to like products from Mexico, in a manner inconsistent with Article I:1 of the GATT 1994; and (ii) accords "less favourable treatment" to Mexican tuna products than that accorded to like domestic products, in a manner inconsistent with Article III:4 of the GATT 1994.

The Appellate Body then turned to assess whether the amended tuna measure is applied consistently with the chapeau of Article XX of the GATT 1994. The Appellate Body recalled that neither participant had appealed the Panel's finding that the features of the amended tuna measure that give rise to violations of Articles I and III "relate to" the goal of conserving dolphins and are, therefore, provisionally justified under Article XX(g). The Appellate Body also recalled its view that the relevant conditions prevailing between countries are the risks of adverse effects on dolphins arising from tuna fishing practices and that, in the circumstances of this dispute, these are the same for purposes of an analysis under the chapeau of Article XX of the GATT 1994.

Turning to consider whether the discrimination under the amended tuna measure is "arbitrary or unjustifiable", the Appellate Body considered relevant the question of whether the various conditions for access to the dolphin-safe label can be justified or explained in the light of differences in risks to dolphins inside and outside the ETP large purse-seine fishery. The Appellate Body took the view that the new certification and tracking and verification requirements introduced by the 2013 Final Rule for tuna products derived from tuna caught outside the ETP large purse-seine fishery may be said to go in the direction of responding to the "calibration" of the dolphin-safe labelling conditions to different risk profiles of different fishing methods in different areas of the ocean that the Appellate Body had found to be lacking in the original tuna measure. The Appellate Body added that, in order to assess whether the amended tuna measure results in arbitrary or unjustifiable discrimination due to the manner in which it addresses the relative adverse effects on dolphins inside and outside the ETP large purse-seine fishery, it would be important to examine the Panel's findings and undisputed evidence regarding the different risk profiles in those different fisheries. However, since the Panel had not conducted a proper assessment of the respective risks posed to dolphins inside and outside the ETP large purse-seine fishery, the Appellate Body found itself unable to complete the legal analysis and assess fully whether all of the regulatory distinctions drawn under the amended tuna measure can be explained and justified in the light of differences in the relative risks associated with different methods of fishing for tuna in different areas of the oceans.

Nevertheless, the Appellate Body was able to complete the legal analysis with respect to certain features of the amended tuna measure that are not dependent on an assessment of the relative risks associated with different fishing methods in different areas of the ocean. In particular, the Appellate Body considered that the determination provisions are designed in a manner that prevents the United States from reinforcing the substantive conditions of access to the dolphin-safe label by observer certification in certain scenarios in which there may be heightened risks of harm to dolphins associated with particular fisheries outside the ETP large purse-seine fishery and that this may also entail the application of tracking and verification requirements different from those applied inside the ETP large purse-seine fishery. Thus, the Appellate Body considered that these aspects of the design of the amended tuna measure are difficult to reconcile with the objective of protecting dolphins from harm.

For all these reasons, the Appellate Body found that it had not been demonstrated that the amended tuna measure is applied in a manner that does not constitute arbitrary or unjustifiable discrimination; and, thus, that the amended tuna measure is not justified under Article XX of the GATT 1994.

5. PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS

Table 5 lists the WTO Members that participated in appeals for which an Appellate Body report was circulated in 2015. It distinguishes between Members that filed a Notice of Appeal pursuant to Rule 20 of the Working Procedures (appellants) and Members that filed a Notice of Other Appeal pursuant to Rule 23(1) (known as the "other appellants"). Rule 23(1) provides that "a party to the dispute other than the original appellant may join in that appeal, or appeal on the basis of other alleged errors in the issues of law covered in the Panel report and legal interpretations developed by the Panel". Under the Working Procedures, parties wishing to appeal a panel report pursuant to Rule 23(1) are required to file a Notice of Other Appeal within 5 days of the filing of the Notice of Appeal.

Table 5 also identifies those Members that participated in appeals as third participants under paragraphs (1), (2), or (4) of Rule 24 of the Working Procedures. Under Rule 24(1), a WTO Member that was a third party to the panel proceedings may file a written submission as a third participant within 21 days of the filing of the Notice of Appeal. Pursuant to Rule 24(2), a Member that was a third party to the panel proceedings and that does not file a written submission with the Appellate Body may, within 21 days of the filing of the Notice of Appeal, notify its intention to appear at the oral hearing and indicate whether it intends to make a statement at the hearing. Rule 24(4) provides that a Member that was a third party to the panel proceedings and neither files a written submission in accordance with Rule 24(1), nor gives notice in accordance with Rule 24(2), may notify its intention to appear at the oral hearing and request to make a statement.

TABLE 5: PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS FOR WHICH AN APPELLATE BODY REPORT WAS CIRCULATED IN 2015

Case	Appellant[a]	Other appellant[b]	Appellee(s)[c]	Third participants		
				Rule 24(1)	Rule 24(2)	Rule 24(4)
Argentina – Measures Affecting the Importation of Goods (DS438, DS444, DS445)	Argentina	European Union Japan	Argentina European Union Japan United States	Australia Chinese Taipei Saudi Arabia	Canada China Ecuador Guatemala India Israel Korea Norway Thailand Turkey United States	Switzerland
United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico (DS384, DS386)	United States	Canada Mexico	Canada Mexico United States	Australia Brazil China Colombia European Union Japan New Zealand	Guatemala	India Korea
United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam (DS429)	Viet Nam	–	United States	China European Union Japan	Norway	Ecuador Thailand

Case	Appellant[a]	Other appellant[b]	Appellee(s)[c]	Third participants		
				Rule 24(1)	Rule 24(2)	Rule 24(4)
India – Measures Concerning the Importation of Certain Agricultural Products (DS430)	India	–	United States	Argentina Australia Brazil European Union Japan	Colombia Ecuador Guatemala	China Viet Nam
Peru – Additional Duty on Imports of Certain Agricultural Products (DS457)	Peru	Guatemala	Guatemala Peru	Brazil Colombia European Union United States	Argentina China El Salvador Honduras India	Ecuador Korea
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan (DS454)	Japan	China	Japan China	European Union United States	India Korea Russia Saudi Arabia Turkey	–
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union (DS460)	China	European Union	China European Union	Japan United States	India Korea Russia Saudi Arabia Turkey	–
United States – Measures Concerning the Importation, Marketing and Sale Of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico (DS381)	United States	Mexico	Mexico United States	Canada European Union Japan New Zealand	Australia China Guatemala Korea Norway	Thailand

[a] Pursuant to Rule 20 of the Working Procedures.

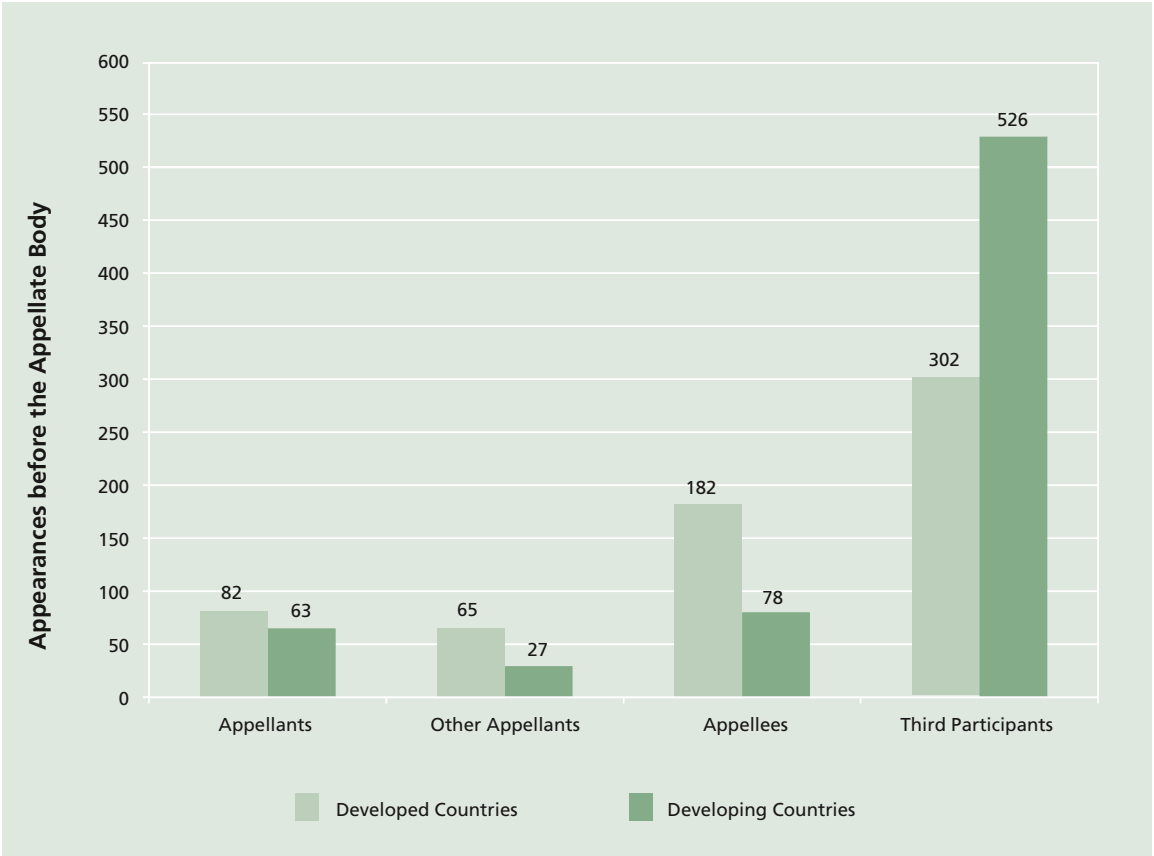
[b] Pursuant to Rule 23(1) of the Working Procedures.

[c] Pursuant to Rule 22 or 23(3) of the Working Procedures.

A total of 27 WTO Members appeared at least once as appellant, other appellant, appellee, or third participant in appeals for which an Appellate Body report was circulated in 2015.

Chart 3 shows the ratio of developed country Members to developing country Members in terms of appearances made as appellant, other appellant, appellee, and third participant in appeals for which an Appellate Body report was circulated from 1996 through 2015.

CHART 3: WTO MEMBER PARTICIPATION IN APPEALS 1996–2015



Annex 9 provides a statistical summary and details on WTO Members' participation as appellant, other appellant, appellee, and third participant in appeals for which an Appellate Body report was circulated from 1996 through 2015.

6. WORKING PROCEDURES FOR APPELLATE REVIEW

6.1 Guidelines regarding executive summaries of written submissions in appellate proceedings

In March 2015, the Appellate Body published a communication on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings"[31] by which the Appellate Body informed WTO Membership that it is adopting new guidelines regarding executive summaries.

While the practice of asking participants in appeals to submit executive summaries of their written submissions and the deadlines for filing such summaries remained unchanged, the Appellate Body introduced two new aspects to this practice. First, now the Appellate Body requests not only the participants but also each third participant that elects to file a written submission in an appeal to submit an executive summary of such written submission at the same time. Second, rather than using the executive summaries to assist in drafting its own description of the arguments of the participants, the Appellate Body now annexes to each of its reports the executive summaries submitted by the participants and third participants in the relevant appellate proceedings. This change enables Members to ensure that their own positions and requests to the Appellate Body are accurately reflected, in their own words, in Appellate Body reports. It also enables the Appellate Body to make optimal use of its limited resources. The Appellate Body implemented the new approach on a trial basis, starting from the appeals in *Peru – Agricultural Products* and *China – HP-SSST (Japan) / China – HP-SSST (EU)*.

The "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" seek to allow WTO Members to summarize their positions and supporting arguments in their own words, while encouraging a degree of harmonization in the structure and length of such summaries. In particular, according to the guidelines, each participant filing an appellant's, other appellant's, or appellee's submission, and each third participant filing a written submission shall submit an executive summary of such written submission by the same deadline. In their executive summaries, participants may wish to identify each claim of error or response to a claim of error and each request to reverse, modify, or uphold specific panel findings and conclusions, and summarize concisely the main arguments in support of such claims, responses, and requests, as presented in the relevant written submission. Third participants may wish to identify the legal issue(s) on appeal upon which they wish to express a view, and summarize concisely their position or view on such issue(s). The maximum length of each executive summary of a written submission is limited to the longer of 250 words or 10% of the total word count of the written submission itself. The executive summaries are annexed as addenda to the Appellate Body report, and their content is not revised or edited by the Appellate Body. These executive summaries do not serve as a substitute for the submissions of the participants and third participants in the Appellate Body's examination of the appeal and, in addressing and disposing of the issues on appeal, the Appellate Body continues to draw upon and summarize the arguments of the participants and third participants as appropriate.

The Communications of the Appellate Body on "Executive Summaries of Written Submissions in Appellate Proceedings" and "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" are provided in Annex 1.

6.2 Procedural issues arising from appeals

No amendments were made to the Working Procedures during 2015. The current version of the Working Procedures is contained in document WT/AB/WP/6, which was circulated to WTO Members on 16 August 2010. The Appellate Body's communication on "Executive Summaries of Written Submissions

[31] Document WT/AB/23, 11 March 2015.

in Appellate Proceedings", however, indicated that the Appellate Body will consider whether it would be useful to incorporate some or all aspects of the "Guidelines in Respect of Executive Summaries of Written Submissions in Appellate Proceedings" into the Working Procedures once both the Appellate Body and Members have some experience with the guidelines that have now been introduced on a trial basis.

The procedural issues that arose in appellate proceedings in 2015 are the following: (i) protection of business confidential information; (ii) public observation of the oral hearing; (iii) consolidation of appellate proceedings; (iv) extension of time to file submissions; (v) amendments to the official Working Schedule; (vi) unsolicited *amicus curiae* briefs; (vii) extension of time period for circulation of reports; and (viii) correction of clerical errors. These procedural issues are discussed below.

6.2.1 Treatment of confidential information

In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body examined the European Union's claim regarding the additional working procedures adopted by the panel to protect BCI. The Appellate Body found that the panel had conflated: (i) the confidentiality obligations under Anti-Dumping Agreement setting the framework for confidential treatment of information that is applicable in the context of domestic anti-dumping proceedings; and (ii) the confidentiality obligations applicable in WTO dispute settlement proceedings. In addition, the panel conflated: (i) confidentiality requirements generally applicable in WTO proceedings or in anti-dumping proceedings as foreseen in the above-mentioned provisions of the DSU and the Anti-Dumping Agreement; and (ii) the additional layer of protection of sensitive business information provided under special procedures adopted by a panel for the purposes of a particular dispute. The Appellate Body stated that whether information treated as confidential pursuant to Article 6.5 of the Anti-Dumping Agreement, and submitted by a party to a WTO panel under the confidentiality requirements generally applicable in WTO dispute settlement, should receive additional confidential treatment as BCI, is to be determined in each case by a panel. Furthermore, it rests upon the panel to adjudicate any disagreement or dispute that may arise under those procedures regarding the designation or the treatment of information as business confidential. The Appellate Body added that, where necessary, a panel must draw appropriate inferences from a party's failure to provide requested information to the panel. The Appellate Body also clarified that any additional procedures adopted by a panel to protect the confidentiality of sensitive business information should go no further than necessary to guard against a determined risk of harm (actual or potential) that could result from disclosure, and must be consistent with the relevant provisions of the DSU and other covered agreements (including the Anti-Dumping Agreement).

In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the panel redacted certain text from its report, which it characterized as containing BCI. On appeal, Mexico also redacted certain portions of its appellee's submission, and the European Union, as a third participant, asserted that its ability to comment on the panel report had been impaired by the panel's redactions. The Appellate Body saw no indication in the panel record suggesting that either Mexico or the United States had requested the adoption of special procedures to protect BCI, or that the panel had adopted such special procedures. Nor had the panel indicated the criteria used to identify the information considered to constitute BCI. Therefore, the Appellate Body did not see the legal basis for the panel to redact portions of its reasoning from its report. The Appellate Body further observed that, absent any request from the participants, procedures for additional protection of BCI did not apply in the appellate proceedings.

6.2.2 Public observation of the oral hearing

The Appellate Body Division hearing the appeal in *US – COOL (Article 21.5 – Canada and Mexico)*, received a joint communication from Canada and the United States requesting that the Division allow observation by the public at the oral hearing of the participants' answers to questions as well as statements of those third participants who agree to public observation. The request was made on the understanding that any information that was designated as confidential in the documents filed by any party in the Panel

proceedings would be adequately protected in the course of the oral hearing. Mexico did not object to allowing observation by the public of the oral hearing, but maintained that its position in these proceedings was without prejudice to its systemic views on the matter. The third participants expressed no objection to the request. The Division issued a Procedural Ruling allowing public observation of the oral hearing and adopting additional procedures for the conduct of the hearing.[32] Public observation of the oral hearing took place via simultaneous closed-circuit television broadcast to a separate room. Transmission was turned off during statements made by those third participants that had indicated their wish to maintain the confidentiality of their submissions.

6.2.3 Consolidation of appellate proceedings

In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body informed the participants and third participants that it intended to consolidate the appellate proceedings in these disputes, and gave them an opportunity to comment. Having received no objections, the Appellate Body decided, pursuant to Rule 16(1) of the Working Procedures to consolidate the appeals to the panel reports in *China – HP-SSST (Japan) / China – HP-SSST (EU)* due to the significant overlap in the content of these disputes for which the appeals were filed on the same date (WT/DS454/AB/R; WT/DS460/AB/R). A single Appellate Body Division was selected to hear both appeals, and a single oral hearing was held by the Division.

6.2.4 Time-limits for the filing of written submissions

In *India – Agricultural Products*, the Division received a letter from Australia requesting, pursuant to Rule 16 of the Working Procedures, an extension of the deadline for the filing of the third participants' submissions. Australia requested that the deadline be extended by two days, given that the deadlines for the appellee's and third participants' submissions left third participants with only one working day to incorporate the appellee's arguments into their own written submissions. The Division provided the participants and other third participants with an opportunity to comment and received no objections to Australia's request. Noting that India had presented arguments in its appellant's submission concerning the Panel's understanding of Australia's risk assessment, quarantine measures, and position in this dispute, the Appellate Body decided to extend the deadline as requested by Australia.

In *US – COOL (Article 21.5 – Canada and Mexico)*, Canada, Mexico, and the United States made a joint request to the Appellate Body to modify the time-periods for filing written submissions. The participants jointly submitted that "exceptional circumstances" present in the disputes meant that strict adherence to the regular deadlines for filing submissions would result in "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures. In particular, the participants submitted that the time-period set out in Rule 21 would not afford the United States as appellant sufficient time to present its arguments, and that this would impede the development of arguments in subsequent submissions, thereby impeding the orderly conduct of the appeal. In support of their request, the participants pointed to resource constraints due to concurrent work on other pending proceedings, as well as the constraints imposed by the contemporaneous holiday period, the multiple, complex issues at stake in these disputes, and the present workload of the Appellate Body. The Presiding Member of the Appellate Body Division invited the third participants to comment and the Division suspended the deadlines for the filing of any Notice of Other Appeal, and of written submissions, until the issuance of a ruling on the participants' joint request. Brazil, the European Union, India, and Japan considered it to be within the discretion of the Appellate Body to modify deadlines for filing written submissions and no third participant expressed any objections. Thereafter, the Division issued a Procedural Ruling extending the time-periods for filing written submissions in this appeal.[33]

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[32] The Procedural Ruling was attached as Annex 6 to *US – COOL (Article 21.5 – Canada and Mexico)*, WT/DS384/AB/RW, WT/DS386/AB/RW.

[33] The Procedural Ruling was attached as Annex 4 to *US – COOL (Article 21.5 – Canada and Mexico)*, WT/DS384/AB/RW, WT/DS386/AB/RW.

In the same appellate proceedings, the Division received a letter from Australia requesting that the deadline for filing third participants' submissions be further extended. Australia noted that, although the time-period between the filing of the appellees' submissions and the filing of the third participants' submissions was in line with the standard time-periods set out in the Working Procedures, in this particular case this three-day period ran over a weekend, providing the third participants with only one working day to incorporate reactions to the appellees' submissions into their third participants' submissions. Australia further explained that the challenges it faced in preparing its submission were exacerbated by the decreased staffing capacity during the peak summer holiday period in Australia. The Division received no objection to an extension of the deadline by the participants and the other third participants. Mexico submitted that it had no objection if the timetable for the subsequent stages of the appellate proceedings was not affected and if the extension was granted to all third participants. The Division then issued a Procedural Ruling further extending the deadline for filing written submissions for all third participants.[34]

6.2.5 Requests to modify the date of the oral hearing

In *Argentina – Import Measures*, before the Working Schedule for that appeal had been communicated to the participants and third participants, Japan requested the Appellate Body that the oral hearing not be scheduled between 3-5 November 2014 on account of a scheduling conflict of a key member of its litigation team during this period. The Appellate Body invited the participants and third participants to comment on Japan's request. Although none of the participants objected to Japan's request, Argentina and the European Union each indicated their own scheduling constraints and requested that the oral hearing not be held on 27-31 October and 11-12 November 2014, respectively. For its part, the United States expressed a preference for the oral hearing to be held within 45 days of the date of filing of the Notice of Appeal, and noted that an oral hearing scheduled after 21 November 2014 would cause a scheduling conflict for its lead counsel. The Appellate Body Division issued a Procedural Ruling denying Japan's request.[35] The Appellate Body explained that, in its draft Working Schedule, drawn up prior to the receipt of Japan's request, the oral hearing had been scheduled to take place on 3-4 November 2014, and that such scheduling was coordinated with the working schedules in the two other proceedings also before the Appellate Body, namely, the appeals in *US – Carbon Steel (India)* and *US – Countervailing Measures (China)*. The Division considered itself unable to accommodate Japan's request, given the overlap in the dates of the three working schedules, and in the composition of the Divisions hearing these three appeals, leaving the Appellate Body with limited choices for scheduling the oral hearings as well as its internal deliberations in this appeal.

In *US – Shrimp II (Viet Nam)*, the United States requested that the scheduled date of the oral hearing be changed due to certain logistical difficulties faced by the United States in securing reasonable hotel accommodation in Geneva during the week of the hearing. Having considered the United States' request and comments received from Viet Nam and China, the Division informed the participants and third participants of its decision that the circumstances outlined by the United States did not, in this particular case, amount to "exceptional circumstances" that would result in "manifest unfairness" within the meaning of Rule 16(2) of the Working Procedures. Therefore, the Division decided not to change the date of the oral hearing.[36]

In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, Mexico requested that the oral hearing not be held as scheduled because a key member of Mexico's litigation team would not be available on those dates and attending the hearing with a reduced legal team would have an impact on its ability to present adequately its arguments before the Appellate Body. Neither the United States nor any of the third participants objected to Mexico's request, at least with respect to certain proposed alternative dates. The Division issued a Procedural Ruling

[34] The Procedural Ruling was attached as Annex 5 to *US – COOL (Article 21.5 – Canada and Mexico)*, WT/DS384/AB/RW, WT/DS386/AB/RW.

[35] The Procedural Ruling was attached as Annex 4 to *Argentina – Import Measures*, WT/DS438/AB/R, WT/DS444/AB/R, WT/DS445/AB/R.

[36] The Procedural Ruling was attached as Annex 2 to *US – Shrimp II (Viet Nam)*, WT/DS429/AB/R.

finding that Mexico had identified "exceptional circumstances", within the meaning of Rule 16(2) of the Working Procedures, warranting modification of the dates for the oral hearing.[37] In reaching its conclusion, the Division took into account Mexico's right to defend properly its case, as well as the high level of activity experienced at that moment by the WTO dispute settlement system, which can impair a Member's ability to engage effectively in multiple, parallel proceedings.

6.2.6 Unsolicited *amicus curiae* briefs

In *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, the Appellate Body received one unsolicited *amicus curiae* brief from a professor of law. The Division did not find it necessary to rely on this *amicus curiae* brief in rendering its decision.

6.2.7 Extension of time period for circulation of reports

The 90-day time period stipulated in Article 17.5 of the DSU for the circulation of reports was exceeded in *Argentina – Import Measures*, *US – COOL (Article 21.5 – Canada and Mexico)*, *India – Agricultural Products*, *Peru – Agricultural Products*, *China – HP-SSST (Japan) / China – HP-SSST (EU),* and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*.

The Appellate Body communicated to the DSB Chair the reasons why it was not possible to circulate the Appellate Body report within the 90-day time period in each of the appeals for which this time period was not met in 2015.[38] These reasons included the substantial workload of the Appellate Body; the number and complexity of the issues raised on appeal; the scheduling difficulties arising from overlap in the composition of Divisions hearing appeals concurrently pending before the Appellate Body; the demands that these concurrent appeals place on the WTO Secretariat's translation services; the extensions of the time-periods for filing written submissions granted at the request of the participants and third participants; the rescheduling of oral hearings; and the shortage of staff in the Appellate Body Secretariat.

6.2.8 Correction of clerical errors

In *India – Agricultural Products*, India requested authorization, pursuant to Rule 18(5) of the Working Procedures, to correct a clerical error in its Notice of Appeal. The Appellate Body Division provided the United States and the third participants with an opportunity to comment in writing on India's request. Having received no objections to India's request, the Division authorized India to correct the clerical error in its Notice of Appeal.[39]

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[37] The Procedural Ruling was attached as Annex D to *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, WT/DS381/AB/RW.

[38] For *Argentina – Import Measures*, see WT/DS438/17, WT/DS444/15, and WT/DS/445/16; *US – COOL (Article 21.5 – Canada and Mexico)*, see WT/DS384/31, WT/DS386/30; *India – Agricultural Products*, see WT/DS430/9; for *Peru – Agricultural Products*, see WT/DS457/9; for *China – HP-SSST (Japan) / China – HP-SSST (EU)*, see WT/DS454/9, WT/DS460/9; for *US – Tuna II (Mexico) (Article 21.5 – Mexico)*, see WT/DS381/26.

[39] The document circulated as WT/DS430/8 reflected the corrected version of India's Notice of Appeal.

7. ARBITRATIONS UNDER ARTICLE 21.3(c) OF THE DSU

Individual Appellate Body Members have been appointed to serve as arbitrators under Article 21.3(c) of the DSU to determine the "reasonable period of time" for the implementation by a WTO Member of the recommendations and rulings adopted by the DSB in dispute settlement cases. The DSU does not specify who shall serve as arbitrator. The parties to the arbitration select the arbitrator by agreement or, if they cannot agree on an arbitrator, the Director-General of the WTO appoints the arbitrator. In all but one arbitration proceeding, all those who have served as arbitrators pursuant to Article 21.3(c) have been current or former Appellate Body Members.[40] In carrying out arbitrations under Article 21.3(c), Appellate Body Members act in an individual capacity.

Further information about the three arbitration proceedings carried out in 2015 is provided below.

7.1 *United States — Countervailing Duty Measures on Certain Products from China*, WT/DS437/16

On 16 January 2015, the Dispute Settlement Body (DSB) adopted the Panel and Appellate Body Reports in *United States — Countervailing Duty Measures on Certain Products from China*. This dispute concerned a challenge by China to countervailing duties imposed by the United States on a variety of products from China following 17 countervailing duty investigations initiated by the US Department of Commerce (USDOC) between 2007 and 2012.

With respect to Articles 14(d) and 1.1(b) of the SCM Agreement, the Appellate Body reversed the Panel's finding that USDOC could reject private prices as potential benchmarks in the investigations at issue on the grounds that such prices were distorted. The Appellate Body also reversed the Panel's finding that China had failed to establish that the USDOC had acted inconsistently with Articles 14(d) or 1.1(b) by rejecting in-country private prices in China as benefit benchmarks in the OCTG, Solar Panels, Pressure Pipe, and Line Pipe countervailing duty investigations. The Appellate Body completed the legal analysis and found that the USDOC had acted inconsistently with the obligations of the United States under Article 14(d) and Article 1.1(b) in these four countervailing duty investigations. The Appellate Body upheld the Panel's finding that the USDOC did not act inconsistently with the obligations of the United States under Article 2.1 by analysing specificity exclusively under Article 2.1(c). However, the Appellate Body modified the Panel's interpretation of Article 2.1(c) and, in particular, its interpretation of the concepts of "subsidy programme" and "granting authority" that it developed in the context of its analysis of *de facto* specificity of certain subsidies at issue. It also reversed the Panel's finding that China had not established that the USDOC had acted inconsistently with Article 2.1 by failing to identify a "subsidy programme", as well as the Panel's finding that China had not established that the USDOC had acted inconsistently with Article 2.1(c) by failing to identify a "granting authority". The Appellate Body was unable to complete the legal analysis with respect to China's claims under Article 2.1. Finally, with respect to the use of "facts available" by the USDOC, the Appellate Body reversed the Panel's finding that China had failed to establish that the USDOC had acted inconsistently with Article 12.7 by not relying on the facts that were available on the record in making its preliminary or final determinations, but it was unable to complete the analysis in this regard.[41]

By a letter to the Chair of the DSB dated 13 February 2015, the United States indicated its intention to implement the recommendations and rulings of the DSB in this dispute in a manner that respects its WTO obligations, and stated that it would require a reasonable period of time within which to do so. Consultations between the parties failed to result in an agreement on the reasonable period of time for implementation. China therefore requested that this period be determined through arbitration pursuant to Article 21.3(c) of

[40] Mr Simon Farbenbloom as the Arbitrator in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*. Mr Farbenbloom had previously served as chairperson of the Panel in the underlying dispute.

[41] For a detailed summary of the Appellate Body Report in the underlying dispute, see the Appellate Body Annual Report for 2014, WT/AB/24, p. 61.

the DSU. China and the United States were unable to agree on an arbitrator. Consequently, China requested the Director-General of the WTO to appoint the arbitrator. The Director-General appointed Mr Georges M. Abi-Saab as the Arbitrator on 17 July 2015, after consulting with the parties.

The United States requested a reasonable period of time for implementation in this dispute of 19 months, asserting that this is the shortest period of time within which the USDOC can modify the countervailing duty investigations at issue in the light of the procedural requirements under United States' law, the complexity of the issues involved, and the workload of the USDOC. China responded that the United States should be granted a period of ten months to implement the recommendations and rulings of the DSB in this dispute and asserted that several steps of the implementation process require less time than requested by the United States.

The Arbitrator began by noting that, for all but two investigations, the parties agreed that the recommendations and rulings of the DSB in this dispute would be implemented through modification of the WTO-inconsistent measures by remedial administrative action, i.e. through the process set out in Section 129(b)(1) of the URAA. The Arbitrator also noted that the parties agreed that the implementation process for the investigations at issue consists of the following specific steps: (i) consultation and pre-commencement analysis; (ii) seeking information from interested parties and analysing that information; (iii) verification of the information received; (iv) issuing of preliminary determinations; (v) receipt of case and rebuttal briefs; (vi) issuing of final determinations; (vii) correction of ministerial errors; and (viii) consultations with the United States' Congress and implementation.

Based on the language of Section 129(b), the Arbitrator considered that China had not established that the 180-day time-period specified in Section 129(b)(2) is the maximum amount of time, in every case, for the USDOC to issue a redetermination implementing the recommendations and rulings of the DSB.

The Arbitrator identified certain general considerations that may bear upon the implementation process in this dispute. First, the Arbitrator noted that, given the United States' statement at the hearing, implementation of the Panel's "as such" finding of inconsistency concerning the policy articulated in the Kitchen Shelving investigation should not be a consideration in determining the reasonable period of time for implementation. Second, the Arbitrator also considered relevant the complexity of several legal interpretations and findings made by the Panel and the Appellate Body. The Arbitrator recalled the Panel's finding as to how it can be determined that an entity is a "public body" within the meaning of the SCM Agreement and the Appellate Body's finding as to how it can be evaluated whether the proposed benchmark prices are market determined such that they can be used to assess whether benefit is conferred. The Arbitrator considered that implementing such findings may require the USDOC to undertake further analysis and consider additional factors compared to the original proceedings.

Turning to the parties' disagreement over the time required for pre-commencement analysis and consultations, that is, the initial step before any formal implementation action is taken, the Arbitrator considered it reasonable to expect that, with respect to the five findings of inconsistency by the Panel which were not appealed by the United States, the United States' authorities tasked with implementation could begin their preparatory work and consultations once it became clear that the Panel's findings would not be appealed. With respect to the time needed for seeking information from interested parties and analysing such information, the Arbitrator noted China's position that it would only be providing further information in six out of the fifteen investigations at issue, and that much of this information would be similar as all six investigations concern the steel industry. However, the Arbitrator also noted that, besides the Government of China, other interested parties might also provide information, and that though the information submitted by the Government of China might be similar, the analysis of that information might be different in the light of the determination required in each investigation.

With respect to the parties' disagreement over the time needed for verification of the information received, the Arbitrator noted that, regardless of whether verification was required in every investigation as a matter of US law, Article 12.5 of the SCM Agreement requires that investigating authorities "*shall* … satisfy themselves as to the accuracy of the information supplied by interested Members or interested parties". The Arbitrator further noted that the USDOC may receive new information from other interested parties which may warrant verification.

The Arbitrator did not consider the current workload of the USDOC to be relevant for the determination of the reasonable period of time in the light of the fundamental obligations assumed by the Members of the WTO. The Arbitrator noted that prioritizing the investigations at issue reflects the exercise of a flexibility which is available to the USDOC, and which it is expected to utilize. Finally, the Arbitrator considered the parties' disagreement over the means to implement the Panel's finding of inconsistency relating to the initiation of investigations in respect of certain export restraints in two investigations. China argued that the only means of implementing this finding is the withdrawal of the determinations, whereas the United States considered that implementation could be achieved by modification of the determinations. The Arbitrator noted that, even if modification of the determinations falls within the range of permissible implementation actions, as of the date of the hearing in this proceeding, the USDOC had still not reached a decision on whether it considered that modification of the determinations was possible. The Arbitrator considered that although the United States has a measure of discretion in choosing the means of implementing the Panel's finding at issue, the implementation process with respect to the Panel's "export restraints" finding could reasonably have proceeded further than it had. The Arbitrator therefore was of the view that the implementation process in these investigations should not be a reason to extend the reasonable period of time for implementation.

In the light of the above, the Arbitrator determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 14 and-a-half months, expiring on 1 April 2016.

7.2 *United States — Anti-Dumping Measures on Certain Shrimp from Viet Nam*, WT/DS429/16

On 22 April 2015, the DSB adopted the Panel and Appellate Body Reports in *United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam*. This dispute concerned anti-dumping measures imposed by the United States on imports of certain shrimp from Viet Nam, as well as certain US laws or practices concerning the imposition of anti-dumping measures and the implementation of adverse DSB recommendations and rulings in trade remedy cases. The investigation at issue was initiated in January 2004, resulting in a final anti-dumping order on 8 December 2004, amended on 1 February 2005.

The Panel found that the United States acted inconsistently with: (i) Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 as a result of the USDOC's application of the simple zeroing methodology to calculate the dumping margins of mandatory respondents in the fourth, fifth and sixth administrative reviews; (ii) Articles 6.10 and 9.2 of the Anti-Dumping Agreement because the practice or policy whereby, in NME proceedings, the USDOC presumes that all producers/exporters in the NME country belong to a single, NME-wide, entity and assigns a single rate to these producers/exporters (the "NME-wide entity practice"), is inconsistent "as such" with these provisions; (iii) Articles 6.10 and 9.2 of the Anti-Dumping Agreement as a result of the application by the USDOC, in the fourth, fifth and sixth administrative reviews, of a rebuttable presumption that all companies in Viet Nam belong to a single, Viet Nam-wide, entity and assignment of a single rate to that entity; (iv) Article 9.4 of the Anti-Dumping Agreement as a result of the application to the Viet Nam-wide entity of a duty rate exceeding the ceiling applicable under that provision in the fourth, fifth and sixth administrative reviews; (v) Article 11.3 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping or rates in its likelihood-of-dumping determination in the first sunset review; (vi) Article 11.2 of the Anti-Dumping Agreement in the

fourth and fifth administrative reviews as a result of its treatment of requests for revocation made by certain Vietnamese producers/exporters that were not being individually examined; and (vii) Article 11.2 of the Anti-Dumping Agreement as a result of the USDOC's reliance on WTO-inconsistent margins of dumping in its determination, in the fourth and fifth administrative reviews, not to revoke the Shrimp anti-dumping order with respect to certain Vietnamese producers/exporters. Furthermore, the Panel found that Viet Nam had failed to establish that Section 129(c)(1) of the Uruguay Round Agreement Act (URAA) precludes implementation of recommendations and rulings of the DSB with respect to prior unliquidated entries and, consequently, that Viet Nam had not established that Section 129(c)(1) is inconsistent "as such" with Articles 1, 9.2, 9.3, 11.1, and 18.1 of the Anti-Dumping Agreement. Viet Nam appealed this finding of the Panel. Specifically, Viet Nam claimed that the Panel acted inconsistently with Article 11 of the DSU because its interpretation and analysis of Section 129(c)(1) of the URAA was not based on an objective assessment of the provision and its broader statutory context. The Appellate Body rejected Viet Nam's claim that the Panel acted inconsistently with Article 11 of the DSU, and upheld the relevant finding of the Panel. The United States did not appeal any findings of the Panel.

At the meeting of the DSB held on 20 May 2015, the United States indicated its intention to implement the DSB's recommendations and rulings in this dispute in a manner that respects its WTO obligations, and stated that it would need a reasonable period of time in which to do so. As the parties were unable to agree on a "reasonable period of time" for implementation, Viet Nam referred the matter to arbitration pursuant to Article 21.3(c). By joint letter dated 7 October 2015, Viet Nam and the United States agreed on Mr Simon Farbenbloom as the Arbitrator. Mr Farbenbloom had served as chairperson of the Panel in the underlying dispute. He accepted his appointment on 8 October 2015.

The United States requested a reasonable period of time for implementation in this dispute of "at least 21 months", asserting that this is the shortest period of time within which it would be possible to implement the recommendations and rulings of the DSB, given the procedural requirements under US law, the complexity of the issues involved, and the current resource demands and constraints of the USDOC. As for the means of implementation, the United States submitted that the most practical way under US law would be to implement the Panel's findings in three, sequential, phases, utilizing the procedures set out in Section 123(g) and Section 129(b) of the URAA.

Viet Nam responded that the time-frame proposed by the United States was extraordinarily long, and that there was no basis for a longer period than six months for implementation of the DSB's findings and recommendations. Although Viet Nam agreed in principle that the implementation of the Panel's "as such" and "as applied" findings will need to be conducted sequentially, it contended that a greater degree of overlap between the different phases proposed by the United States would be possible. Moreover, Viet Nam submitted that the Panel's findings, to the extent they concern "prior unliquidated entries", cannot be implemented by the means of implementation proposed by the United States.

The Arbitrator began by noting that, overall, the sequence of the implementation steps proposed by the United States appeared reasonable in the context of the US legal system. Specifically, given that any modification to the NME-wide entity practice would need to be incorporated in the implementation of the Panel's "as applied" findings in the fourth, fifth, and sixth administrative reviews, he considered it logical that the implementation of the Panel's "as such" finding on the practice would need to be completed first. Furthermore, because the results of the Section 129 determinations on the administrative reviews may be taken into account for purposes of making a sunset review determination, it also seemed logical to the Arbitrator that the implementation of the finding concerning the first sunset review would be completed in the last phase.

The Arbitrator addressed three points of contention between the parties in relation to the implementation process under Section 123(g) of the URAA. First, he noted the parties' disagreement over the time needed for the preparatory stage of the Section 123 process. The Arbitrator recalled that arbitrators in past disputes

had taken into account whether the implementing Member had taken action since the adoption of the DSB's recommendations and rulings. The Arbitrator further noted that, in the present dispute, the United States did not appeal any of the Panel's findings, and that seven months had passed since the adoption of the Panel and Appellate Body Reports. Therefore, the Arbitrator expressed the view that it would be reasonable to assume that preparatory work of the implementation process under Section 123(g) had already commenced. He also noted the United States' confirmation at the hearing that consultations regarding the implementation of the Panel's "as such" findings had occurred, and that other preparatory work relating to implementation had also been undertaken.

Second, as regards the time needed for processing the comments of the public on the preliminary determination, the Arbitrator observed that any proposed modification of the NME-wide entity practice, once published, could trigger multiple views from the public that the USDOC would need to address in the final determination. At the same time, he stressed the need for a proper balance between the transparency and due process rights of interested parties, on the one hand, and the promptness required in implementing recommendations and rulings of the DSB, on the other hand.

Third, with respect to the overall time-frame for the completion of the Section 123 process, the Arbitrator noted that, although no specific time-periods are prescribed for the steps set out under Section 123(g), these steps are mandatory and must be conducted. The Arbitrator further noted that Section 123(g) had been utilized by the United States in a number of prior disputes for purposes of implementing the DSB's recommendations and rulings, and that, on some occasions, the United States had indicated that a period of seven to nine months would be sufficient to complete the process.

Thereafter, the Arbitrator turned to the proposed implementation steps and the relevant time-frames under Section 129(b) of the URAA. The Arbitrator began by noting the parties' agreement that the following five steps are required to implement the Panel's relevant findings: (i) the United States Trade Representative (USTR) consults with the USDOC and the relevant congressional committees; (ii) the USTR requests the USDOC to take implementation action; (iii) the USDOC issues preliminary determinations and provides an opportunity for interested parties to comment; (iv) the USTR consults with the USDOC and the relevant congressional committees with regard to the USDOC's determinations; and (v) the USTR directs the USDOC to implement the determinations, as well as the issuance of a US Federal Register notice in which the USDOC officially implements the determinations. The Arbitrator, however, also noted that the parties' views diverged significantly with respect to: (i) the time needed for some of these steps; (ii) the need for additional information-gathering; (iii) the degree of overlap among certain steps in the implementation process; and (iv) the relevance of the current workload of the USDOC to the determination of the reasonable period of time.

First, the Arbitrator rejected Viet Nam's argument that the substantive work for the Section 129 proceedings has to be completed in 180 days. He noted that Section 129(b)(2) requires that the determination by the USDOC to implement the Panel's findings be made within 180 days from the USTR's request to the USDOC to take implementing actions. The Arbitrator recalled that, in addition to this 180-day period, Sections 129(b)(1), (3), and (4) set out other actions involving the USTR, the USDOC, and the US Congress that have to be completed, both before and after the step contemplated in Section 129(b)(2).

Second, the Arbitrator recalled that the NME-wide entity practice concerns the USDOC's approach in addressing the relationship between the NME Member government and producers/exporters from that Member, and that the Panel's "as such" finding regarding this practice must be implemented first. In the Arbitrator's view, it cannot be excluded that, following a modification of the NME-wide entity practice, the USDOC may need to gather more information regarding individual producers/exporters from Viet Nam in the administrative reviews. At the same time, the Arbitrator noted that, once relevant additional information is gathered, changing the computer programme for recalculating dumping margins might not necessarily

be time-consuming in itself. Finally, the Arbitrator recalled that there must be a balance between the transparency and due process rights of interested parties, on the one hand, and the promptness required in implementing recommendations and rulings of the DSB, on the other hand.

Third, the Arbitrator turned to consider the parties' arguments regarding the degree of overlap among different steps of the Section 129 proceedings. With regard to Viet Nam's argument that the USDOC could speed up the process by issuing a separate Section 129 determination on Minh Phu's revocation request while the Section 123 process is ongoing, the Arbitrator noted that the United States has a measure of discretion to decide how to structure its Section 129 determinations according to its normal practice, while at the same time utilizing all the available flexibilities. In this respect, the Arbitrator noted that the USDOC's work on implementing the Panel's findings regarding the use of simple zeroing and Minh Phu's revocation request would be conducted concurrently with the Section 123 process. The Arbitrator further stated that there should not be a significant time-lag between the end of the Section 129 proceedings on the administrative reviews and the beginning of the Section 129 sunset review proceedings.

Finally, the Arbitrator turned to consider the United States' argument that the current workload of the USDOC should be taken into account as part of the particular circumstances of this dispute. The Arbitrator recalled that the United States had raised the same argument in the arbitration in *US – Countervailing Measures (China)*.[42] The arbitrator in that dispute found that, in the light of the fundamental obligations assumed by the Members of the WTO, and the flexibilities available in the US legal system, the current workload of the USDOC should not be considered as relevant to the determination of the reasonable period of time for implementation. The Arbitrator considered that prioritizing compliance action in respect of the DSB's recommendations and rulings at issue in these proceedings would constitute an exercise of flexibility available to the USDOC, which it would be expected to utilize. The Arbitrator therefore did not find the workload claimed by the United States to be relevant to his determination of the reasonable period of time.

In the light of the above, the Arbitrator determined that the "reasonable period of time" for the United States to implement the recommendations and rulings of the DSB in this dispute is 15 months from the adoption of the Panel and Appellate Body Reports, thus expiring on 22 July 2016.

7.3 *Peru – Additional Duty on Imports of Certain Agricultural Products*, WT/DS457/15

On 31 July 2015, the DSB adopted the Panel and Appellate Body Reports in *Peru – Additional Duty on Imports of Certain Agricultural Products*. This dispute concerned additional duties imposed by Peru on imports of certain types of rice, sugar, corn, and milk. The Panel and the Appellate Body found that the additional duties resulting from the Price Range System (PRS) are inconsistent with Article 4.2 of the Agreement on Agriculture and the second sentence of Article II:1(b) of the GATT 1994.[43]

At the DSB meeting held on 31 July 2015, Peru informed the DSB of its intention to implement the recommendations and rulings of the DSB in this dispute and stated that it would need a reasonable period of time in which to do so. As the parties were unable to agree on a "reasonable period of time" for implementation, Guatemala referred the matter to arbitration pursuant to Article 21.3(c) of the DSU. By joint letter dated 9 October 2015, Peru and Guatemala agreed to ask Mr Ricardo Ramírez-Hernández to serve as the Arbitrator for this matter. Mr Ramírez-Hernández accepted his appointment on 9 October 2015.

Peru requested a reasonable period of time for implementation in this dispute of at least 19 months, taking into account: (i) the procedural steps contemplated in Peru's internal regulations, (ii) the expected impact of the climate phenomenon *El Niño* on the implementation process undertaken by Peruvian authorities, and (iii) the complexity and role of the PRS in Peru's tariff policy. As for the chosen means of implementation,

[42] Award of the Arbitrator, *United States – Countervailing Duty Measures on Certain Products from China – Arbitration under Article 21.3(c) of the DSU*, WT/DS437/16, 9 October 2015.

[43] For a detailed summary of the Appellate Body Report in this dispute, see p. 57 above.

Peru submitted that it would implement the recommendations and rulings of the DSB by way of a "Supreme Decree". Supreme Decrees are laws of general application issued by the President of Peru that govern rules with the status of law or regulate governmental activities at the national level. Guatemala responded that the reasonable period of time for implementation should be five months, arguing that (i) this time-frame would be sufficiently long and reasonable in accordance with Peru's regulatory framework, (ii) the climate phenomenon *El Niño* is not a valid consideration for an extension of the reasonable period of time, and (iii) the PRS is not a complex measure or an essential component of Peru's tariff policy. Guatemala also noted that it would not be opposed to a reasonable period of time of six months if the Arbitrator were to consider other factors in his determination of the reasonable period of time.

The Arbitrator first addressed the reasonable periods of time proposed by the parties through an examination of the following six procedural steps identified by Peru as necessary to enact the Supreme Decree: (i) the process of consultations with relevant stakeholders; (ii) the designing of the implementation measure; (iii) the preparation of a draft Supreme Decree; (iv) the approval of the draft by the Commission of Vice-Ministerial Coordination; (v) the approval of the draft by the Council of Ministers; and (vi) the endorsement of the draft by the Minister of Agriculture and Irrigation, the signature of the Minister of Economy and Finance, and the publication and entry into force of the Supreme Decree.

First, in relation to the consultations process with relevant stakeholders, Peru argued that although consultations are not required by law, they have become common practice within Peru's legal system in order to maintain dialogue with sectors that are affected by regulatory changes. Peru added that the consultations serve three objectives: (i) to inform the relevant private sectors that the regulatory change comes from a decision by an international organization, (ii) to discuss with the private sectors the means for implementation, and (iii) to establish support programs to improve competitiveness and withstand the negative impact of implementation on the private sectors at issue. Guatemala argued that consultations should not be taken into account when determining the reasonable period of time for implementation since they are not necessary for implementation or required by Peruvian law. Recalling previous arbitrations under Article 21.3(c) of the DSU, the Arbitrator noted that structural adjustments to allow a private sector to adapt to the withdrawal or the modification of an inconsistent measure, such as support programs for the affected sectors, cannot be relevant for the determination of the reasonable period of time for implementation. Thus, the Arbitrator concluded that the creation of support programs was not relevant for his determination and that, in any event, the consultations at issue could be conducted in parallel with implementation. Highlighting that the support programs covered in the first step are the same as the support programs included in the second step, the Arbitrator considered that the first step and part of the second step are not relevant for the determination of the reasonable period of time for implementation.

Second, with respect to designing the implementation measure, Peru submitted that its laws establish a maximum period of time of six months to complete this step. Guatemala argued that, based on the clarity of Peru's obligation to cease applying the additional duty resulting from the PRS – this could be completed in three months. The Arbitrator considered that Guatemala had not provided sufficient explanation as to how its calculation resulted in three months. Accordingly, the Arbitrator considered only the amount of time required under Peruvian law, i.e. six months.

Finally, in relation to steps three to six, Peru submitted minimum and maximum periods of time to complete steps three to five, as well as a single period of time within which to complete step six. The Arbitrator agreed with Guatemala that a Member must make all possible efforts to implement, in the shortest time possible, the recommendations and rulings of the DSB. Prompt compliance, in the view of the Arbitrator, is a "fundamental cogwheel" for the proper functioning of WTO dispute settlement. On this basis, the Arbitrator considered that, in accordance with the usual periods of time provided for under Peruvian law, and taking into account Peru's obligation to bring its measure into conformity in the shortest time possible, Peru could prepare and issue a Supreme Decree in a shorter period than that proposed by Peru.

The Arbitrator then turned to examine whether there were "particular circumstances" in this case that could affect his determination of the reasonable period of time for implementation.

Pursuant to Article 21.2 of the DSU, the Arbitrator paid special attention both to the interests of Peru as an implementing developing Member and to the interests of Guatemala as a complaining developing Member. The Arbitrator, however, concluded that neither Peru nor Guatemala had demonstrated that its status as a developing country Member should be a factor in determining the reasonable period of time. Thus, the Arbitrator did not consider the "developing country" status of Peru and Guatemala in his determination.

In addition, the Arbitrator assessed the relevance of the climate phenomenon *El Niño* as a "particular circumstance" in this dispute, as raised by Peru. The Arbitrator considered that a natural disaster could constitute a "particular circumstance" in a case and, thus, a relevant factor in determining the reasonable period of time. The Arbitrator also noted that the prevention of natural disasters, such as *El Niño*, as well as the mitigation of the effects of such natural disasters, could clearly affect the regulatory or legislative capacity of a Member to implement the recommendations and rulings of the DSB. Nevertheless, the Arbitrator considered that Peru had not sufficiently demonstrated the impact that *El Niño*, and the actions taken by Peru to mitigate its negative effects, would have on Peru's regulatory capacity to implement the recommendations and rulings of the DSB. Accordingly, the Arbitrator concluded that he was unable to assess how and to what extent Peru's activities related to *El Niño* affect the reasonable period of time for implementation.

Finally, the Arbitrator assessed the role of the PRS on Peru's economic and tariff policy as a "particular circumstance". The Arbitrator noted the Panel's and Appellate Body's conclusions that the PRS has an impact on the prices in the Peruvian market for the four groups of covered products. The Arbitrator also noted that Peru has gradually reduced the role of the PRS in relation to the products covered under the PRS. The Arbitrator considered that Peru had not demonstrated that the PRS constitutes an essential element of Peru's economic and tariff policy and, furthermore, how this element would affect or influence Peru's regulatory capacity in a way that would justify a longer period of time for implementing the recommendations and rulings of the DSB. Thus, the Arbitrator concluded that the function and importance of the PRS should not be taken into account as a "particular circumstance" in his determination of the reasonable period of time.

In the light of the above, the Arbitrator determined that the reasonable period of time for Peru to implement the recommendations and rulings of the DSB in this dispute is 7 months and 29 days, expiring on 29 March 2016.

8. OTHER ACTIVITIES

8.1 WTO 20th Anniversary Conferences

In 2015, the Appellate Body launched a series of conferences to celebrate the Twentieth Anniversary of the WTO and its dispute settlement mechanism. The conferences have been hosted by academic institutions and have focused on current dispute settlement issues and the Appellate Body's contribution to the settlement of disputes and other aspects of WTO law. Participants have included current and former Appellate Body Members, high-ranking government representatives, WTO officials, academics, journalists, students, and civil society representatives. The first four conferences in the series were held in 2015.

The first conference took place in Florence, Italy, on 15 May 2015. It was organized by the European University Institute. Mr. Peter Van den Bossche, Appellate Body Member and Professor at Maastricht University, was a member of the steering committee for this conference. The conference focused on issues related to the resolution of international trade disputes and regulatory convergence in the multilateral trading system.

The second set of conferences in the series was held in Beijing, Shanghai and Shenzen, China, from 2 to 6 July 2015. The conference in Beijing was organized by Tsinghua University. The conferences in Shanghai and Shenzhen were organized by Tsinghua University in cooperation with, respectively, the Shanghai WTO Centre and the Shenzen WTO Centre. Ms. Yuejiao Zhang, Appellate Body Member and Professor of Law at Tsinghua University and Shantou University, was a member of the steering committee for these conferences. The conferences addressed several issues related to the multilateral trading system, including the evolution of the GATT/WTO dispute settlement system, China and the WTO, and challenges to the dispute settlement system and DSU reform.

The third conference was held in Seoul, Korea, on 28 August 2015. It was organized by the Seoul National University. Mr. Seung Wha Chang, Appellate Body Member and Professor at the Seoul National University, was a member of the conference steering committee. The conference focused on issues related to the new challenges for dispute settlement mechanisms in the global trading regime, new trends in rule-making in the context of regional trade agreements, and jurisdictional conflicts between the dispute settlement systems of the WTO and free trade agreements.

The fourth conference was held in Cancún, Mexico, from 2 to 4 December 2015. Mr Ricardo Ramírez-Hernández, Appellate Body Member and Professor at the Mexican National University (UNAM), was a member of the steering committee for this conference. The conference addressed issues relating to the role of Latin America in the multilateral trading system, the evolution of the international trade practice in the region, and the implementation of the Trade Facilitation Agreement in Latin America.

The next conference will take place in Cambridge (Massachusetts), United States of America, in April 2016. It will be organized by Harvard University. Mr. Thomas Graham, Appellate Body Member, is on the conference steering committee. It is also possible that a conference will take place in India in 2017.

8.2 WTO internship programme

The Appellate Body Secretariat participates in the WTO internship programme, which allows post-graduate university students to gain practical experience and a deeper knowledge of the global multilateral trading system in general, and WTO dispute settlement procedures in particular. Interns in the Appellate Body Secretariat obtain first-hand experience of the procedural and substantive aspects of WTO dispute settlement and, in particular, appellate proceedings. The internship programme is open to nationals of WTO Members and to nationals of countries and customs territories engaged in accession negotiations. An internship is generally for a three-month period. During 2015, the Appellate Body Secretariat welcomed interns from Belgium, Bulgaria, Costa Rica, India, Ireland, and Japan. A total of 130 post-graduate students,

of over 50 nationalities, have completed internships with the Appellate Body Secretariat since 1998. Further information about the WTO internship programme, including eligibility requirements and application instructions, may be obtained online at:

<https://www.wto.org/english/thewto_e/vacan_e/intern_e.htm>

8.3 The WTO Digital Dispute Settlement Registry

The WTO Digital Dispute Settlement Registry is being developed as a comprehensive application to manage the workflow of the dispute settlement process, as well as to maintain digital information about disputes. This application features: (i) a secure electronic registry for filing and serving dispute settlement documents online; (ii) a central electronic storage facility for all dispute settlement records; and (iii) a research facility on dispute settlement information and statistics.

The Digital Registry will provide for the electronic filing of submissions in disputes, and for the creation of an e-docket of all documents submitted in a particular case. The system will feature: (i) a facility to securely file submissions and other dispute-related documents electronically; (ii) a means of paperless and secure service on other parties of submissions and exhibits; and (iii) a comprehensive calendar of deadlines to assist Members and the Secretariat with workflow management.

As a storage facility, the Digital Registry will provide access to information about WTO disputes, in particular, it will serve as an online repository of all panel and Appellate Body records. During 2015, the Appellate Body participated in the final development and testing of the DDSR application as well as a comprehensive User Guide, which will be provided to Members. A pilot phase started in July 2015 where parties and panelists use the DDSR in parallel to the existing paper filing procedures. Every panel established since that date has been part of the pilot. It is expected that the first appeal using the DDSR in pilot phase will take place some time in 2016.

As a research facility, the Digital Registry will allow Members and the public to search the digital records of publicly available data of past disputes. Users will have access to a broader range of information and statistics than in the past. With the extent of the information available, WTO Members and the Secretariat, as well as the interested public, will be able to generate more in-depth and informative statistics on WTO dispute settlement activity.

ANNEX 1

EXECUTIVE SUMMARIES OF WRITTEN SUBMISSIONS IN APPELLATE PROCEEDINGS[1]

COMMUNICATION FROM THE APPELLATE BODY

The Working Procedures for Appellate Review[2] (Working Procedures) identify the written submissions that WTO Members participating in appeals are to submit in appellate proceedings, as well as the deadlines and modalities for the submission of such documents. For many years, the Appellate Body has requested participants in appellate proceedings to submit executive summaries of their written submissions by the same deadline as for the written submissions themselves. These executive summaries were intended to assist the Appellate Body in summarizing the arguments of the participants in its report in each proceeding. The Appellate Body wishes to inform the WTO Membership that it is adopting new guidelines regarding executive summaries.

The Appellate Body intends to continue the practice of asking participants in appeals to submit executive summaries of their written submissions. The deadlines for filing such summaries will also remain unchanged, namely, the same deadline as for the written submissions themselves. Nevertheless, the Appellate Body is introducing two new aspects to this practice. First, the Appellate Body will request not only the participants but also each third participant that elects to file a written submission in an appeal to submit an executive summary of such written submission at the same time. Second, rather than using the executive summaries to assist in drafting its own description of the arguments of the participants, the Appellate Body will instead annex to each of its reports the executive summaries submitted by the participants and third participants[3] in the relevant appellate proceedings. A similar practice has been followed with success by WTO dispute settlement panels for some time. This change will enable Members to ensure that their own positions and requests to the Appellate Body are accurately reflected, in their own words, in Appellate Body reports. It will also enable the Appellate Body to make optimal use of its limited resources, and to re-direct resources formerly used to summarize the arguments of the participants and third participants to other areas of appeal work.

The Appellate Body intends to implement this approach on a trial basis, as from the next appeal. At present, two panel reports have been circulated and may be subject to appeal. The parties in these two disputes (*Peru – Agricultural Products* (WT/DS457) and *China – HP-SSST (Japan) / China – HP-SSST (EU)* (WT/DS454 / WT/DS460)) have been informed of how the Appellate Body intends to treat their executive summaries in the event of an appeal. However, the Appellate Body also wishes to inform the WTO Membership as a whole of these developments. Accordingly, the remainder of this document sets out certain guidelines for executive summaries submitted in appellate proceedings.

The guidelines seek to allow WTO Members to summarize their own positions and supporting arguments in their own words, while at the same time encouraging a degree of harmonization in the structure and length of such summaries. The Appellate Body will consider whether it would be

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1 WT/AB/23, 11 March 2015.

2 WT/AB/WP/6, 16 August 2010.

3 Pursuant to the Working Procedures, third participants may elect, but are not required, to submit written submissions to the Appellate Body.

useful to incorporate some or all aspects of these guidelines into the Working Procedures once both the Appellate Body and Members have some experience with the guidelines now introduced on a trial basis. The Appellate Body notes that amendments to the Working Procedures will in any event be necessary in the near-term future once the Digital Dispute Settlement Registry is launched. With respect to these matters, the Appellate Body will engage in consultations as required or appropriate.[4]

[4] With respect to amendments to the Working Procedures, Article 17.9 of the Understanding on Rules and Procedures Governing the Settlement of Disputes provides for the Appellate Body to draw up its working procedures in consultation with the Chair of the Dispute Settlement Body (DSB) and the Director-General, and Rule 32(2) of the Working Procedures specifies that the same procedures apply in the event of amendments to those working procedures. The DSB has also adopted procedures for consultations between the Chair of the DSB and WTO Members with respect to amendments to the Working Procedures. This Decision is set out in document WT/DSB/31.

ANNEX 2

LIMITS ON THE LENGTH OF WRITTEN SUBMISSIONS

COMMUNICATION FROM THE APPELLATE BODY[1]

INTRODUCTION

As noted in the Appellate Body's 2013 communication on its workload, the size and complexity of appeals have increased markedly over time.[2] In the face of an increasing workload, the Appellate Body has, over the last few years, undertaken various efforts to continue to ensure both the high quality of its reports and the completion of appellate proceedings in as short a time as possible. These efforts include the revision of internal processes, as well as the adoption, on a trial basis, of the practice of annexing to Appellate Body reports the executive summaries of the arguments submitted by the participants and third participants.[3]

Several WTO Members have suggested that setting limits on the length of written submissions may assist the Appellate Body in managing its increasing workload. With this in mind, the Appellate Body is considering whether, in addition to the above-mentioned efforts, adopting such limits could also allow for better management of WTO appellate proceedings and contribute to a more optimal use of the resources of the Appellate Body and of the users of the dispute settlement system. With this note, the Appellate Body would like to initiate further reflection and discussion among and with WTO Members on issues that may arise in connection with setting limits on the length of written submissions.

This note begins by reviewing the length of written submissions in WTO appellate proceedings to date. Subsequently, it sets out the current guidelines regarding the length of submissions in WTO dispute settlement proceedings and briefly discusses the rules and guidelines applied by several international adjudicative bodies regarding the length of written submissions in proceedings before these bodies. Finally, this note formulates – for reflection and discussion purposes only – a number of questions relating to the issues raised by setting limits on the length of written submissions in WTO appellate proceedings.

Members are kindly invited to provide comments addressing these questions and may wish to post their comments in a dedicated section of the WTO Members' website at https://www.wto.org/abforum. Members may also wish to share their experience with limits on the length of written submissions in proceedings before domestic, regional, and other international adjudicative bodies.

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1 JOB/AB/2, 23 October 2015.

2 Communication from the Appellate Body, The Workload of the Appellate Body, JOB/AB/1, 30 May 2013.

3 See Communication from the Appellate Body, Executive Summaries of Written Submissions in Appellate Proceedings, WT/AB/23, 11 March 2015.

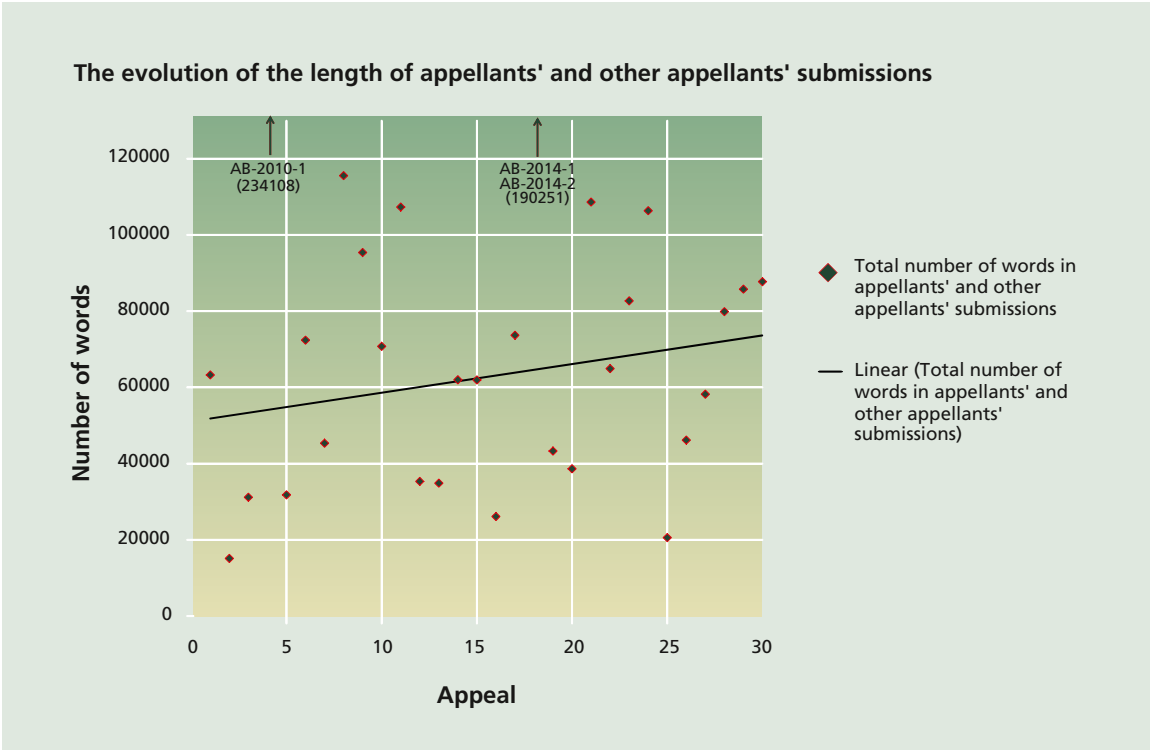
THE LENGTH OF WRITTEN SUBMISSIONS IN WTO APPELLATE PROCEEDINGS

This section provides an overview of the length (in words) of written submissions made to the WTO Appellate Body. Based on a review of participants' submissions in appellate proceedings between 2009 and 2015, this section sets out information relating to the following parameters:

- the evolution of the length of appellants' and appellees' written submissions; and
- the relationship between the length of the panel report and the length of appellants' and appellees' written submissions in appellate proceedings.

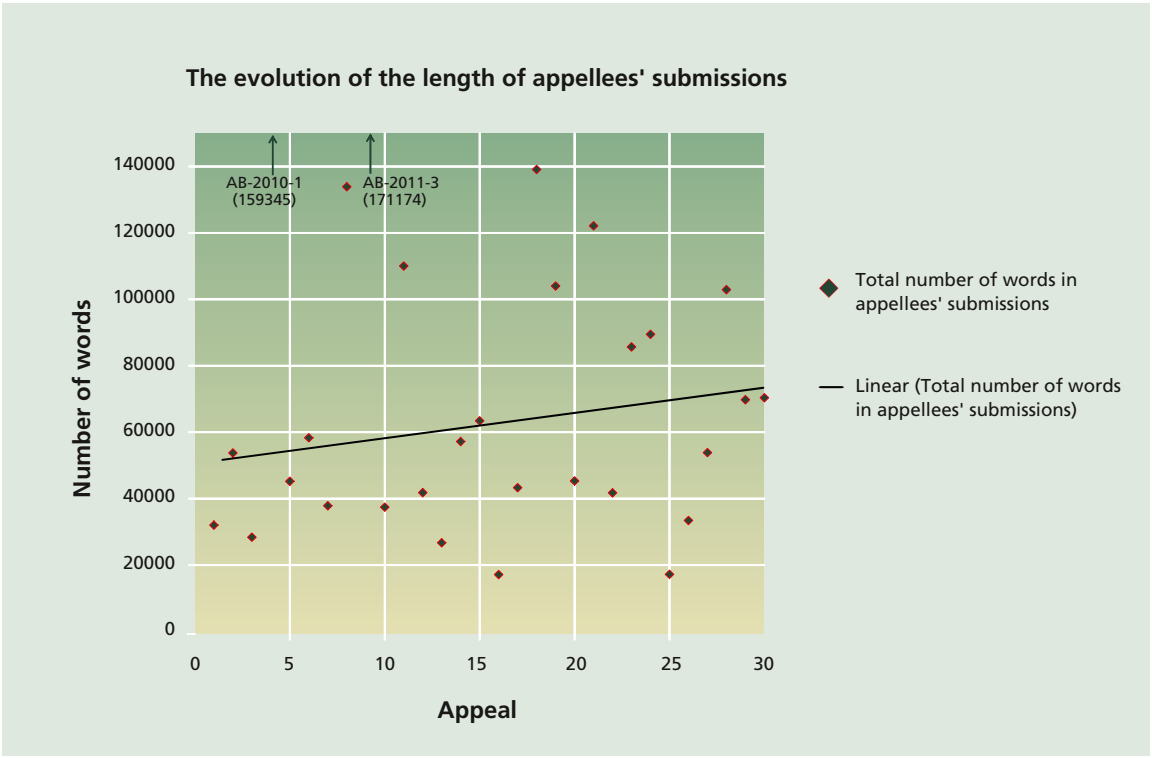
A review of appellate proceedings between January 2009 and October 2015 demonstrates a significant increase in the length of the appellants' and appellees' written submissions, as measured by the word count of those submissions. The average number of words per submission in the first five cases in the period considered was 26,965, and the average number of words per submission in the last five cases of this period was 34,982.[4] This represents an increase of almost 30% in the length of the appellants' and appellees' submissions. The following charts[5] illustrate this trend. In these charts, one data point may represent multiple appellants' and other appellants' submissions or multiple appellees' submissions filed in the same appellate proceeding.

CHARTS 1(A) AND 1(B) – THE EVOLUTION OF THE LENGTH OF PARTICIPANTS' WRITTEN SUBMISSIONS



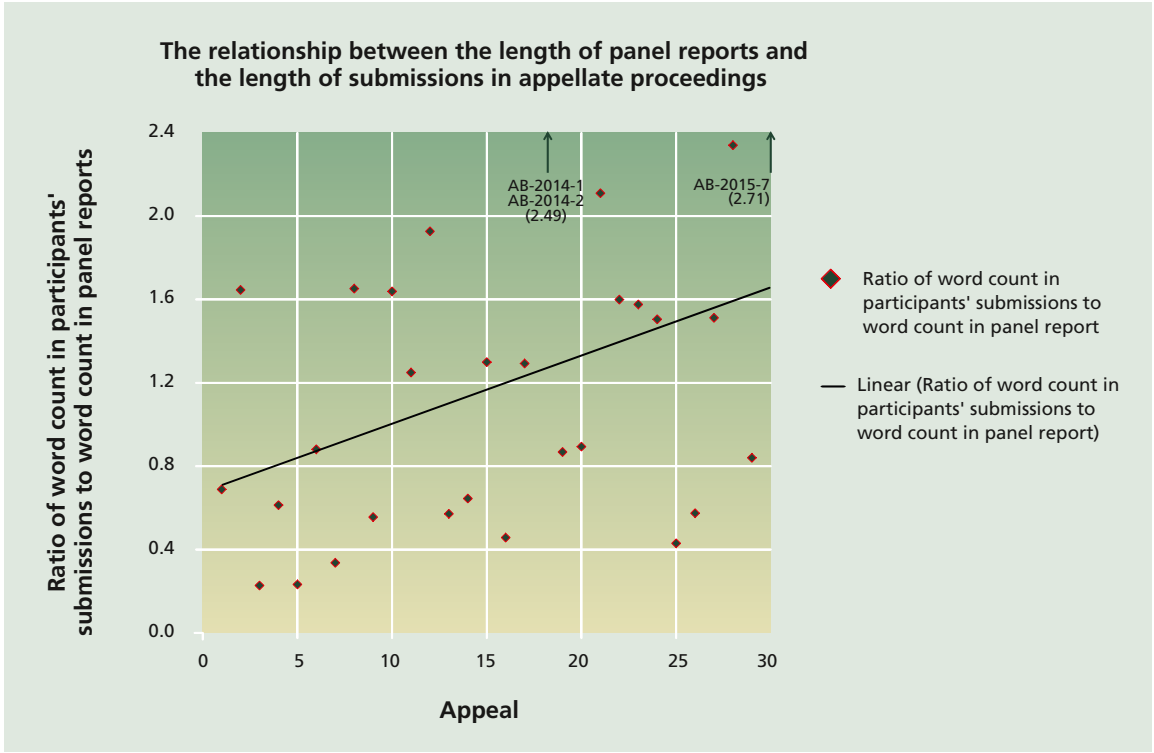
[4] Over the period from January 2009 to October 2015, the average length (excluding the top two outliers) of appellants' and other appellants' submissions was 30,425 words and the average length of appellees' submissions was 28,875 words.

[5] Each appeal handled by the Appellate Body during the period from January 2009 to October 2015 is represented by one data point in the charts. The top two data points have been excluded in generating the trend line for these charts. This was done in order to account for the fact that there are certain exceptional cases (in terms of size, complexity, etc.) and to demonstrate that certain trends exist even when such exceptional cases are not taken into account.



The following chart shows the trend line for the ratio of the total number of words contained in the participants' submissions in each appeal as compared to the total number of words in the corresponding panel report. The trend line shows an increase in the ratio from 0.7 to about 1.6.

CHART 2 – THE RELATIONSHIP BETWEEN THE LENGTH OF PANEL REPORTS AND THE LENGTH OF WRITTEN SUBMISSIONS IN APPELLATE PROCEEDINGS



CURRENT GUIDELINES ON THE LENGTH OF WRITTEN SUBMISSIONS IN WTO DISPUTE SETTLEMENT

As it stands, there are no mandatory limits on the length of written submissions in WTO appellate proceedings. The Working Procedures for Appellate Review do not provide for limits on the length of written submissions, and no such limits are imposed in practice. However, in the standard letter communicating the working schedule to the participants and third participants, the Appellate Body requests the participants and third participants to ensure that their written submissions are concise.

In addition, the Appellate Body has adopted, on a trial basis, the practice of annexing to Appellate Body reports the executive summaries of the arguments submitted by the participants and third participants, rather than drafting its own description of such arguments. The guidelines for executive summaries of written submissions in appellate proceedings provide that the maximum length of each executive summary shall be limited to the longer of 250 words or 10% of the total word count of the written submission itself.[6]

Similarly, there are no limits on the length of written submissions in WTO panel proceedings. However, panels often set limits on the length of executive summaries of the parties' written submissions. Working procedures for panels typically provide that each party shall submit an executive summary of the facts and arguments as presented to the panel in its written submissions and oral statements, and set a limit of 10-15 pages for such executive summaries. These limits may be adjusted in the light of the size of a particular case.

RULES AND GUIDELINES ON THE LENGTH OF WRITTEN SUBMISSIONS IN PROCEEDINGS BEFORE CERTAIN INTERNATIONAL ADJUDICATIVE BODIES

This section surveys rules and guidelines regarding the length of written submissions applicable in proceedings before certain international adjudicative bodies. It is evident that rules and guidelines applied by other international adjudicative bodies must be seen within the context of the features and particularities of the different adjudicative systems. Moreover, it is clear that such rules or guidelines could not simply be transposed into the particular context of the WTO dispute settlement system. Nonetheless, certain elements of such rules or guidelines may usefully inform or inspire the discussion about limits on the length of written submissions in WTO appellate proceedings.

While some international adjudicative bodies have adopted rules limiting the length of written submissions, others have not; instead, they encourage parties to keep their pleadings as concise as possible. For instance, Practice Direction III of the International Court of Justice states that "[t]he parties are strongly urged to keep the written pleadings as concise as possible, in a manner compatible with the full presentation of their positions."[7] Similarly, the Guidelines Concerning the Preparation and Presentation of Cases before the International Tribunal for the Law of the Sea also indicate that "[a] pleading should be as short as possible."[8]

The Rules of Procedure and Evidence of the International Criminal Tribunal for the Former Yugoslavia (ICTY) did not initially restrict the length of written submissions; however, these rules were amended pursuant to Practice Directions issued by the President of the Tribunal establishing limitations on the length of written briefs and motions at trial and on appeal.[9] The most recent relevant Practice Direction, dated 16 September 2005, provides that pre-trial briefs shall not exceed 15,000 words and trial briefs shall not

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[6] See Communication from the Appellate Body, Executive Summaries of Written Submissions in Appellate Proceedings, WT/AB/23, 11 March 2015.

[7] International Court of Justice, Practice Directions, Practice Direction III.

[8] International Tribunal for the Law of the Sea, Guidelines Concerning the Preparation and Presentation of Cases Before the Tribunal, Article 2.

[9] The Rules of Procedure of the ICTY provide that "[p]roposals for amendment of the Rules may … be made in accordance with … the Practice Direction issued by the President" (United Nations, International Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law Committed in the Territory of the former Yugoslavia since 1991 (ICTY), *Rules of Procedure and Evidence*, Case No. IT/32/Rev. 50, 8 July 2015, Rule 6(C)).

exceed 60,000 words.[10] The Practice Direction also provides that neither the "brief of an appellant on appeal from a final judgement of a Trial Chamber", nor the appellee's brief in response, shall exceed 30,000 words[11], and that motions, responses, and replies before a Chamber shall not exceed 3,000 words.[12] The Practice Direction further states that "a party must seek authorization from the Chamber to exceed the word limits and must provide an explanation of the exceptional circumstances that necessitate the oversized filing."[13]

The Regulations of the International Criminal Court (ICC) also establish limits on the length of written briefs and motions at trial and on appeal. In particular, Regulation 38 stipulates specific page limits for several different kinds of documents filed at all stages of the proceedings.[14] In addition, specifically with regard to appeals, Regulations 58 and 59 provide that a document submitted in support of an appeal, as well as the document submitted in response, shall not exceed 100 pages.[15] In certain circumstances, the Appeals Chamber may order the appellant to file a reply, which shall not exceed 50 pages.[16] In addition, the ICC Regulations contain a clause that provides for the possibility of extending page limits in exceptional circumstances.[17]

Finally, we note that several other international adjudicative bodies have not adopted limits on the length of written submissions, including the Court of Justice of the Andean Community, the Permanent Review Tribunal and ad hoc arbitral tribunals of Mercosur, and NAFTA panels.

QUESTIONS FOR FURTHER REFLECTION AND DISCUSSION

This section sets out a number of questions and considerations in order to initiate reflection and discussion among and with WTO Members. While it seeks to cover the key questions and considerations that may arise in connection with setting limits on the length of written submissions, it should not be seen as an exhaustive listing of relevant questions and considerations.

What would be the effects of setting limits on the length of written submissions in WTO appellate proceedings?

Members may wish to consider whether setting limits on the length of written submissions would be useful. Would limits on the length of written submissions result in time-savings in resolving appeals; a reduced workload for participants, the Appellate Body, or both; and a more optimal use of resources of the Appellate Body[18] and the participants? In particular, Members may reflect on whether and how such limits might affect: (i) the number of issues that participants may choose to appeal and the number of arguments they raise in their written submissions; (ii) the focus of submissions on the key issues on appeal; (iii) the quality and clarity of the participants' written submissions; and (iv) the ability of the participants to present their respective cases and exercise their due process rights before the Appellate Body. Additionally, Members may wish to discuss whether setting limits on the length of written submissions would likely lead to longer or shorter hearings, and whether such limits might lead to requests by the Appellate Body for

[10] ICTY, *Practice Direction on the Length of Briefs and Motions*, Case no. IT/184 Rev. 2, 16 September 2005, Section (C)(3) and (C)(4).

[11] ICTY, *Practice Direction on the Length of Briefs and Motions*, Case no. IT/184 Rev. 2, 16 September 2005, Section (C)(1)(a) and (b).

[12] ICTY, *Practice Direction on the Length of Briefs and Motions*, Case no. IT/184 Rev. 2, 16 September 2005, Section (C)(5).

[13] ICTY, *Practice Direction on the Length of Briefs and Motions,* Case no. IT/184 Rev. 2, 16 September 2005, Section (C)(7). The President of the International Criminal Tribunal for Rwanda (ICTR) issued a Practice Direction, dated 8 December 2006, that mirrors the limitations on length adopted by the ICTY. (See: International Criminal Tribunal for Rwanda, *Practice Direction on the Length of Briefs and Motions on Appeal*, Sections (B), (C)(1)(a) and (b), (C)(3), and (C)(5)).

[14] ICC, *Regulations of the Court,* Official documents of the International Criminal Court ICC-BD/01-03-11, Regulation 38(1) and (2).

[15] ICC, *Regulations of the Court*, Official documents of the International Criminal Court ICC-BD/01-03-11, Regulations 58(5) and 59(2).

[16] ICC, *Regulations of the Court*, Official documents of the International Criminal Court ICC-BD/01-03-11, Regulation 60.

[17] See ICC, *Regulations of the Court*, Official documents of the International Criminal Court ICC-BD/01-03-11, Regulation 37.

[18] In this regard, we note that Article 17.12 of the DSU provides that "the Appellate Body shall address each of the issues raised" on appeal.

additional written memoranda from the participants in the course of the proceedings.[19] Finally, Members may also wish to reflect on whether adopting mandatory limits on the length of written submissions would be appropriate in inter-governmental dispute settlement, or whether exhortatory guidelines regarding the length of their written submissions would be preferable.

Should the same limit on length apply to all written submissions in all appeals? If not, what objective criteria should be used to determine the applicable limit?

Members may wish to consider whether it would be appropriate to adopt one general limit on the length of all written submissions in all appeals and, if so, what this limit should be. Alternatively, if limits should be set on a case-by-case basis, Members may wish to consider objective criteria on the basis of which such limits should be determined, such as: (i) the length of the corresponding panel report; (ii) the number of distinct claims addressed in the panel report; or (iii) the number of issues raised in an appeal or cross-appeal. In addition, Members may also wish to consider at what point in time participants would need to be informed of the applicable limit. With respect to the relative length of appellants' and appellees' submissions, it may be useful to discuss whether the limit that applies to the former should also apply to the latter; or whether the limit that applies to an appellee's submission should be set as a percentage of the limit that applies to an appellant's submission (or other appellant's submission). Members may also wish to consider whether, given the limited timeframe for filing appellees' submissions, it would be sufficient to limit only the length of the appellants' and other appellants' submissions.[20] Another question might be how to determine limits on length in cases involving multiple appellants or other appellants, each focusing on different issues. Furthermore, Members may wish to discuss what objective criteria should be used to set limits on the length of third participants' submissions.

Should rules setting limits on the length of written submissions provide for the possibility to request, in exceptional circumstances, an extension of such limits?

Members may wish to consider under what exceptional circumstances extensions of limits on the length of written submissions might be granted. In addition, Members may wish to reflect on when and how such requests to extend such limits should be made and on the basis of what criteria extensions should be determined. With regard to the appellant's submission, the question arises as to when such a request should be made and when a decision should be rendered. For the appellee's submission, the question might arise as to whether an extension of the limit on the length of the written submission could be granted where the appellant has not sought, or was denied an extension.

[19] Rule 28 on "Written Responses" of the Working Procedures for Appellate Review.

[20] According to Rule 22 of Working Procedures for Appellate Review, appellees' submissions are to be filed within 18 days of the filing of the Notice of Appeal (or within 13 days of the filing of an other appellant's submission).

ANNEX 3

SPEECH TO THE DISPUTE SETTLEMENT BODY ON 28 OCTOBER 2015

BY ROBERTO AZEVÊDO, DIRECTOR-GENERAL OF THE WTO

INTRODUCTION

Good afternoon everyone. I am pleased to have the opportunity to address the DSB once again.

I spoke to you here just over a year ago, about the challenges facing the WTO dispute settlement system and what we were doing to address them. There is no question that we have made some progress during the past year. But, as you well know, things are still very challenging. Many delegations referred to the current challenges we face at the August DSB meeting, and some of you have spoken to me about your concerns as well. And of course I fully understand all those concerns. Our dispute settlement system is highly efficient – and remains faster than other international adjudicatory systems the world over. Nevertheless, we can do better.

So I want to talk to you today about the challenges before us, and what we can do to meet them.

ACHIEVEMENTS ON HUMAN RESOURCES SIDE SINCE LAST YEAR

Let me first explain what has been done since I spoke to you last September.

We continue to work under the zero nominal growth principle and caps on personnel expenditure and headcount. I have continued to reallocate existing resources to the legal divisions, but always observing these constraints that you have set. Specifically, I promised to temporarily assign two to three staff members from non-dispute settlement divisions to pending and upcoming disputes as lead lawyers. This was done.

I also mentioned that I had allocated 15 additional lawyer posts to the three dispute settlement divisions – and that vacancies for these posts would be announced soon after my statement. Several recruitments followed. But I have to tell you that it has not been easy to find the senior talent which is what we need most.

As you know, this is a specialized area of practice. People with the knowledge and experience required to lead teams supporting WTO dispute settlement panels are hard to find. We have also lost out on occasion because we are not always competitive. Some attractive CVs were received but our offers were turned down because candidates preferred jobs elsewhere. Despite these setbacks, I have continued to shore up the resources dedicated to dispute settlement by reallocating several posts from other divisions.

As I mentioned at the CBFA meeting on 23 October, a total of 19 lawyer posts ranging from Grade 7 through Grade 10 have been allocated as follows:

- 5 to the Appellate Body Secretariat
- 7 to Rules Division, and
- 7 to Legal Affairs Division

In addition, 8 posts for paralegals, secretaries and an editor were put in place in the three divisions. Overall the number of professional posts in the three legal divisions has almost doubled since I took office in September 2013 – from 30 to 57 in terms of allocated posts.

We have also restructured our Languages, Documentation and Information Management Division in order to be able to cope with the extra burden on translation services. We have found it more appropriate to keep this specialized type of work in-house. As demand continues to increase, we will need to look at recruitment in this area to build up required expertise over time.

MOVING FORWARD

Looking ahead, I will continue doing all I can to direct available resources to the dispute settlement divisions. As I mentioned last year, my intention is to create overcapacity in the dispute settlement area. Should dispute settlement activity wane in a year or two then we will put these talents to work elsewhere in the Secretariat – and bring them back if the workload in dispute settlement so requires. However, it seems extremely unlikely that the high volume of casework is just a temporary surge.

2015 has turned out to be the busiest period on record with 30 active panels per month, on average. Currently, there are 19 panels or arbitrations in the system – 12 in trade remedies, and 7 in all other areas, as well as 3 appeals, and 2 arbitrations. In addition there are 11 panels in composition. And since I spoke to the DSB last September we have received 17 new requests for consultations. Of those 17 new requests, 11 have been in the Rules area, and 6 in Legal Affairs.

The vast majority of disputes in recent times have thus been in the trade remedies area. They also include two of the largest disputes ever brought before the system (the Aircraft disputes). Two robust Rules Division teams have been dedicated to those disputes for over 3 years now, putting a strain on Rules Division resources. And we know from experience that the Appellate Body will have difficulty coping with these large disputes, should they reach that level, together with other appeals that will be on the docket at the time.

In assisting panels, we are currently organised so that Rules Division staff are supposed to handle all disputes dealing with trade remedies – specifically: anti-dumping, subsidies, and safeguards. Meanwhile, Legal Affairs Division staff handle disputes in the other areas. Legal Affairs has pitched in to handle some Rules cases in the sequence they arose when they had available staff with relevant expertise. But this has not been sufficient to deal with the recent surge in Rules cases. We are therefore recruiting and developing expertise in the trade remedies area. We need to ensure that the dispute settlement teams will continue to receive the experienced and specialized assistance they will need, including in the ever-expanding number of trade remedies disputes.

Through our recent actions on resource reallocation and recruitment, we are likely to shorten the waiting periods for Rules cases in the current queue by several months. My aim is to have all the cases in the current queue underway by April next year. Whether this will be possible depends on several elements. And we cannot eliminate the possibility of having a new queue of cases between now and then if many new panels are established in the meantime.

It seems inevitable that the pressures will continue to mount. It takes time to recruit and train new staff members, and new disputes will continue to be filed. We should acknowledge that reallocation and recruitment alone will not eliminate the challenges we are currently facing. Indeed, we are at the limit of what reallocation can achieve. As I said at the CBFA, Members may want to reflect on how we deal with this issue in the future. You have to carefully consider how much resources you want to make available for dispute settlement.

The increased breadth and complexity of disputes over the last 20 years has changed the face of WTO dispute settlement completely. This is set out in more detail in the paper on current dispute settlement DS activity prepared by the Secretariat and provided as a room document. We are therefore exploring ways that will allow us to be more flexible in meeting demand as it arises – and your views will be central to this process.

One idea is to develop more flexibility in staffing panels at the junior level (Grade 7s). For example, we could create a single pool of junior lawyers dedicated to assist all dispute settlement panels – be they trade remedies or otherwise. We could draw the junior members of dispute settlement teams from the general pool, rather than being limited to staff from the responsible legal division which may not have junior staff available at the time. Let me be clear here. This does not mean that we are proposing to merge the Rules and Legal Affairs Divisions, or necessarily to put senior level lawyers in the general pool. Currently we have no such plans. Our senior level lawyers (Grades 9s and 10s) will continue to be assigned to lead dispute teams in their areas of expertise. In other words, those with expertise in trade remedies will lead disputes in trade remedies cases, and others will lead disputes in the other areas. And the reason for this is to preserve efficiency and consistency. We would shift junior resources between Rules and Legal Affairs as demand arises in a particular subject area, while preserving the expertise needed for each dispute.

Now, how will this address the problem of insufficient senior level expertise? The answer is that it won't, right away. But it will allow us over time to build up expertise at the mid-level, which we currently do not have. The idea is to enhance the capacity of senior lawyers. Today, each senior lawyer handles just one case at a time, often doing most of the drafting, besides reviewing and revising the work of junior lawyers. Our goal is to get more junior lawyers doing most of the drafting. If we succeed with better support and assistance, 10 senior lawyers may be able to handle up to 20 cases in future, rather than only 10, as is the situation today. For this to happen, of course, we need adequate resources at all levels – junior and senior. And as I said, we are continuing to work on building up those levels. So this is one idea that might complement the actions I have taken through resource reallocation. We can continue to think about other ideas and I would welcome your thoughts as well.

I have asked DDG Brauner to engage with delegations to gather views from you on improving the functioning of the system further, bearing in mind the budgetary constraints and headcount limitation imposed by members. I also encourage you to continue to actively participate in the DSU review process. This is one of the avenues available to members to make contributions in improving the efficiency and effectiveness of the dispute settlement system.

NON-DISCRIMINATION AND TRANSPARENCY

Finally, I want to say something about non-discrimination and transparency. I have said it before – but let me say it again: there has not been and there will not be any favouritism. Once panels are composed, they are staffed by either the Rules or Legal Affairs Division experts – depending on the subject matter – and move forward by date of composition. If staff are unavailable, panels are set down in a queue – be it a trade remedies or non-trade remedies queue, again by date of composition. And they are staffed as soon as staff members with the right level of seniority and experience in the relevant Division become available. No one is permitted to jump the relevant queue. There are no exceptions.

Turning to transparency, many of you have pointed to a need for more transparency on the status of the queue and on approximate "wait times" for panels to get underway. I appreciate that you need to be able to plan for upcoming panel work as well as to prepare your domestic constituencies appropriately. It is often difficult for the Secretariat to predict when individual disputes will proceed from consultations to the DSB to a request that a panel should be established – or how much time it will take for panel composition.

Workload planning is also complicated at the appellate stage. It is difficult to predict exactly when panel reports will be ready for circulation to Members, whether they will be appealed and when the reports will be appealed. I have been thinking what we can do to shed more light on the queue and expected delays despite the existing constraints. I have also discussed this with Ambassador Neple. And so we will do the following:

The Secretariat will post on the WTO website two lists of panels, one with trade remedies and the other with non-trade remedies disputes, that have been composed and set down in a queue by date of composition. Currently, there is only one queue – for trade remedies cases. But this can change depending on future panels composed and we may have times where there are two queues. We will also post a list of panels that have been established but have not yet been composed. And we will post relevant information about appeals as well. To be clear, this information is already available on the website. But we are going to present it in a more organized, user-friendly manner.

In addition, Ambassador Neple, and his successors as DSB chair, will announce at the DSB meeting each month the number of disputes at panel composition stage and the ability of the Secretariat to meet expected demand over the coming period. Similar information will be provided about the Appellate Body's workload. This information should enable you to plan your dispute settlement activities better, and to brief your domestic constituencies more accurately.

CONCLUSION

In conclusion, I think that, despite our current challenges, we should not forget what we have in the WTO's dispute settlement system. It is unquestionably one of – if not the – most active international adjudicatory systems in the world. And it still operates faster than any other. So clearly we need to work together to maintain and improve the system, and to keep it running well.

I have limited my remarks today to what I can do to address the current challenges we face in dispute settlement. I intentionally avoided focusing on what you can do to improve the system. But of course, what I can do is only part of the picture. As you will see in the dispute settlement activity annexed to my statement, we are in a new world of disputes. You can do much more than I can to make the system work more expeditiously and more efficiently. I appreciate the thoughts that you have already shared on this issue, and I am keen to hear your ideas. As I mentioned, DDG Brauner will engage with you to gather your views and ideas.

I also encourage you to provide comments on the paper recently distributed by the Appellate Body about limits on the length of submissions. They have set up a dedicated section of the WTO Members' website for this purpose. Ambassador Neple is also available to consult with you to find solutions. But before we open the floor, I have one final thing to say.

I cannot close this presentation without saluting the lawyers and non-lawyers alike, across this house, who work so hard to make the dispute settlement such a source of pride for the whole organisation. I want to thank them for their commitment. That concludes my statement. Thank you for listening.

ANNEX 4

MEMBERS OF THE APPELLATE BODY (1 JANUARY TO 31 DECEMBER 2015)

BIOGRAPHICAL NOTES

Ujal Singh Bhatia (India) (2011–2019)

Ujal Singh Bhatia was born in India on 15 April 1950. He was India's Ambassador and Permanent Representative to the WTO from 2004 to 2010 and represented India in a number of dispute settlement cases. He also served as a WTO dispute settlement panelist in 2007–2008.

Mr Bhatia has also served as Joint Secretary in the Indian Ministry of Commerce, apart from two decades in Orissa State in various field and State-level administrative assignments that involved development administration and policy-making. His legal and adjudicatory experience spans over three decades, and focuses on domestic and international legal/jurisprudence issues, negotiation of trade agreements and policy issues at the bilateral, regional, and multilateral levels, as well as the implementation of trade and development policies in the agriculture, manufacturing and service industries.

Mr Bhatia has often lectured on international trade issues and has published numerous papers and articles on a wide range of trade and economic topics. He holds an MA in Economics from the University of Manchester and from Delhi University, as well as a BA (Hons) in Economics, also from Delhi University.

Seung Wha Chang (Korea) (2012–2016)

Born in Korea on 1 March 1963, Seung Wha Chang is currently Professor of Law at Seoul National University where he teaches International Trade Law and International Arbitration.

He has served on several WTO dispute settlement panels, including *US – FSC*, *Canada – Aircraft Credits and Guarantees*, and *EC – Trademarks and Geographical Indications*. He has also served as Chairman or Co-arbitrator of numerous arbitral tribunals dealing with commercial matters. Until he joined the Appellate Body in 2012, he had served as a Member of the International Court of Arbitration.

Professor Chang began his professional academic career at the Seoul National University School of Law in 1995. He has taught international trade law and, in particular WTO dispute settlement, at more than ten foreign law schools, including Harvard Law School, Yale Law School, Stanford Law School, New York University, Duke Law School, and Georgetown University. In 2007, Harvard Law School granted him an endowed visiting professorial chair title, the Nomura Visiting Professor of International Financial Systems.

In addition, Professor Chang previously served as a Seoul District Court judge, handling many cases involving international trade. He also practised as a foreign attorney at a leading law firm in Washington DC, handling international trade matters, including trade remedies and WTO-related disputes.

Professor Chang has published many books and articles in the field of international trade law in internationally recognized journals. In addition, he serves as an Advisory Board Member of the *Journal of International Economic Law* (Oxford University Press) and the *Journal of International Dispute Settlement* (Oxford University Press).

Professor Chang holds a Bachelor of Laws degree (LLB) and a Master of Laws degree (LLM) from Seoul National University School of Law; and a Master of Laws degree (LLM) as well as a Doctorate in International Trade Law (SJD) from Harvard Law School.

Thomas R. Graham (United States) (2011–2019)

Tom is the former head of the international trade practice at King & Spalding, and he was the founder of the international trade practice at Skadden, Arps. He was one of the first US lawyers to represent respondents in trade remedy cases in various countries around the world, and he was among the first to bring economists, accountants, and other non-lawyer professionals into the international trade practices of private law firms.

Prior to entering private practice, Tom served as Deputy General Counsel in the Office of the US Trade Representative. Early in his career, he was a Legal Officer of the United Nations, in Geneva; and a visiting professor of law and staff member of Ford Motor Company, in Caracas, Venezuela.

Tom was the founding chairman of the American Society of International Law's Committee on International Economic Law, and he served as chair of the American Bar Association's Subcommittee on Exports. He has been a visiting professor at the University of North Carolina Law School, and an adjunct professor at the Georgetown Law Center and the American University Washington College of Law. He has edited books on international trade policy, and international trade and environment, and he has written many articles and monographs on international trade law and policy as a Guest Scholar at the Brookings Institution, and as a Senior Associate at the Carnegie Endowment for International Peace. He also is the co-author, with his daughter, of Getting Open: The Unknown Story of Bill Garrett and the Integration of College Basketball, (Simon & Schuster, Atria Books, 2006; Indiana University, paperback, 2008).

Tom received his undergraduate degree from Indiana University, and his J.D. from Harvard Law School.

Ricardo Ramírez-Hernández (Mexico) (2009–2017)

Born in Mexico on 17 October 1968, Ricardo Ramírez-Hernández holds the Chair of International Trade Law at the Mexican National University (UNAM) in Mexico City. He was Head of the International Trade Practice for Latin America of an international law firm in Mexico City. His practice focused on issues related to NAFTA and trade across Latin America, including international trade dispute resolution.

Prior to practicing with a law firm, Mr Ramírez-Hernández was Deputy General Counsel for Trade Negotiations of the Ministry of Economy in Mexico for more than a decade. In this capacity, he provided advice on trade and competition policy matters related to 11 free trade agreements signed by Mexico, as well as with respect to multilateral agreements, including those related to the WTO, the Free Trade Area of the Americas (FTAA), and the Latin American Integration Association (ALADI).

Mr Ramírez-Hernández also represented Mexico in complex international trade litigation and investment arbitration proceedings. He acted as lead counsel to the Mexican government in several WTO disputes. He has also served on NAFTA panels.

Mr Ramírez-Hernández holds an LLM degree in International Business Law from the American University Washington College of Law, and a law degree from the Universidad Autónoma Metropolitana.

Shree Baboo Chekitan Servansing (Mauritius) (2014–2018)

Born in Mauritius on 22 April 1955, Shree Baboo Chekitan Servansing enjoyed a long and distinguished career with the Mauritian civil service. From 2004 to 2012, Mr Servansing was Mauritius' Ambassador and Permanent Representative to the United Nations Office and other International Organizations in Geneva, including the WTO. During his tenure as Permanent Representative, he served on various Committees at the WTO, and chaired the Committees on Trade and Environment, and Trade and Development. He also chaired the Work Programme on Small Economies, the dedicated session on Aid-for-Trade, and the African Group, and was coordinator of the African Caribbean Pacific (ACP) Group.

Mr Servansing previously worked, in various capacities, for the Mauritius Ministry of Foreign Affairs in Mauritius, India and Belgium. During his tenure at the Mauritius Embassy in Belgium, he was intensively involved in the ACP-EU negotiations leading to the Cotonou Agreement and subsequently in the Economic Partnership Agreement (EPA) negotiations. Mr Servansing also served as the personal representative of the Prime Minister of Mauritius on the Steering Committee of the New Partnership for Africa's Development (NEPAD). In this capacity he was engaged in the strategic formulation of Africa's flagship development framework.

Upon retiring from civil service, Mr Servansing served as the head of the ACP-EU Programme on Technical Barriers to Trade in Brussels from 2012 to 2014. In this position, he was responsible for facilitating the building of capacity among ACP countries in order to enhance their export competitiveness, and improve their Quality Infrastructure to comply with technical regulations.

Mr Servansing's experience in trade policy, trade negotiations, and the multilateral trading system spans three decades. He has frequently spoken on international trade issues, and has published numerous papers and articles in Mauritian and foreign journals on a variety of trade-related issues.

Mr Servansing holds an M.A. from the University of Sussex, a Postgraduate Diploma in Foreign Affairs and International Trade from Australian National University, and a B.A. (Hons.) from the University of Mauritius.

Peter Van den Bossche (Belgium) (2009–2017)

Born in Belgium on 31 March 1959, Peter Van den Bossche is Professor of International Economic Law at Maastricht University, the Netherlands. Van den Bossche is also visiting professor at the College of Europe, Bruges (since 2010); the University of Barcelona (IELPO Programme) (since 2008); and the World Trade Institute, Berne (MILE Programme) (since 2002). He is member of the Advisory Board of the *Journal of International Economic Law,* the *Journal of World Investment and Trade* and the *Revista Latinoamericana de Derecho Comercial International.* He is also member of the Advisory Board of the WTO Chairs Programme (WCP).

Mr Van den Bossche holds a Doctorate in Law from the European University Institute in Florence, an LLM from the University of Michigan Law School, and a Licence en Droit *magna cum laude* from the University of Antwerp. From 1990 to 1992, he served as a référendaire of Advocate General W. van Gerven at the European Court of Justice in Luxembourg. From 1997 to 2001, Mr Van den Bossche was Counsellor and subsequently Acting Director of the WTO Appellate Body Secretariat. In 2001, he returned to academia and from 2002 to 2009 frequently acted as a consultant to international organisations and developing countries on issues of international economic law. He also served on the faculty of the Université libre de Bruxelles, Brussels, Belgium (2002–2009); the China-EU School of Law, China University of Political Science and Law, Beijing, China (2008-2014); the Trade Policy Training Centre in Africa (trapca), Arusha, Tanzania (2008 and 2013); the Foreign Trade University, Hanoi & Ho Chi Minh City, Vietnam (2009 and 2011); the Universidad San Francisco de Quito, Ecuador (2013); and at the Law School of Koç University, Istanbul, Turkey (2013).

Mr Van den Bossche has published extensively in the field of international economic law. He is author of the book *The Law and Policy of the World Trade Organization*, of which the third edition (with Werner Zdouc) was published by Cambridge University Press in 2013.

Yuejiao Zhang (China) (2008–2016)

Yuejiao Zhang is Professor of International Economic Law at Tsinghua University and at Shantou University in China. She is an arbitrator at the International Chamber of Commerce (ICC) and at China's International Trade and Economic Arbitration Commission (CIETAC). She served as Vice-President of China's International Economic Law Society. She is also a member of the Advisory Board of the International Development Law Organization (IDLO).

Professor Zhang served as a Board Director to the West African Development Bank from 2005 to 2007. Between 1998 and 2004, she held various senior positions at the Asian Development Bank (ADB), including as Assistant General Counsel, Co-Chair of the Appeal Committee, and Director-General. She was the head of the ADB experts group on international trade and the ADB contact point to the WTO. Prior to this, she held several positions in government and academia in China, including as Director-General of Law and Treaties at the Ministry of Foreign Trade and Economic Cooperation (1984–1997). She participated in the preparation of China's first joint-venture law, general principles of civil law, contract law, and foreign trade law. From 1987 to 1996, she was one of China's chief negotiators on intellectual property and was involved in the preparation of China's patent law, trademark law, and copyright law. She also served as the chief legal counsel for China's GATT resumption. Between 1982 and 1985, she worked as legal counsel at the World Bank. She was a Member of the Governing Council of the International Institute for the Unification of Private Law (UNIDROIT) from 1987 to 1999 and a Board Member of IDLO from 1988 to 1999. Professor Zhang was a member of the UNIDROIT and UNCITRAL drafting committees concerning several international trade and economic conventions, such as the General Principles of Commercial Contract and the International Financial Leasing Convention.

Professor Zhang has authored several books and articles on international economic law and international dispute settlement. She has a BA from China High Education College, a BA from Rennes University, France, and an LLM from Georgetown University. Professor Zhang also lectured at universities in France and in Hong Kong, Macau of China.

DIRECTOR OF THE APPELLATE BODY SECRETARIAT

Werner Zdouc

Director of the WTO Appellate Body Secretariat since 2006, Werner Zdouc obtained a law degree from the University of Graz in Austria. He then went on to earn an LLM from Michigan Law School and a Ph.D. from the University of St Gallen in Switzerland. Dr Zdouc joined the WTO Legal Affairs Division in 1995, advised many dispute settlement panels, and conducted technical cooperation missions in many developing countries. He became legal counsellor at the Appellate Body Secretariat in 2001. In 2008-2009 he chaired the WTO Joint Advisory Committee to the Director-General. He has been a lecturer and Visiting Professor for international trade law at Vienna Economic University, the Universities of St. Gallen, Zurich, Barcelona, Seoul, Shanghai, and the Geneva Graduate Institute. From 1987 to 1989, he worked for governmental and non-governmental development aid organizations in Austria and Latin America. Dr Zdouc has authored various publications on international economic law and is a member of the Trade Law Committee of the International Law Association.

ANNEX 5

I. FORMER APPELLATE BODY MEMBERS

Name	Nationality	Term(s) of office
Said El-Naggar	Egypt	1995–2000
Mitsuo Matsushita	Japan	1995–2000
Christopher Beeby	New Zealand	1995–1999 1999–2000
Claus-Dieter Ehlermann	Germany	1995–1997 1997–2001
Florentino Feliciano	Philippines	1995–1997 1997–2001
Julio Lacarte-Muró	Uruguay	1995–1997 1997–2001
James Bacchus	United States	1995–1999 1999–2003
John Lockhart	Australia	2001–2005 2005–2006
Yasuhei Taniguchi	Japan	2000–2003 2003–2007
Merit E. Janow	United States	2003–2007
Arumugamangalam Venkatachalam Ganesan	India	2000–2004 2004–2008
Georges Michel Abi-Saab	Egypt	2000–2004 2004–2008
Luiz Olavo Baptista	Brazil	2001–2005 2005–2009
Giorgio Sacerdoti	Italy	2001–2005 2005–2009
Jennifer Hillman	United States	2007–2011
Lilia Bautista	Philippines	2007–2011
Shotaro Oshima	Japan	2008–2012
David Unterhalter	South Africa	2006-2009 2009-2013

II. FORMER CHAIRPERSONS OF THE APPELLATE BODY

Name	Nationality	Term(s) as Chairperson
Julio Lacarte-Muró	Uruguay	7 February 1996 – 6 February 1997 7 February 1997 – 6 February 1998
Christopher Beeby	New Zealand	7 February 1998 – 6 February 1999
Said El-Naggar	Egypt	7 February 1999 – 6 February 2000
Florentino Feliciano	Philippines	7 February 2000 – 6 February 2001
Claus-Dieter Ehlermann	Germany	7 February 2001 – 10 December 2001
James Bacchus	United States	15 December 2001 – 14 December 2002 15 December 2002 – 10 December 2003
Georges Abi-Saab	Egypt	13 December 2003 – 12 December 2004
Yasuhei Taniguchi	Japan	17 December 2004 – 16 December 2005
Arumugamangalam Venkatachalam Ganesan	India	17 December 2005 – 16 December 2006
Giorgio Sacerdoti	Italy	17 December 2006 – 16 December 2007
Luiz Olavo Baptista	Brazil	17 December 2007 – 16 December 2008
David Unterhalter	South Africa	18 December 2008 – 11 December 2009 12 December 2009 – 16 December 2010
Lilia Bautista	Philippines	17 December 2010 – 14 June 2011
Jennifer Hillman	United States	15 June 2011 – 10 December 2011
Yuejiao Zhang	China	11 December 2011 – 31 May 2012 1 June 2012 – 31 December 2012
Ricardo Ramírez Hernández	Mexico	1 January 2013 – 31 December 2013 1 January 2014 – 31 December 2014
Peter Van den Bossche	Belgium	1 January 2015 – 31 December 2015

ANNEX 6

APPEALS FILED: 1995–2015

Year	Notices of Appeal filed	Notices of Appeal in original proceedings	Notices of Appeal in Article 21.5 proceedings
1995	0	0	0
1996	4	4	0
1997	6 [a]	6	0
1998	8	8	0
1999	9 [b]	9	0
2000	13 [c]	11	2
2001	9 [d]	5	4
2002	7 [e]	6	1
2003	6 [f]	5	1
2004	5	5	0
2005	13	11	2
2006	5	3	2
2007	4	2	2
2008	11 [g]	8	3
2009	3	1	2
2010	3	3	0
2011	6	6	0
2012	4	4	0
2013	1	1	0
2014	9	8	1
2015	8 [h]	6	2
Total	**134**	**112**	**22**

[a] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: *EC – Hormones (Canada) and EC – Hormones (US)*. A single Appellate Body report was circulated in relation to those appeals.

[b] This number excludes one Notice of Appeal that was withdrawn by the United States, which subsequently filed another Notice of Appeal in relation to the same panel report: *US – FSC*.

[c] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: US – 1916 Act (EC) and *US – 1916 Act (Japan)*. A single Appellate Body report was circulated in relation to those appeals.

[d] This number excludes one Notice of Appeal that was withdrawn by the United States, which subsequently filed another Notice of Appeal in relation to the same panel report: *US – Line Pipe*.

[e] This number includes one Notice of Appeal that was subsequently withdrawn: India – Autos; and excludes one Notice of Appeal that was withdrawn by the European Communities, which subsequently filed another Notice of Appeal in relation to the same panel report: *EC – Sardines*.

[f] This number excludes one Notice of Appeal that was withdrawn by the United States, which subsequently filed another Notice of Appeal in relation to the same panel report: *US – Softwood Lumber IV*.

[g] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: US – Shrimp (Thailand) and *US – Customs Bond Directive*.

[h] This number includes two Notices of Appeal that were filed at the same time in related matters, counted separately: *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan* and *China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union*.

ANNEX 7

PERCENTAGE OF PANEL REPORTS APPEALED BY YEAR OF ADOPTION: 1995–2015 [a]

	All panel reports			Panel reports other than Article 21.5 reports [b]			Article 21.5 panel reports		
Year of adoption	Panel reports adopted [c]	Panel reports appealed [d]	Percentage appealed [e]	Panel reports adopted	Panel reports appealed	Percentage appealed	Panel reports adopted	Panel reports appealed	Percentage appealed
1996	2	2	100%	2	2	100%	0	0	–
1997	5	5	100%	5	5	100%	0	0	–
1998	12	9	75%	12	9	75%	0	0	–
1999	10	7	70%	9	7	78%	1	0	0%
2000	19	11	58%	15	9	60%	4	2	50%
2001	17	12	71%	13	9	69%	4	3	75%
2002	12	6	50%	11	5	45%	1	1	100%
2003	10	7	70%	8	5	63%	2	2	100%
2004	8	6	75%	8	6	75%	0	0	–
2005	20	12	60%	17	11	65%	3	1	33%
2006	7	6	86%	4	3	75%	3	3	100%
2007	10	5	50%	6	3	50%	4	2	50%
2008	11	9	82%	8	6	75%	3	3	100%
2009	8	6	75%	6	4	67%	2	2	100%
2010	5	2	40%	5	2	40%	0	0	–
2011	8	5	63%	8	5	63%	0	0	–
2012	18	11	61%	18	11	61%	0	0	–
2013	4	2	50%	4	2	50%	0	0	–
2014	15	13	87%	13	11	85%	2	2	100%
2015	13	8	62%	11	6	55%	2	2	100%
Total	**214**	**144**	**67%**	**183**	**121**	**66%**	**31**	**23**	**74%**

[a] No panel reports were adopted in 1995.

[b] Under Article 21.5 of the DSU, a panel may be established to hear a "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings" of the DSB upon the adoption of a previous panel or Appellate Body report.

[c] The panel reports in EC – *Bananas III (Ecuador), EC – Bananas III (Guatemala and Honduras), EC – Bananas III (Mexico)*, and *EC – Bananas III (US)* are counted as a single panel report. The panel reports in US – Steel Safeguards, in *EC – Export Subsidies on Sugar*, and in *EC – Chicken Cuts*, are also counted as single panel reports in each of those disputes.

[d] Panel reports are counted as having been appealed where they are adopted as upheld, modified, or reversed by an Appellate Body report. The number of panel reports appealed may differ from the number of Appellate Body reports because some Appellate Body reports address more than one panel report.

[e] Percentages are rounded to the nearest whole number.

ANNEX 8

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED THROUGH 2015 [a]

Year of circulation	DSU	WTO Agmt	GATT 1994	Agri-culture	SPS	ATC	TBT	TRIMs	Anti-Dumping	Import Licensing	SCM	Safe-guards	GATS	TRIPS
1996	0	0	2	0	0	0	0	0	0	0	0	0	0	0
1997	4	1	5	1	0	2	0	0	0	1	1	0	1	1
1998	7	1	4	1	2	0	0	0	1	1	0	0	0	0
1999	7	1	6	1	1	0	0	0	0	0	2	1	0	0
2000	8	1	7	2	0	0	0	0	2	0	5	2	1	1
2001	7	1	3	1	0	1	1	0	4	0	1	2	0	0
2002	8	2	4	3	0	0	1	0	1	0	3	1	1	1
2003	4	2	3	0	1	0	0	0	4	0	1	1	0	0
2004	2	0	5	0	0	0	0	0	2	0	1	0	0	0
2005	9	0	5	2	0	0	0	0	2	0	4	0	1	0
2006	5	0	3	0	0	0	0	0	3	0	2	0	0	0
2007	5	0	2	1	0	0	0	0	2	0	1	0	0	0
2008	8	1	9	1	2	0	0	0	3	0	3	0	0	0
2009	3	0	4	0	0	0	0	0	3	0	0	0	1	0
2010	1	0	0	0	1	0	0	0	0	0	0	0	0	0
2011	7	1	6	0	0	0	0	0	1	0	2	0	0	0
2012	9	0	7	0	0	0	4	0	1	0	2	0	0	0
2013	0	0	2	0	0	0	0	2	0	0	2	0	0	0
2014	6	4	7	0	0	0	2	0	0	0	3	0	0	0
2015	7	0	7	1	0	0	2	0	3	1	0	0	0	0
Total	**107**	**15**	**91**	**14**	**7**	**3**	**10**	**2**	**32**	**3**	**33**	**7**	**5**	**3**

[a] No appeals were filed in 1995.

ANNEX 9

PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS: 1995–2015

As of the end of 2015, there were 162 WTO Members, of which 74 have participated in appeals in which Appellate Body reports were circulated between 1996 and 2015.[1]

The rules pursuant to which Members participate in appeals as appellant, other appellant, appellee, and third participant are described in section 5 of this Annual Report.

I. STATISTICAL SUMMARY

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Antigua & Barbuda	0	1	1	0	2
Argentina	3	3	6	20	32
Australia	2	2	6	43	53
Bahrain, Kingdom of	0	0	0	1	1
Barbados	0	0	0	1	1
Belize	0	0	0	4	4
Benin	0	0	0	1	1
Bolivarian Republic of Venezuela	0	0	1	6	7
Bolivia, Plurinational State of	0	0	0	1	1
Brazil	5	7	12	34	58
Cameroon	0	0	0	3	3
Canada	14	10	23	30	77
Chad	0	0	0	2	2
Chile	3	0	2	12	17
China	15	4	10	45	74
Colombia	0	0	0	22	22
Costa Rica	1	0	0	3	4
Côte d'Ivoire	0	0	0	4	4
Cuba	0	0	0	4	4
Dominica	0	0	0	4	4
Dominican Republic	1	0	1	4	6
Ecuador	0	2	2	16	20

[1] No appeals were filed and no Appellate Body reports were circulated in 1995, the year the Appellate Body was established.

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Egypt	0	0	0	2	2
El Salvador	0	0	0	5	5
European Union	21	20	46	67	154
Fiji	0	0	0	1	1
Ghana	0	0	0	2	2
Grenada	0	0	0	1	1
Guatemala	1	2	2	11	16
Guyana	0	0	0	1	1
Honduras	0	2	2	4	8
Hong Kong, China	0	0	0	8	8
Iceland	0	0	0	2	2
India	8	2	8	43	61
Indonesia	0	1	1	4	6
Israel	0	0	0	2	2
Jamaica	0	0	0	5	5
Japan	7	6	15	63	91
Kazakhstan	0	0	0	0	0
Kenya	0	0	0	1	1
Korea	3	4	6	34	47
Kuwait, the State of	0	0	0	1	1
Madagascar	0	0	0	1	1
Malaysia	1	0	1	0	2
Malawi	0	0	0	1	1
Mauritius	0	0	0	2	2
Mexico	5	6	9	35	55
Namibia	0	0	0	1	1
New Zealand	0	3	6	14	23
Nicaragua	0	0	0	4	4
Nigeria	0	0	0	1	1
Norway	2	1	3	28	34
Oman	0	0	0	3	3
Pakistan	0	0	2	3	5
Panama	0	0	0	3	3
Paraguay	0	0	0	5	5
Peru	1	1	1	7	10
Philippines	3	0	3	1	7
Poland	0	0	1	0	1
Russian Federation	0	0	0	8	8

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Saint Lucia	0	0	0	4	4
Saudi Arabia, Kingdom of	0	0	0	13	13
Senegal	0	0	0	1	1
Seychelles	0	0	0	0	0
St Kitts & Nevis	0	0	0	1	1
St Vincent & the Grenadines	0	0	0	3	3
Suriname	0	0	0	3	3
Swaziland	0	0	0	1	1
Switzerland	0	1	1	1	3
Chinese Taipei	0	0	0	39	39
Tanzania	0	0	0	1	1
Thailand	3	2	5	22	32
Trinidad & Tobago	0	0	0	1	1
Turkey	1	0	0	16	17
United States	36	24	80	38	178
Viet Nam	1	0	0	7	8
Total	**137**	**104**	**256**	**785**	**1282**

II. DETAILS BY YEAR OF CIRCULATION

1996

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Gasoline WT/DS2/AB/R	United States	- - -	Brazil Venezuela	European Communities Norway
Japan – Alcoholic Beverages II WT/DS8/AB/R, WT/DS10/AB/R, WT/DS11/AB/R	Japan	United States	Canada European Communities Japan United States	- - -

1997

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Underwear WT/DS24/AB/R	Costa Rica	- - -	United States	India
Brazil – Desiccated Coconut WT/DS22/AB/R	Philippines	Brazil	Brazil Philippines	European Communities United States
US – Wool Shirts and Blouses WT/DS33/AB/R and Corr.1	India	- - -	United States	- - -
Canada – Periodicals WT/DS31/AB/R	Canada	United States	Canada United States	- - -
EC – Bananas III WT/DS27/AB/R	European Communities	Ecuador Guatemala Honduras Mexico United States	Ecuador European Communities Guatemala Honduras Mexico United States	Belize Cameroon Colombia Costa Rica Côte d'Ivoire Dominica Dominican Republic Ghana Grenada Jamaica Japan Nicaragua St Lucia St Vincent & the Grenadines Senegal Suriname Venezuela
India – Patents (US) WT/DS50/AB/R	India	- - -	United States	European Communities

1998

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Hormones WT/DS26/AB/R, WT/DS48/AB/R	European Communities	Canada United States	Canada European Communities United States	Australia New Zealand Norway
Argentina – Textiles and Apparel WT/DS56/AB/R and Corr.1	Argentina	- - -	United States	European Communities
EC – Computer Equipment WT/DS62/AB/R, WT/DS67/AB/R, WT/DS68/AB/R	European Communities	- - -	United States	Japan
EC – Poultry WT/DS69/AB/R	Brazil	European Communities	Brazil European Communities	Thailand United States
US – Shrimp WT/DS58/AB/R	United States	- - -	India Malaysia Pakistan Thailand	Australia Ecuador European Communities Hong Kong, China Mexico Nigeria
Australia – Salmon WT/DS18/AB/R	Australia	Canada	Australia Canada	European Communities India Norway United States
Guatemala – Cement I WT/DS60/AB/R	Guatemala	- - -	Mexico	United States

1999

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Korea – Alcoholic Beverages WT/DS75/AB/R, WT/DS84/AB/R	Korea	- - -	European Communities United States	Mexico
Japan – Agricultural Products II WT/DS76/AB/R	Japan	United States	Japan United States	Brazil European Communities
Brazil – Aircraft WT/DS46/AB/R	Brazil	Canada	Brazil Canada	European Communities United States
Canada – Aircraft WT/DS70/AB/R	Canada	Brazil	Brazil Canada	European Communities United States
India – Quantitative Restrictions WT/DS90/AB/R	India	- - -	United States	- - -
Canada – Dairy WT/DS103/AB/R, WT/DS113/AB/R and Corr.1	Canada	- - -	New Zealand United States	- - -
Turkey –Textiles WT/DS34/AB/R	Turkey	- - -	India	Hong Kong, China Japan Philippines
Chile – Alcoholic Beverages WT/DS87/AB/R, WT/DS110/AB/R	Chile	- - -	European Communities	Mexico United States
Argentina – Footwear (EC) WT/DS121/AB/R	Argentina	European Communities	Argentina European Communities	Indonesia United States
Korea – Dairy WT/DS98/AB/R	Korea	European Communities	Korea European Communities	United States

2000

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – FSC WT/DS108/AB/R	United States	European Communities	European Communities United States	Canada Japan
US – Lead and Bismuth II WT/DS138/AB/R	United States	- - -	European Communities	Brazil Mexico
Canada – Autos WT/DS139/AB/R	Canada	European Communities Japan	Canada European Communities Japan	Korea United States
Brazil – Aircraft (Article 21.5 – Canada) WT/DS46/AB/RW	Brazil	- - -	Canada	European Communities United States
Canada – Aircraft (Article 21.5 – Brazil) WT/DS70/AB/RW	Brazil	- - -	Canada	European Communities United States
US – 1916 Act WT/DS136/AB/R, WT/DS162/AB/R	United States	European Communities Japan	European Communities Japan United States	European Communities [a] India Japan [b] Mexico
Canada – Term of Patent Protection WT/DS170/AB/R	Canada	- - -	United States	- - -
Korea – Various Measures on Beef WT/DS161/AB/R, WT/DS169/AB/R	Korea	- - -	Australia United States	Canada New Zealand
US – Certain EC Products WT/DS165/AB/R	European Communities	United States	European Communities United States	Dominica Ecuador India Jamaica Japan St Lucia
US – Wheat Gluten WT/DS166/AB/R	United States	European Communities	European Communities United States	Australia Canada New Zealand

[a] In complaint brought by Japan.

[b] In complaint brought by the European Communities.

2001

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Bed Linen WT/DS141/AB/R	European Communities	India	European Communities India	Egypt Japan United States
EC – Asbestos WT/DS135/AB/R	Canada	European Communities	Canada European Communities	Brazil United States
Thailand – H-Beams WT/DS122/AB/R	Thailand	- - -	Poland	European Communities Japan United States
US – Lamb WT/DS177/AB/R, WT/DS178/AB/R	United States	Australia New Zealand	Australia New Zealand United States	European Communities
US – Hot-Rolled Steel WT/DS184/AB/R	United States	Japan	Japan United States	Brazil Canada Chile European Communities Korea
US – Cotton Yarn WT/DS192/AB/R	United States	- - -	Pakistan	European Communities India
US – Shrimp (Article 21.5 – Malaysia) WT/DS58/AB/RW	Malaysia	- - -	United States	Australia European Communities Hong Kong, China India Japan Mexico Thailand
Mexico – Corn Syrup (Article 21.5 – US) WT/DS132/AB/RW	Mexico	- - -	United States	European Communities
Canada – Dairy (Article 21.5 – New Zealand and US) WT/DS103/AB/RW, WT/DS113/AB/RW	Canada	- - -	New Zealand United States	European Communities

2002

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Section 211 Appropriations Act WT/DS176/AB/R	European Communities	United States	European Communities United States	- - -
US – FSC (Article 21.5 – EC) WT/DS108/AB/RW	United States	European Communities	European Communities United States	Australia Canada India Japan
US – Line Pipe WT/DS202/AB/R	United States	Korea	Korea United States	Australia Canada European Communities Japan Mexico
India – Autos [c] WT/DS146/AB/R, WT/DS175/AB/R	India	- - -	European Communities United States	Korea
Chile – Price Band System WT/DS207/AB/R and Corr.1	Chile	- - -	Argentina	Australia Brazil Colombia Ecuador European Communities Paraguay United States Venezuela
EC – Sardines WT/DS231/AB/R	European Communities	- - -	Peru	Canada Chile Ecuador United States Venezuela
US – Carbon Steel WT/DS213/AB/R and Corr.1	United States	European Communities	European Communities United States	Japan Norway
US – Countervailing Measures on Certain EC Products WT/DS212/AB/R	United States	- - -	European Communities	Brazil India Mexico
Canada – Dairy (Article 21.5 – New Zealand and US II) WT/DS103/AB/RW2, WT/DS113/AB/RW2	Canada	- - -	New Zealand United States	Argentina Australia European Communities

[c] India withdrew its appeal the day before the oral hearing was scheduled to proceed.

2003

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Offset Act (Byrd Amendment) WT/DS217/AB/R, WT/DS234/AB/R	United States	- - -	Australia Brazil Canada Chile European Communities India Indonesia Japan Korea Mexico Thailand	Argentina Costa Rica Hong Kong, China Israel Norway
EC – Bed Linen (Article 21.5 – India) WT/DS141/AB/RW	India	- - -	European Communities	Japan Korea United States
EC – Tube or Pipe Fittings WT/DS219/AB/R	Brazil	- - -	European Communities	Chile Japan Mexico United States
US – Steel Safeguards WT/DS248/AB/R, WT/DS249/AB/R, WT/DS251/AB/R, WT/DS252/AB/R, WT/DS253/AB/R, WT/DS254/AB/R, WT/DS258/AB/R, WT/DS259/AB/R	United States	Brazil China European Communities Japan Korea New Zealand Norway Switzerland	Brazil China European Communities Japan Korea New Zealand Norway Switzerland United States	Canada Cuba Mexico Chinese Taipei Thailand Turkey Venezuela
Japan – Apples WT/DS245/AB/R	Japan	United States	Japan United States	Australia Brazil European Communities New Zealand Chinese Taipei
US – Corrosion-Resistant Steel Sunset Review WT/DS244/AB/R	Japan	- - -	United States	Brazil Chile European Communities India Korea Norway

2004

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Softwood Lumber IV WT/DS257/AB/R	United States	Canada	Canada United States	European Communities India Japan
EC – Tariff Preferences WT/DS246/AB/R	European Communities	- - -	India	Bolivia Brazil Colombia Costa Rica Cuba Ecuador El Salvador Guatemala Honduras Mauritius Nicaragua Pakistan Panama Paraguay Peru United States Venezuela
US – Softwood Lumber V WT/DS264/AB/R	United States	Canada	Canada United States	European Communities India Japan
Canada – Wheat Exports and Grain Imports WT/DS276/AB/R	United States	Canada	Canada United States	Australia China European Communities Mexico Chinese Taipei
US – Oil Country Tubular Goods Sunset Reviews WT/DS268/AB/R	United States	Argentina	Argentina United States	European Communities Japan Korea Mexico Chinese Taipei

2005

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Upland Cotton WT/DS267/AB/R	United States	Brazil	Brazil United States	Argentina Australia Benin Canada Chad China European Communities India New Zealand Pakistan Paraguay Chinese Taipei Venezuela
US – Gambling WT/DS285/AB/R and Corr.1	United States	Antigua & Barbuda	Antigua & Barbuda United States	Canada European Communities Japan Mexico Chinese Taipei
EC – Export Subsidies on Sugar WT/DS265/AB/R, WT/DS266/AB/R, WT/DS283/AB/R	European Communities	Australia Brazil Thailand	Australia Brazil European Communities Thailand	Barbados Belize Canada China Colombia Côte d'Ivoire Cuba Fiji Guyana India Jamaica Kenya Madagascar Malawi Mauritius New Zealand Paraguay St Kitts & Nevis Swaziland Tanzania Trinidad & Tobago United States

2005 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Dominican Republic – Import and Sale of Cigarettes WT/DS302/AB/R	Dominican Republic	Honduras	Dominican Republic Honduras	China El Salvador European Communities Guatemala United States
US – Countervailing Duty Investigation on DRAMS WT/DS296/AB/R	United States	Korea	Korea United States	China European Communities Japan Chinese Taipei
EC – Chicken Cuts WT/DS269/AB/R, WT/DS286/AB/R and Corr.1	European Communities	Brazil Thailand	Brazil European Communities Thailand	China United States
Mexico – Anti-Dumping Measures on Rice WT/DS295/AB/R	Mexico	- - -	United States	China European Communities
US – Anti-Dumping Measures on Oil Country Tubular Goods WT/DS282/AB/R	Mexico	United States	Mexico United States	Argentina Canada China European Communities Japan Chinese Taipei
US – Softwood Lumber IV (Article 21.5 – Canada) WT/DS257/AB/RW	United States	Canada	Canada United States	China European Communities

2006

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – FSC (Article 21.5 – EC II) WT/DS108/AB/RW2	United States	European Communities	European Communities United States	Australia Brazil China
Mexico – Taxes on Soft Drinks WT/DS308/AB/R	Mexico	- - -	United States	Canada China European Communities Guatemala Japan
US – Softwood Lumber VI (Article 21.5 – Canada) WT/DS277/AB/RW and Corr.1	Canada	- - -	United States	China European Communities
US – Zeroing (EC) WT/DS294/AB/R and Corr.1	European Communities	United States	United States European Communities	Argentina Brazil China Hong Kong, China India Japan Korea Mexico Norway Chinese Taipei
US – Softwood Lumber V (Article 21.5 – Canada) WT/DS264/AB/RW	Canada	- - -	United States	China European Communities India Japan New Zealand Thailand
EC – Selected Customs Matters WT/DS315/AB/R	United States	European Communities	European Communities United States	Argentina Australia Brazil China Hong Kong, China India Japan Korea Chinese Taipei

2007

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Zeroing (Japan) WT/DS322/AB/R	Japan	United States	United States Japan	Argentina China European Communities [d] Hong Kong, China India Korea Mexico New Zealand Norway Thailand
US – Oil Country Tubular Goods Sunset Reviews (Article 21.5 – Argentina) WT/DS268/AB/RW	United States	Argentina	Argentina United States	China European Communities Japan Korea Mexico
Chile – Price Band System (Article 21.5 – Argentina) WT/DS207/AB/RW	Chile	Argentina	Argentina Chile	Australia Brazil Canada China Colombia European Communities Peru Thailand United States
Japan – DRAMs (Korea) WT/DS336/AB/R and Corr.1	Japan	Korea	Korea Japan	European Communities United States
Brazil – Retreaded Tyres WT/DS332/AB/R	European Communities	- - -	Brazil	Argentina Australia China Cuba Guatemala Japan Korea Mexico Paraguay Chinese Taipei Thailand United States

[d] By virtue of the Treaty of Lisbon, as of 1 December 2009, "European Union" replaced and succeeded "European Communities". For disputes that began before the entry into force of the Treaty, the WTO dispute settlement reports refer to "European Communities".

2008

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Stainless Steel (Mexico) WT/DS344/AB/R	Mexico	- - -	United States	Chile China European Communities Japan Thailand
US – Upland Cotton (Article 21.5 – Brazil) WT/DS267/AB/RW	United States	Brazil	Brazil United States	Argentina Australia Canada Chad China European Communities India Japan New Zealand Thailand
US – Shrimp (Thailand) WT/DS343/AB/R	Thailand	United States	United States Thailand	Brazil Chile China European Communities India Japan Korea Mexico Viet Nam
US – Customs Bond Directive WT/DS345/AB/R	India	United States	United States India	Brazil China European Communities Japan Thailand

2008 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Continued Suspension WT/DS320/AB/R	European Communities	United States	United States European Communities	Australia Brazil China India Mexico New Zealand Norway Chinese Taipei
Canada – Continued Suspension WT/DS321/AB/R	European Communities	Canada	Canada European Communities	Australia Brazil China India Mexico New Zealand Norway Chinese Taipei
India – Additional Import Duties WT/DS360/AB/R	United States	India	India United States	Australia Chile European Communities Japan Viet Nam
EC – Bananas III (Article 21.5 – Ecuador II) WT/DS27/AB/RW2/ECU and Corr.1	European Communities	Ecuador	Ecuador European Communities	Belize Brazil Cameroon Colombia Côte d'Ivoire Dominica Dominican Republic Ghana Jamaica Japan Nicaragua Panama St Lucia St Vincent & the Grenadines Suriname United States

2008 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Bananas III (Article 21.5 – US) WT/DS27/AB/RW/USA and Corr.1	European Communities	- - -	United States	Belize Brazil Cameroon Colombia Côte d'Ivoire Dominica Dominican Republic Ecuador Jamaica Japan Mexico Nicaragua Panama St Lucia St Vincent & the Grenadines Suriname
China – Auto Parts (EC) WT/DS339/AB/R	China	- - -	European Communities	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand
China – Auto Parts (US) WT/DS340/AB/R	China	- - -	United States	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand
China – Auto Parts (Canada) WT/DS342/AB/R	China	- - -	Canada	Argentina Australia Brazil Japan Mexico Chinese Taipei Thailand

2009

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Continued Zeroing WT/DS350/AB/R	European Communities	United States	European Communities United States	Brazil China Egypt India Japan Korea Mexico Norway Chinese Taipei Thailand
US – Zeroing (EC) *(Article 21.5 – EC)* WT/DS294/AB/RW and Corr.1	European Communities	United States	European Communities United States	India Japan Korea Mexico Norway Chinese Taipei Thailand
US – Zeroing (Japan) *(Article 21.5 – Japan)* WT/DS322/AB/RW	United States	- - -	Japan	China European Communities Hong Kong, China Korea Mexico Norway Chinese Taipei Thailand
China – Publications and Audiovisual Products WT/DS363/AB/R	China	United States	China United States	Australia European Communities Japan Korea Chinese Taipei

2010

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Australia – Apples WT/DS367/AB/R	Australia	New Zealand	New Zealand Australia	Chile European Union Japan Pakistan Chinese Taipei United States

2011

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Anti-Dumping and Countervailing Duties (China) WT/DS379/AB/R	China	- - -	United States	Argentina Australia Bahrain Brazil Canada European Union India Japan Kuwait Mexico Norway Saudi Arabia Chinese Taipei Turkey
EC and certain member States – Large Civil Aircraft WT/DS316/AB/R	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea
Thailand – Cigarettes (Philippines) WT/DS371/AB/R	Thailand	- - -	Philippines	Australia China European Union India Chinese Taipei United States

2011 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Fasteners (China) WT/DS397/AB/R	European Union	China	China European Union	Brazil Canada Chile Colombia India Japan Norway Chinese Taipei Thailand Turkey United States
US – Tyres (China) WT/DS399/AB/R	China	- - -	United States	European Union Japan Chinese Taipei Turkey Viet Nam
Philippines – Distilled Spirits (European Union) WT/DS396/AB/R	Philippines	European Union	European Union Philippines	Australia China India Mexico Chinese Taipei Thailand
Philippines – Distilled Spirits (United States) WT/DS403/AB/R	Philippines	- - -	United States	Australia China Colombia India Mexico Chinese Taipei Thailand

2012

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – Raw Materials (United States) WT/DS394/AB/R	China	United States	China United States	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey
China – Raw Materials (European Union) WT/DS395/AB/R	China	European Union	China European Union	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey
China – Raw Materials (Mexico) WT/DS398/AB/R	China	Mexico	China Mexico	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey

2012 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Large Civil Aircraft (2nd complaint) WT/DS353/AB/R	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea
US – Clove Cigarettes WT/DS406/AB/R	United States	- - -	Indonesia	Brazil Colombia Dominican Republic European Union Guatemala Mexico Norway Turkey
US – Tuna II (Mexico) WT/DS381/AB/R	United States	Mexico	Mexico United States	Argentina Australia Brazil Canada China Ecuador Guatemala Japan Korea New Zealand Chinese Taipei Thailand Turkey Venezuela
US – COOL (Canada) WT/DS384/AB/R	United States	Canada	Canada United States	Argentina Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand Peru Chinese Taipei

2012 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – COOL (Mexico) WT/DS386/AB/R	United States	Mexico	Mexico United States	Argentina Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand Peru Chinese Taipei
China – GOES WT/DS414/AB/R	China	- - -	United States	Argentina European Union Honduras India Japan Korea Saudi Arabia Viet Nam

2013

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Canada – Certain Measures Affecting the Renewable Energy Generation Sector WT/DS412/AB/R	Canada	Japan	Japan Canada	Australia Brazil China El Salvador European Union Honduras India Korea Mexico Norway Saudi Arabia Chinese Taipei United States
Canada – Measures Relating to the Feed-in Tariff Program WT/DS426/AB/R	Canada	European Union	European Union Canada	Australia Brazil China El Salvador India Japan Korea Mexico Norway Saudi Arabia Chinese Taipei Turkey United States

2014

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
European Communities – Measures Prohibiting the Importation and Marketing of Seal Products WT/DS400/AB/R	Canada Norway	European Union	Canada Norway European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Russia United States
European Communities – Measures Prohibiting the Importation and Marketing of Seal Products WT/DS401/AB/R	Canada Norway	European Union	Canada Norway European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Namibia Russia United States
United States – Countervailing and Anti-Dumping Measures on Certain Products from China WT/DS449/AB/R and Corr.1	China	United States	United States China	Australia Canada European Union India Japan Russia Turkey Viet Nam
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum WT/DS431/AB/R	United States	China	United States China	Argentina Australia Brazil Canada Chinese Taipei Colombia European Union India Indonesia Korea Japan Norway Oman Peru Russia Saudi Arabia Turkey Viet Nam

2014 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum WT/DS432/AB/R	China		European Union	Argentina Australia Brazil Canada Chinese Taipei Colombia India Indonesia Japan Korea Norway Oman Peru Russia Saudi Arabia Turkey United States Viet Nam
China – Measures Related to the Exportation of Rare Earths, Tungsten and Molybdenum WT/DS433/AB/R	China		Japan	Argentina Australia Brazil Canada Chinese Taipei Colombia India Indonesia Korea Norway Oman Peru Russia
United States – Countervailing Measures on Certain Hot-Rolled Carbon Steel Flat Products from India WT/DS436/AB/R	India	United States	India United States	Australia Canada China European Union Saudi Arabia Turkey

2014 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
United States – Countervailing Duty Measures on Certain Products from China WT/DS437/AB/R	China	United States	United States China	Australia Brazil Canada European Union India Japan Korea Norway Russia Saudi Arabia Turkey Viet Nam

2015

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Argentina – Measures Affecting the Importation of Goods WT/DS438/AB/R	Argentina	European Union	Argentina European Union	Australia Canada China Ecuador Guatemala India Israel Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland United States
Argentina – Measures Affecting the Importation of Goods WT/DS444/AB/R	Argentina		United States	Australia Canada China Ecuador Guatemala India Israel Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Argentina – Measures Affecting the Importation of Goods WT/DS445/AB/R	Argentina	Japan	Argentina Japan	Australia Canada China Ecuador Guatemala India Israel Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland United States
United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico WT/DS384/AB/RW	United States	Canada	Canada United States	Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand
United States – Certain Country of Origin Labelling (COOL) Requirements – Recourse to Article 21.5 of the DSU by Canada and Mexico WT/DS386/AB/RW	United States	Mexico	Mexico United States	Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand
United States – Anti-Dumping Measures on Certain Shrimp from Viet Nam WT/DS429/AB/R	Viet Nam		United States	China Ecuador European Union Japan Norway Thailand
India – Measures Concerning the Importation of Certain Agricultural Products WT/DS430/AB/R	India		United States	Argentina Brazil China Colombia Ecuador European Union Guatemala Japan

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Peru – Additional Duty on Imports of Certain Agricultural Products WT/DS457/AB/R	Peru	Guatemala	Guatemala Peru	Argentina Brazil China Colombia Ecuador El Salvador European Union Honduras India Korea United States
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from Japan WT/DS454/AB/R and Add. 1	Japan	China	China Japan	India Korea Russia Saudi Arabia Turkey United States
China – Measures Imposing Anti-Dumping Duties on High-Performance Stainless Steel Seamless Tubes ("HP-SSST") from the European Union WT/DS460/AB/R and Add. 1	China	European Union	China European Union	India Korea Russia Saudi Arabia Turkey United States
United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by Mexico WT/DS381/AB/RW	United States	Mexico	Mexico United States	Australia Canada China European Union Guatemala Japan Korea New Zealand Norway Thailand

WORLD TRADE ORGANIZATION

2015