WORLD TRADE ORGANIZATION

ANNUAL REPORT FOR 2016

APPELLATE BODY

March 2017

ANNUAL REPORT

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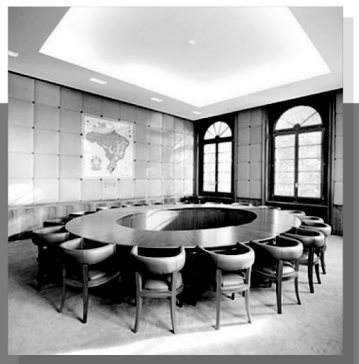

ANNUAL REPORT FOR 2016

APPELLATE BODY

March 2017

APPELLATE BODY MEMBERS: 1 JANUARY 2016 – 31 MAY 2016

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.

APPELLATE BODY MEMBERS: 1 DECEMBER 2016 – 31 DECEMBER 2016

From left to right: Mr. Shree Baboo Chekitan Servansing; Ms. Hong Zhao; Mr. Peter Van den Bossche; Mr. Ujal Singh Bhatia; Mr. Thomas Graham; Mr. Ricardo Ramírez-Hernández; Mr. Hyun Chong Kim.

CONTENTS

WTO ABBREVIATIONS USED IN THIS ANNUAL REPORT

Abbreviation	Description
Anti-Dumping Agreement	Agreement on Implementation of Article VI of the General Agreement on Tariffs and Trade 1994
Basic Regulation	Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (codified version), Official Journal of the European Union, L Series, No. 343 (22 December 2009), pp. 51-73, and corrigendum thereto, L Series, No. 7 (12 January 2010), pp. 22-23 (Panel Exhibit ARG-1)
DCR Measures	Domestic Content Requirements
DDSR	WTO Digital Dispute Settlement Registry
Definitive Regulation	Council Implementing Regulation (EU) No. 1194/2013 of 19 November 2013 imposing a definitive anti-dumping duty and collecting definitively the provisional duty imposed on imports of biodiesel originating in Argentina and Indonesia, Official Journal of the European Union, L Series, No. 315 (26 November 2013), pp. 2-26 (Panel Exhibit ARG-22)
DET	Differential Export Tax
DPM	Differential Pricing Methodology
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EBB	European Biodiesel Board
EC	European Communities
EU	European Union
ELSA	European Law Students' Association
f.o.b. price	Free on Board Price
GATS	General Agreement on Trade in Services
GATT 1994	General Agreement on Tariffs and Trade 1994

LRWs	Large residential washers
NME	Non-market economy
PCN	Product control number
Provisional Regulation	Commission Regulation (EU) No. 490/2013 of 27 May 2013 imposing a provisional anti-dumping duty on imports of biodiesel originating in Argentina and Indonesia, Official journal of the European Union, L Series, No. 141 (28 May 2013), pp. 6-25 (Panel Exhibit ARG-30)
R&D	Research and development
RSTA	Korea's Restriction of Special Taxation Act
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
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SPDs	Solar power developers
TRIMs Agreement	Agreement on Trade-Related Investment Measures
T-T comparison methodology	Transaction-to-transaction comparison methodology
USDOC	United States Department of Commerce
Working Procedures	Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010
W-T comparison methodology	Weighted average-to-transaction comparison methodology
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization
W-W comparison methodology	Weighted average-to-weighted average comparison methodology

FOREWORD

2016 was a challenging year for the Appellate Body in several ways. I would like to focus mainly on the greatly increasing workload and its implications for the timely completion of our work.

The Appellate Body was engaged in appellate proceedings throughout the 12 months of 2016. The Appellate Body circulated six reports in 2016: *EC – Fasteners (Article 21.5 – China)*; *Argentina – Financial Services; Colombia – Textiles*; *India – Solar Cells; EU – Biodiesel*; and *US – Washing Machines*. These reports addressed matters including the WTO Agreement, the Anti-Dumping Agreement, the TRIMs Agreement, GATS, the GATT 1994, and the DSU. These disputes concerned a number of contemporary issues such as climate change, renewable energy, tax evasion, money laundering, and fair trade.

Late in 2016 four more appeals were filed, in the following disputes: the very large *EC and certain member States – Large Civil Aircraft (Article 21.5)*; *Russia – Pigs*; *US – Anti-Dumping Methodologies (China)*; and *US – Tax Incentives*. Moreover, the WTO Secretariat that assists panels has estimated that more than 12 panel reports could be issued to parties in the course of 2017. These include the massive *US – Large Civil Aircraft (Boeing) (Article 21.5)*; *Brazil – Taxation Measures*; and the *Australia – Tobacco Plain Packaging* disputes. The size, complexity, and number of these appeals will occupy a significant part of Appellate Body Secretariat staff resources for exceptionally long time periods. The average appeal rate is 68%. Thus, the large increase in the Appellate Body's workload that had been predicted is now upon us, and will be with us for the foreseeable future.

The constraints on the Appellate Body's resources were further exacerbated by the changes in its composition. The DSB established a Selection Committee on 25 January 2016 to carry out a selection process for the appointment of a new Appellate Body member to replace our colleague Yuejiao Zhang, whose second term was due to expire on 31 May 2016. At the same meeting, the Chairman of the DSB announced his intention to initiate consultations on the possible reappointment of our colleague Seung Wha Chang, whose first four-year term of office was due to expire on 31 May 2016. Mr Chang was eligible for reappointment by the DSB to a second four-year term and had expressed his willingness to serve a second term. On 11 May 2016, the Chairman of the DSB was informed that a delegation did not support Mr Chang's reappointment. Shortly thereafter, this delegation publicized its reasons for its opposition to Mr Chang's reappointment. Subsequently, Appellate Body members other than Mr Chang, in a letter signed by the Appellate Body Chair, expressed concerns about the public statement of reasons given for opposition to Mr Chang's reappointment. As a result of the expiration of the term of Mrs Zhang, and the non-reappointment of Mr Chang, there were only five members of the Appellate Body from 1 June 2016 until near the end of 2016, when the process of appointment of new members was completed.

At its meeting of 23 November 2016, the DSB agreed to appoint Ms Hong Zhao and Mr Hyun Chong Kim as the new Appellate Body members for a four-year term. Their respective terms started on 1 December 2016.

During 2016, the Appellate Body continued efforts to improve efficiency and to make our reports more concise and readable by WTO delegations and others. We continued the practice, initiated in 2015, of annexing to Appellate Body reports the executive summaries of the arguments submitted by the participants and third participants, instead of summarizing the arguments of the participants in the body of our reports. We also introduced more complete descriptions of our "findings and conclusions", so as to make our central reasoning, as well as our bottom-line conclusions, more quickly accessible to those who turn first to the "findings and conclusions". We have also tried to make our reports more concise. These changes are aimed at making the public face of our work more "user friendly" and at using efficiently our limited resources.

It should be recognized, however, that the massive volume of appeals in 2017 will strain our resources, and that there will be inevitable delays. Faced with our caseload and our limits, the Appellate Body will do what it can, with the staff and resources that it has, on a sustainable basis. In striking the balance between quality, speed, sustainability, and capacity, we will give priority to quality within our capacity. This means that almost certainly there will be delays and queues. We will work with the Members and case participants to handle these problems as best we can. I take this opportunity to reiterate the request that I made to WTO Members in my speech of November 2016, which is annexed to this annual report: Let us work together to maintain, nurture, and preserve the trust and credibility that has been built up over the years in this dispute settlement system, which is uniquely effective, but fragile, and which cannot be taken for granted. In particular, we hope to find a better way for WTO Members and the Appellate Body to discuss long-standing structural problems of the dispute settlement system, and in particular of the Appellate Body.

In this regard, I am pleased to report that there has been some progress. As my predecessor did in 2015, I engaged in a series of informal consultations with WTO Members, particularly those who are active users of the dispute settlement system, on possible further improvements to internal procedures and practices. These consultations included discussions of concerns relating to the independence and impartiality of the Appellate Body, and practical concerns regarding the resources necessary to meeting the growing demands of the dispute settlement system in general, and the Appellate Body in particular. The constructive nature of these consultations persuades me that we should engage with one another more broadly, and more frequently, rather than merely meeting across the podium in the hearing room.

Finally, 2016 will sadly also be remembered as the year that we lost one of the great proponents of the multilateral trading system and the Appellate Body. Ambassador Julio Lacarte-Muró passed away on 4 March 2016 at the age of 97. Few have had as sustained and as profound an influence on the multilateral trading system as Ambassador Lacarte. He took part in the first session in 1946 of the Preparatory Committee, tasked with drawing up a charter for the proposed International Trade Organization (ITO), and participated in the 1947 Havana Conference. Ambassador Lacarte later helped launch the Uruguay Round, which eventually led to the establishment of the WTO in 1995. He served as Chairman of the Uruguay Round negotiating group on dispute settlement, and the text of the Dispute Settlement Understanding was negotiated and agreed under his leadership. Having served as a key architect of the WTO dispute settlement system, Ambassador Lacarte was appointed as one of the original seven Appellate Body members, and then elected the first Chairman of that body. Ambassador Lacarte's chairmanship of the Appellate Body in its formative years was instrumental in shaping this institution. To honour Ambassador Lacarte's legacy, I am pleased to announce that the Appellate Body has launched an initiative to create an annual "Julio Lacarte Lecture", on issues of relevance to the multilateral trading system, with the inaugural lecture to be held in 2017.

Thomas R. Graham
Chair, Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY
ANNUAL REPORT FOR 2016

1. INTRODUCTION

This Annual Report summarizes the activities of the Appellate Body and its Secretariat for the year 2016.

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 identifies the purpose and role of the dispute settlement system as follows: "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

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.

with 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 second term of office of Mrs Yuejiao Zhang expired on 31 May 2016.[21] The first four-year term of Mr Seung Wha Chang expired on 31 May 2016. Mr Chang expressed his interest and willingness to be appointed for a second four-year term. At a meeting held on 25 January 2016, the DSB agreed to the following: (i) to launch a selection process for one position in the Appellate Body to replace Mrs Zhang; (ii) to establish a Selection Committee, consistent with the procedures set out in document WT/DSB/1 and with previous selection processes, composed of the Director-General and the 2016 Chairpersons of the General Council, the Goods Council, the Services Council, the TRIPS Council and the DSB, to be chaired by the DSB Chair; (iii) to set a deadline of 15 March 2016 for Members to submit nominations of candidates; (iv) to request the Selection Committee to carry out its work in April/May 2016 in order to make a recommendation to the DSB by no later than 12 May 2016, so that the DSB could take a decision to appoint a new Appellate Body member at its regular meeting scheduled for 23 May 2016; and (v) to request the DSB Chairman to carry out consultations on the possible reappointment of Mr Chang.[22]

At the DSB meeting of 23 March 2016, the DSB Chairman reported on the developments regarding the selection process for the new Appellate Body member. The DSB Chairman informed the WTO Members that by the agreed deadline of 15 March 2016, the names of seven candidates had been submitted by the following Members: Japan, Nepal, China, Australia, Malaysia and Turkey. China had submitted names of two candidates. The DSB Chairman also noted that the 2016 Chair of the Council for Trade in Goods, Mr Hamish McCormick of Australia, had recused himself from the process in light of the fact that Australia had submitted a nomination for consideration in the 2016 selection process.[23] At the DSB meeting of 23 May 2016, the DSB Chairman stated that the Selection Committee had conducted thorough interviews with the seven nominated candidates on 7 and 8 April 2016 with a view to identifying those individuals who possessed the qualifications and expertise as required by the DSU for Appellate Body members. As part of the selection process, the Committee had met individually with 50 delegations to hear their views on the candidates. The Committee had also received in writing the views of 23 delegations. Throughout the process, the Committee had based its work on the guidelines, the rules and procedures contained in the DSU, and documents WT/DSB/1 and WT/DSB/70 governing the selection and appointment of Appellate Body members. The Selection Committee regretted that despite its best efforts, at that time it was not in a position to recommend a candidate who would enjoy the consensus of the entire Membership. The Selection Committee therefore requested more time to consult further on this matter.[24]

At the DSB meeting of 23 May 2016, the DSB Chairman also recalled that, in the DSB's decision of 25 January 2016, contained in document WT/DSB/70, the DSB Chairman was requested to carry out consultations on the possible reappointment of Mr Seung Wha Chang for a second four-year term. Since then, both the DSB Chairman's predecessor and he had carried out informal consultations with interested delegations on this matter. As a result of those consultations, the DSB Chairman had hosted an informal meeting on 10 May 2016 to enable delegations to pose questions to Mr Chang.

The DSB Chairman reported that a total of 26 delegations had participated in the meeting of 10 May 2016. At the outset of the meeting, the DSB Chairman had read out the ground rules for the process, based on the process conducted in 2015 by the previous DSB Chairman. In this regard, the Chairman had emphasized that the meeting was not intended to replicate or repeat the extensive interviews conducted by delegations in connection with original appointments. The Chairman had also informed the delegations

[21] Mrs Zhang delivered her farewell speech on 26 October 2016. See Annex 4 of this Report.
[22] See WT/DSB/M/373.
[23] See WT/DSB/M/376.
[24] See WT/DSB/M/379.

that questions to Mr Chang 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 had ruled during the term of the Appellate Body member seeking reappointment; or (iii) any legal issues which had not yet been addressed by the Appellate Body. The Chairman had further 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 Chairman had emphasized that Mr Chang could at any time decline to answer any of the questions posed during the meeting.

The DSB Chairman explained that, following these introductory remarks at the 10 May informal meeting, two delegations had made statements regarding the nature of the meeting and had expressed their views on the issue of reappointment, as set out in Article 17.2 of the DSU. Subsequently, several delegations had posed questions to which Mr Chang had given his replies, and the meeting was then concluded. The following day, on 11 May 2016, the DSB Chairman had been informed by one delegation that it would be unable to support Mr Chang's reappointment. That delegation's position and reasons had also been made public. The Chairman recalled that delegations had also received a communication by fax from the Chairman of the Appellate Body, dated 19 May 2016, which included a letter that the Appellate Body members had sent the DSB Chairman with their views on these recent developments.[25] This letter is reproduced in Annex 3 of this report. The Chairman concluded by observing that, if the situation remained unchanged, Mr Chang's term as an Appellate Body member would expire on 31 May 2016.

Given the absence of agreement amongst Members on the matter of reappointment, Mr Chang's term as an Appellate Body member expired on 31 May 2016.[26] On the same day, all living former Appellate Body members addressed a letter to the DSB Chairman expressing their views on the non-reappointment of Mr Chang.[27]

At the DSB meeting of 21 July 2016, the DSB Chairman reported that he had consulted with WTO Members on Appellate Body matters. Based on these consultations, it appeared to him that Members were ready to proceed as follows. First, beginning in September 2016, the DSB Chairman would convene Dedicated Sessions for a focused discussion by Members on any issue that had been raised in respect of Appellate Body reappointments, including whether WTO Members wish to modify the rules governing reappointments. The DSB Chairman clarified that the purpose of these Dedicated Sessions would be to discuss issues relating to reappointment only, with particular attention paid to assuring the independence and impartiality of the Appellate Body, and not to discuss any other issues including those raised in the DSU negotiations. The DSB Chairman encouraged all Members to fully and actively engage in these Dedicated Sessions with a sense of urgency so as to reach an agreement on this matter at the earliest moment with a view to making recommendations to the DSB.

Second, the DSB adopted a decision: (i) to launch a selection process to fill the vacancy left by the non-reappointment of one Appellate Body member; (ii) to invite Members to nominate candidates to fill that vacancy and to set a deadline of 14 September 2016 for Members' nominations; (iii) to agree that, should any of the candidates nominated for the 2016 process initiated by the DSB at its meeting on 25 January 2016 wish to participate in this selection process, the Member who nominated the candidate would inform the Selection Committee of the candidate's intention to participate by the deadline stated in paragraph (ii), and that such candidate would not need to be interviewed by the Selection Committee for a second time; (iv) to agree that the 2016 Selection Committee would also carry out this new selection

[25] See WT/DSB/M/379.

[26] Mr Chang delivered his farewell speech on 26 September 2016. See Annex 4 of this Report.

[27] This letter is reproduced in Annex 3 of this report.

process; and (v) to request the Selection Committee to carry out its work, including conducting interviews of any new candidates and hearing the views of delegations on all candidates during the month of October in order to make recommendations to the DSB as soon as possible so that the DSB could take a decision to appoint the new Appellate Body member at the latest by its regular meeting in November 2016.[28]

At the DSB meeting of 23 October 2016, the DSB Chairman informed WTO Members that, by the deadline of 14 September 2016, seven candidates had been proposed. Pursuant to the 21 July 2016 DSB decision, Australia, China, Japan and Nepal had re-submitted their candidates for the new vacancy and two new nominations had been submitted by Chinese Taipei and Korea. The interviews by the Selection Committee of the two new candidates that had been submitted by Chinese Taipei and Korea took place on 17 October 2016.[29]

At the DSB meeting of 23 November 2016, the DSB Chairman reported that on 3 November 2016, the Selection Committee had made a recommendation on the vacancy left by Mrs Zhang's departure. With regard to the second selection process, the DSB Chairman indicated that the Selection Committee had met individually with 57 delegations to hear the views on the seven candidates. The Committee had also received, in writing, the views of 30 delegations. Throughout the process, the Committee had again based its work on the guidelines, rules and procedures contained in the DSU and WT/DSB/1 governing the selection and appointment of Appellate Body members. On 3 November 2016, the Selection Committee made a recommendation on the vacancy left by the non-reappointment of Mr Chang.[30] At the DSB meeting of 23 November 2016, the DSB agreed that Ms Zhao Hong and Mr Hyun Chong Kim be appointed as new members of the Appellate Body, each for a four-year term beginning on 1 December 2016.[31]

The composition of the Appellate Body in 2016 and the respective terms of office of its members are set out in Table 1.

[28] See WT/DSB/M/383.
[29] WT/DSB/M/387.
[30] WT/DSB/M/389.
[31] WT/DSB/M/389.

TABLE 1: COMPOSITION OF THE APPELLATE BODY IN 2016

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
Hyun Chong Kim**	Korea	2016-2020
Shree Baboo Chekitan Servansing	Mauritius	2014-2018
Peter Van den Bossche	Belgium	2009-2013 2013-2017
Yuejiao Zhang*	China	2008-2012 2012-2016
Hong Zhao**	China	2016-2020

* Seung Wha Chang and Yuejiao Zhang's terms as Appellate Body members ended on 31 May 2016.
** Hyun Chong Kim and Hong Zhao's terms as Appellate Body members began on 1 December 2016.

Pursuant to Rule 5.1 of the Working Procedures, the members of the Appellate Body elected Mr Thomas R. Graham to serve as Chairman of the Appellate Body from 1 January to 31 December 2016.[32] In November 2016, Mr Ujal Singh Bhatia was elected to serve as Chairman as of 1 January 2017 until 31 December 2017.[33]

Biographical information about the members of the Appellate Body is provided in Annex 6. A list of former Appellate Body members and Chairpersons is provided in Annex 7.

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 2016, the Secretariat comprised a Director, fifteen lawyers, one administrative assistant, and five support staff. Werner Zdouc has been Director of the Appellate Body Secretariat since 2006.

[32] See WT/DSB/69.
[33] WT/DSB/72.

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 eight matters were appealed in 2016. One dispute 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 five out of the eight disputes. Table 2 sets out further information regarding appeals filed in 2016. Further information on the number of appeals filed each year since 1996 is provided in Annex 8.

The overall average of panel reports that have been appealed from 1996 to 2016 is 68%. A breakdown of the percentage of panel reports appealed each year is provided in Annex 9.

TABLE 2: PANEL REPORTS APPEALED IN 2016

Panel report appealed	Date of appeal	Appellant[a]	Document symbol	Other appellant[b]	Document symbol
Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear	22 January 2016	Colombia	WT/DS461/6	No other appeal	---
United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea	19 April 2016	United States	WT/DS464/7	Korea	WT/DS464/8
India – Certain Measures Relating to Solar Cells and Solar Modules	20 April 2016	India	WT/DS456/9	No other appeal	---
European Union – Anti-Dumping Measures on Biodiesel from Argentina	20 May 2016	European Union	WT/DS473/10	Argentina	WT/DS473/11
Russian Federation – Measures on the Importation of Live Pigs, Pork and Other Pig Products from the European Union	23 September 2016	Russian Federation	WT/DS475/8	European Union	WT/DS475/9
European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft – Recourse to Article 21.5 of the DSU by the United States	13 October 2016	European Union	WT/DS316/29	United States	WT/DS316/30

Panel report appealed	Date of appeal	Appellant[a]	Document symbol	Other appellant[b]	Document symbol
United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China	18 November 2016	China	WT/DS471/8	No other appeal	---
United States – Conditional Tax Incentives for Large Civil Aircraft	16 December 2016	United States	WT/DS487/6	European Union	WT/DS487/7

[a] Pursuant to Rule 20(1) of the Working Procedures.
[b] Pursuant to Rule 23(1) of the Working Procedures.

4. APPELLATE BODY REPORTS

Six Appellate Body reports concerning six matters were circulated in 2016, the details of which are summarized in Table 6 3. As of the end of 2016, the Appellate Body had circulated a total of 144 reports.

TABLE 3: APPELLATE BODY REPORTS CIRCULATED IN 2016

Case	Document symbol	Date circulated	Date adopted by the DSB
European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China	WT/DS397/AB/RW	18 January 2016	12 February 2016
Argentina – Measures Relating to Trade in Goods and Services	WT/DS453/AB/R	14 April 2016	9 May 2016
Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear	WT/DS461/AB/R	7 June 2016	22 June 2016
United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea	WT/DS464/AB/R	7 September 2016	26 September 2016
India – Certain Measures Relating to Solar Cells and Solar Modules	WT/DS456/AB/R	16 September 2016	14 October 2016
European Union – Anti-Dumping Measures on Biodiesel from Argentina	WT/DS473/AB/R	6 October 2016	26 October 2016

Table 4 below shows which WTO agreements were addressed in the Appellate Body reports circulated in 2016.

TABLE 4: WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED IN 2016

Case	Document symbol	WTO agreements addressed
European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China	WT/DS397/AB/RW	Anti-Dumping Agreement DSU GATT 1994
Argentina – Measures Relating to Trade in Goods and Services	WT/DS453/AB/R	DSU GATT 1994 GATS
Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear	WT/DS461/AB/R	DSU GATT 1994
United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea	WT/DS464/AB/R	Anti-Dumping Agreement DSU GATT 1994 SCM Agreement
India – Certain Measures Relating to Solar Cells and Solar Modules	WT/DS456/AB/R	DSU GATT 1994 TRIMs Agreement
European Union – Anti-Dumping Measures on Biodiesel from Argentina	WT/DS473/AB/R	Anti-Dumping Agreement DSU GATT 1994 WTO Agreement

The findings and conclusions contained in the Appellate Body reports circulated in 2016 are summarized below.

4.1 Appellate Body Report, *European Communities – Definitive Anti-Dumping Measures on Certain Iron or Steel Fasteners from China – Recourse to Article 21.5 of the DSU by China*, WT/DS397/AB/RW

This dispute concerned certain measures taken by the European Union to comply with the recommendations and rulings of the DSB in *EC – Fasteners (China)* relating to the imposition by the European Union of anti-dumping duties on fasteners from China. The original dispute arose from a complaint brought by China against the European Union concerning Council Regulation (EC) No. 91/2009 (the Definitive Regulation) imposing definitive anti-dumping duties on fasteners from China, and aspects of the underlying anti-dumping investigation leading to their imposition. In the original proceedings, the panel and the Appellate Body found that the Definitive Regulation was inconsistent with several provisions of the Anti-Dumping Agreement (Article 2.4, Articles 3.1 and 4.1, as well as Articles 6.2 and 6.4).

Subsequent to the DSB's adoption of the panel and Appellate Body reports in the original proceedings, the European Union took certain measures to implement the DSB's recommendations and rulings, including, conducting a review investigation. In both the original and the review investigations, the Commission considered that the Chinese producers under investigation did not operate according to the principles of a market economy and resorted to the so-called "analogue country methodology" for determining the normal values for the Chinese producers' products. The Commission determined the normal values used to calculate the dumping margins on the basis of data provided by the analogue country producer, Pooja Forge, rather than the Chinese producers under investigation because the producers had non-market economy (NME) status. Before the Article 21.5 Panel, China claimed that certain aspects of the review investigation leading to the continued application of definitive duties on fasteners from China were inconsistent with Articles 2.4, 2.4.2, 3.1, 4.1, 6.1.2, 6.2, 6.4, 6.5, and 6.5.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994.

The Article 21.5 Panel found that the European Union acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by treating the information on the list and characteristics of the products of Pooja Forge as confidential. Consequentially, the Article 21.5 Panel found that it was not necessary for it to make a finding under that provision since it had already found a violation of Article 6.5. The Article 21.5 Panel further found that the European Union acted inconsistently under Article 6.4 of the Anti-Dumping Agreement by failing to provide the Chinese producers with timely opportunities to see the information on the list and characteristics of Pooja Forge's products, which was not confidential within the meaning of Article 6.5. Furthermore, the Article 21.5 Panel found that, having denied the Chinese producers access to information relevant within the meaning of Article 6.4, the European Union acted inconsistently with Article 6.2 of the Anti-Dumping Agreement. With respect to China's claim under Article 6.1.2 of the Anti-Dumping Agreement, the Article 21.5 Panel found that Pooja Forge was not an interested party in the review investigation, and that China had failed to establish that the European Union acted inconsistently with the obligations under Article 6.1.2 by failing to ensure that the information provided by Pooja Forge concerning the list and characteristics of its products was made available promptly to the Chinese producers. In addition, the Article 21.5 Panel found that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to provide the Chinese producers with the information regarding the characteristics of Pooja Forge's products that were used in the determination of the normal values. With respect to the remainder of China's claims under Article 2.4, the Article 21.5 Panel found that China had failed to establish the alleged inconsistencies. The Article 21.5 Panel further concluded that the European Union acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement by not taking into consideration, in its dumping margin determinations, models exported by the Chinese producers that did not match any of the models sold by Pooja Forge. Finally, the Article 21.5 Panel found that the European Union acted inconsistently with Article 4.1 in defining the domestic industry in the review investigation and with Article 3.1 since the Commission's injury determination was based on the data obtained from a wrongly defined domestic industry.

4.1.1 Terms of reference issues

The European Union claimed on appeal that the Panel erred in finding that China's claims under Articles 6.5, 6.5.1, 6.4, 6.2, 6.1.2, 2.4, 4.1, and 3.1 of the Anti-Dumping Agreement fell within its terms of reference under Article 21.5 of the DSU.

The European Union argued that China's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement did not fall within the Panel's terms of reference because these were the same claims that had been raised and decided in the original proceedings. The Appellate Body recalled its ruling in *EC – Bed Linen (Article 21.5 – India)* that a complainant should not be allowed to raise claims in compliance proceedings that were already raised and dismissed in the original proceedings in respect of a component of the implementation measure that is the same as in the original measure. However, the Appellate Body also recalled that in subsequent disputes, it had clarified that the same claim with respect to an unchanged element of the measure can be re-litigated in the Article 21.5 proceedings, if in the original proceedings the matter was not resolved because, for instance, the Appellate Body was not able to complete the analysis.

The Appellate Body considered that the objects of China's claims under Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement in the original and in the compliance proceedings were not the same. China's claims under Articles 6.5 and 6.5.1 in the original proceedings concerned the confidential treatment of the information provided in Pooja Forge's questionnaire on the "product types", which the Commission used to make the dumping calculation. China's claims under Articles 6.5 and 6.5.1 in the compliance proceedings concerned the confidential treatment of the list and characteristics of Pooja Forge's products, which the Chinese producers asked to see after the Commission had disclosed to them in the review investigation the "product types" and certain characteristics used in the price comparison, in order to bring itself into compliance with the DSB recommendations and rulings in the original proceedings under Articles 6.4 and 6.2.

Moreover, the Appellate Body considered that the treatment as confidential by the Commission of the list and characteristics of Pooja Forge's products constituted an integral part of the measure taken to comply with the DSB recommendations and rulings in the original proceedings. Accordingly, the Appellate Body upheld the Panel's finding that China's claims under Articles 6.5 and 6.5.1 were within the Panel's terms of reference.

The European Union argued that China's claims under Articles 6.4 and 6.2 of the Anti-Dumping Agreement that the Commission failed to provide timely opportunities to the Chinese producers to see the information concerning the list and characteristics of Pooja Forge's products and to defend their interests, did not fall within the Panel's terms of reference because these were claims that China could have raised, but did not raise, in the original proceedings. Moreover, the European Union contended that China's claims raised in these Article 21.5 proceedings concerned an unchanged aspect of the original measure that was separable from the measure taken to comply.

The Appellate Body recalled that in *US – Upland Cotton (Article 21.5 – Brazil)* it had found that a complaining Member ordinarily would not be allowed to raise claims in an Article 21.5 proceeding that it did not, but could have, pursued in the original proceedings. The Appellate Body further referred to its finding in *US – Zeroing (EC) (Article 21.5 – EC)* that this was not the case for new claims against a measure taken to comply, i.e. in principle, a new and different measure even if such measure incorporates components of the original measure that are unchanged, but are not separable from other aspects of the measure taken to comply.

The Appellate Body observed that violations of the procedural obligations under Articles 6.4 and 6.2 of the Anti-Dumping Agreement could occur multiple times during an investigation, depending on the piece of information that an interested party requests to see or the presentation that such a party wishes to make for the defence of its interests. The Appellate Body considered that the aspect of the measure China challenged

in these compliance proceedings had changed from the original proceedings, considering that China was challenging a different episode of non-disclosure by the Commission, which concerned different aspects of Pooja Forge's product information. According to the Appellate Body, the key question in addressing this issue on appeal was whether the Chinese producers were aware in the original investigation of the existence of the information regarding the list and the characteristics of Pooja Forge's products and of its relevance. Only if it could be demonstrated that the Chinese producers were aware of the existence and of the relevance of this information, could it then be concluded that China could have claimed in the original proceedings that the non-disclosure of such information by the Commission amounted to a violation of Articles 6.4 and 6.2.

The Appellate Body recalled that the Chinese producers' requests to see information concerning the information at issue were prompted by the Commission's disclosures of the product types used in the dumping calculation and that the exchanges between the Commission and the Chinese producers in the review investigation suggested that the Chinese producers became aware of the existence of the information at issue only during the review investigation, following partial disclosures made by the Commission. Accordingly, the Appellate Body agreed with the Panel that China's claims were not claims that it could have made in the original proceedings.

Finally, the Appellate Body considered that the Commission's non-disclosure of the information at issue could be characterized as an omission in the disclosures made by the Commission to comply with the DSB recommendations and rulings under Articles 6.4, 6.2, and 2.4 of the Anti-Dumping Agreement. The Appellate Body considered that it constituted an integral part of, and was not separable from, the measure taken to comply with the DSB recommendations and ruling in the original proceedings.

Accordingly, the Appellate Body concluded the claims that China raised in these compliance proceedings under Articles 6.4 and 6.2 of the Anti-Dumping Agreement were not claims that China could have raised in the original proceedings and, therefore, upheld the Panel's finding that China's claims under Articles 6.4 and 6.2 were within the Panel's terms of reference.

The European Union made the same arguments *mutatis mutandis* in respect of China's claim under Article 6.1.2 of the Anti-Dumping Agreement. The Appellate Body rejected the European Union's claim that the Panel erred in finding that China's claims under Article 6.1.2 fell within its terms of reference, and rejected it. The European Union further contended that in finding that China's claim under Article 6.1.2 fell within its terms of reference the Panel had acted inconsistently with Article 11 of the DSU, because it had concluded that Pooja Forge had provided certain information on coating of fasteners, for the first time, in the review investigation, rather than simply confirming information that it had already provided in the original investigation. The Appellate Body rejected this claim under Article 11 of the DSU because it considered that whether the information was provided for the first time in the review investigation or not was immaterial to the Panel's finding that China's claims under Article 6.1.2 of the Anti-Dumping Agreement fell within its terms of reference. Accordingly, the Appellate Body concluded that the claim that China raised in these compliance proceedings under Article 6.1.2 of the Anti-Dumping Agreement was not a claim that China could have raised in the original proceedings and, therefore, upheld the Panel's finding that China's claim under Article 6.1.2 was within the Panel's terms of reference.

The European Union argued that China's claims under Article 2.4 of the Anti-Dumping Agreement in respect of adjustments for differences in physical characteristics did not fall within the Panel's terms of reference because these were claims that China could have raised, but did not raise, in the original proceedings. Moreover, the European Union contended that China's claims in these Article 21.5 proceedings concerned an unchanged aspect of the original measure that was separable from the measure taken to comply.

The Appellate Body observed that the exchanges between the Chinese producers and the Commission in the review investigation demonstrated that the Chinese producers became aware of the information underlying

China's claim under Article 2.4 of the Anti-Dumping Agreement only during the review investigation. This was because the Commission never fully disclosed all the information regarding the characteristics of Pooja Forge's products that were relevant to the dumping determination. The Appellate Body, thus, agreed with the Panel that the absence from the record of the original investigation of any discussion on the impact on price comparability of physical characteristics, not included in the original product control numbers (PCNs), showed that this issue was unique to the review investigation and, therefore, could not have been raised in the original proceedings.

Moreover, the Appellate Body considered that the claim by China in these compliance proceedings under Article 2.4 of the Anti-Dumping Agreement could not have been raised in the original proceedings, and challenged aspects that were intrinsically connected with, and formed part of the measure taken to comply, namely, the disclosures made by the Commission in the review investigation to comply with the DSB recommendations and rulings under Article 2.4 in the original proceedings.

Accordingly, the Appellate Body considered that the claim that China raised in these compliance proceedings under Article 2.4, in respect of adjustments relating to differences in physical characteristics not reflected in the original PCNs, was not a claim that China could have raised in the original proceedings. The Appellate Body, therefore, upheld the Panel's finding that China's claim under Article 2.4 in respect of adjustments relating to differences in physical characteristics not reflected in the original PCNs, fell within its terms of reference.

The European Union also argued that China's claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement did not fall within the Panel's terms of reference because these were claims that China could have raised, but did not raise, in the original proceedings. Moreover, the European Union contended that China's claims in these Article 21.5 proceedings concerned an unchanged aspect of the original measure that was separable from the measure taken to comply.

The Appellate Body observed that China's claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement related to a disagreement among the parties over the meaning and scope of the DSB recommendations and rulings in the original proceedings. The European Union considered that all it had to do to comply was to re-define the domestic industry, based on the original Notice of Initiation, and include all producers that had come forward within the deadline set forth in that notice. In contrast, China considered that the Commission had to issue a new notice of initiation. The Appellate Body stated that such a disagreement on the scope of the DSB recommendations and rulings in the original proceedings clearly could not have been addressed in the original proceedings, and that this was exactly the type of disagreement which a compliance panel under Article 21.5 of the DSU was called upon to resolve. Accordingly, the Appellate Body upheld the Panel's finding that China's claims under Articles 4.1 and 3.1 of the Anti-Dumping Agreement, with respect to the definition of domestic industry, fell within its terms of reference.

Finally, the Appellate Body made some remarks in relation to claims regarding the Panel's terms of reference under Article 21.5 of the DSU brought by the European Union. In this respect, the Appellate Body recalled that before the Panel the European Union raised objections regarding the Panel's terms of reference under Article 21.5 of the DSU in respect of 7 out of 10 claims brought by China. On appeal, the European Union challenged 6 of the 7 findings by the Panel's findings regarding its terms of references.

The Appellate Body observed that a decision to raise a claim regarding a panel's terms of reference must be taken judiciously, in particular given the serious consequences that flow from a finding that a matter is beyond the scope of a panel's jurisdiction under Article 21.5; namely, that the complainant would be able to obtain a ruling on that matter only by initiating dispute settlement proceedings afresh. The Appellate Body emphasized that complainants should exercise their judgment as to whether it is fruitful to raise such claims, as well as whether, on appeal, it is fruitful to claim that a panel erred in finding jurisdiction in circumstances where the panel itself has rejected the same challenge to its jurisdiction on a reasoned basis. Finally, the

Appellate Body recalled that, even when the parties to a dispute remain silent on issues that touch on the proper scope of proceedings, panels and the Appellate Body cannot ignore such issues, but must deal with such issues in order to satisfy themselves that they have authority to proceed.

4.1.2 Articles 6.5 and 6.5.1 of the Anti-Dumping Agreement

The European Union raised a series of claims in relation to the Panel's findings under Article 6.5 of the Anti-Dumping Agreement. In particular, the European Union raised claims of error regarding the Panel's treatment of Pooja Forge's request for the confidential treatment of the information, regarding the list and characteristics of its products in its analysis of China's claim under Article 6.5. For its part, China put forward a conditional appeal under Article 6.5.1 of the Anti-Dumping Agreement regarding the Commission's alleged failure to ensure that Pooja Forge submitted a non-confidential summary of the information at issue. In this regard, China requested that the Appellate Body find that the European Union acted inconsistently with this provision, in the event that the Appellate Body found that the European Union had not acted inconsistently with Article 6.5.

4.1.2.1 Whether the Panel erred in its treatment of Pooja Forge's request for the confidential treatment of the information regarding the products list and characteristics of the analogue country producer

The Appellate Body first addressed the European Union's claim that the Panel erred in its treatment of Pooja Forge's request for the confidential treatment of the information regarding the list and characteristics of its products. The Appellate Body noted that the request for confidential treatment by Pooja Forge was reflected in an e-mail to the Commission in which Pooja Forge stated that the list of the products sold by it could not be provided because, if disclosed, this information would confer an advantage on its competitors. The Appellate Body then turned to address the European Union's argument that the Panel acted inconsistently with Article 17.5(ii) of the Anti-Dumping Agreement by disregarding Pooja Forge's request in its consideration of China's claim under Article 6.5 of that Agreement. The Appellate Body found that the Panel had clearly engaged with the content of Pooja Forge's request when it found that the e-mail contained no more than a bald assertion, which, in the Panel's view, was insufficient to support the conclusion that good cause had been shown for the confidential treatment of the information at issue. Accordingly, the Appellate Body rejected the European Union's argument that the Panel disregarded Pooja Forge's request for confidential treatment in its analysis of China's claim under Article 6.5 of the Anti-Dumping Agreement, and thereby acted inconsistently with Article 17.5(ii) of that Agreement.

The Appellate Body next turned to examine the European Union's argument that the Panel failed to conduct an objective assessment of the facts, as required by Article 11 of the DSU, when it found that, because Pooja Forge's e-mail to the Commission requesting confidential treatment of the information at issue was placed on the confidential file of the investigation, the Chinese producers had been deprived of the opportunity to respond to Pooja Forge's request. The Appellate Body examined the record evidence on which the European Union relied, in support of its argument, and found that this evidence did not call into question the objectivity of the Panel's finding. In particular, the Appellate Body highlighted that a panel does not act inconsistently with Article 11 of the DSU merely because it does not refer to a certain piece of evidence or attribute to that evidence the same weight as the party relying on it.

In relation to the Panel's treatment of Pooja Forge's request for the confidential treatment of the information at issue, the Appellate Body considered the European Union's further claim that the Panel erred in finding that Pooja Forge's e-mail to the Commission contained no more than a bald assertion on the part of Pooja Forge, which did not seem to support the argument that Pooja Forge had provided good cause to justify the confidential treatment of its information. The European Union contended in this regard that the Panel was required to examine whether, in light of the nature of the information at issue and the particular good cause alleged by Pooja Forge, the statement contained in the e-mail was sufficient to establish that

the Commission objectively assessed "good cause" for the purposes of Article 6.5 of the Anti-Dumping Agreement. The Appellate Body considered that, in light of the particular circumstances of this case, where substantiation of the particular good cause alleged by Pooja Forge was lacking in Pooja Forge's request for confidential treatment and in the Commission's published reports and related supporting documents, it was not for the Panel to examine, *ab initio*, Pooja Forge's request for confidential treatment in light of the nature of the information at issue and the particular good cause alleged by Pooja Forge. The Appellate Body recalled that a panel does not comply with the applicable standard of review under Article 6.5 if, in the absence of an objective assessment by the investigating authority of the good cause alleged, it engages in a *de novo* review of evidence on the record of the investigation and determines for itself, or on the basis of subjective concerns of the submitting party, whether the request for confidential treatment is sufficiently substantiated and that good cause for such treatment objectively exists. Accordingly, the Appellate Body found that, in the circumstances of this case, the Panel did not err in finding that Pooja Forge's e-mail to the Commission contained "no more than a bald assertion".

4.1.2.2 Whether the Panel erred in finding that the Commission "never" conducted an objective assessment of the "good cause" alleged by Pooja Forge

The Appellate Body then turned to consider the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in finding that the Commission never conducted an objective assessment of whether the information at issue was confidential by nature or whether "good cause" had been shown to justify its confidential treatment, as required by Article 6.5. The European Union relied on a letter from the case-handler who had conducted the verification visit at Pooja Forge's premises in the course of the original investigation. In this letter, the case-handler averred that, at the time of the Commission's verification visit, Pooja Forge had requested that its company details be treated confidentially, and that Pooja Forge was very much concerned about the treatment of its information in the investigation because of strong competition with the Chinese producers in the after-sales market in India. The European Union further relied on an exchange of e-mails between Pooja Forge and the Commission in which Pooja Forge confirmed that it did not wish to disclose its company details to interested parties, as it had mentioned during the verification visit that took place in 2008.

The Appellate Body noted that the letter from the case-handler on which the European Union relied was not part of the record of the investigation but, instead, a document that had been prepared specifically for these WTO dispute settlement proceedings. The Appellate Body considered that the letter from the case-handler constituted *ex post* rationalization, which the Panel could not have properly relied on in examining China's claim under Article 6.5. The Appellate Body further pointed out that, in any event, this letter, as well as the exchange of e-mails between Pooja Forge and the Commission on which the European Union relied merely confirmed that Pooja Forge had requested confidential treatment of its information on the basis that its disclosure could confer an advantage on its competitors. This evidence did not, however, indicate whether and how the Commission engaged with the particular good cause alleged by Pooja Forge in according confidential treatment to the information at issue. On this basis, the Appellate Body concluded that the evidence relied on by the European Union did not call into question the objectivity of the Panel's finding that the Commission never conducted an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue. Accordingly, the Appellate Body found that, in reaching this finding, the Panel did not fail to make an objective assessment of the facts, as required by Article 11 of the DSU.

4.1.2.3 Whether the Panel erred in finding that there was an inconsistency in the arguments put forward by the European Union

The Appellate Body then turned to the European Union's claim that the Panel's finding under Article 6.5 was in error, insofar as it rested on the Panel's statement that there was an inconsistency in the arguments presented by the European Union. The Appellate Body found that the Panel's conclusion that the European

Union acted inconsistently with Article 6.5 followed from its finding that the Commission had failed to conduct an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue, as required by Article 6.5. The Appellate Body, therefore, considered that the Panel's statement that there was a logical inconsistency in the European Union's arguments constituted *obiter dictum*, which did not provide a basis for reversing the Panel's ultimate conclusion that the European Union acted inconsistently with Article 6.5.

4.1.2.4 Whether the Panel erred by not conducting its own analysis of the nature of the information at issue

The Appellate Body proceeded to address the European Union's claim that the Panel erred in concluding that the European Union acted inconsistently with Article 6.5 because the Panel found, without a proper analysis, that the information at issue was not confidential. At the outset of its analysis, the Appellate Body disagreed with the European Union to the extent that it suggested that the Panel found that the information at issue was, in fact, not confidential by nature. In this regard, the Appellate Body highlighted that the Panel expressly stated that it was not making such a finding because the applicable standard of review would not have allowed it to conduct a *de novo* review. Instead, the Panel found that the European Union acted inconsistently with Article 6.5 on the basis that the Commission failed to conduct an objective assessment of whether Pooja Forge had shown good cause for the confidential treatment of the information at issue.

Turning to the European Union's argument that this was an insufficient basis for the Panel's finding that the European Union acted inconsistently with Article 6.5, the Appellate Body considered that this argument did not comport with the Appellate Body's guidance under Article 6.5 regarding: the role of a party requesting confidential treatment for information that it submits to an authority; the role of that authority in examining that request; and the role of a WTO panel in the event of a claim that the authority acted inconsistently with Article 6.5 by according confidential treatment to the information in the absence of "good cause" being shown by the party submitting the information. The Appellate Body recalled in this regard that it is for the party requesting confidential treatment for information that it considers to be confidential by nature, or that it submits on a confidential basis, to furnish reasons justifying such treatment. The role of the authority is to assess such reasons and determine, objectively, whether the submitting party has shown good cause for the confidential treatment of its information. In the event of a claim of violation of Article 6.5, a panel, tasked with reviewing whether an authority has objectively assessed the good cause alleged by the party submitting information to it, must examine this issue on the basis of the investigating authority's published report and its related supporting documents, in light of the nature of the information at issue, and the reasons given by the submitting party for its request for confidential treatment.

Noting that the Panel found that the Commission had never conducted the objective assessment required of it under Article 6.5, the Appellate Body considered that, having made that finding, it was not for the Panel to conduct a *de novo* review of whether the information at issue was confidential by nature or whether good cause had been shown by Pooja Forge. Thus, the Appellate Body found that the Panel did not err by not conducting its own analysis of the nature of the information at issue for the purposes of its assessment of China's claim under Article 6.5.

In light of the foregoing considerations, the Appellate Body upheld the Panel's finding that the European Union acted inconsistently with Article 6.5 in the review investigation at issue. The Appellate Body further noted that China's conditional appeal under Article 6.5.1 of the Anti-Dumping Agreement would have been triggered only in the event of the reversal of the Panel's finding of a violation under Article 6.5. Having upheld the Panel's finding under Article 6.5, the condition for addressing China's claim under Article 6.5.1 was not met and, accordingly, the Appellate Body made no findings under Article 6.5.1.

4.1.3 Articles 6.4 and 6.2 of the Anti-Dumping Agreement

On appeal, the European Union claimed that the Panel erred in finding that the information at issue was: (i) relevant to the presentation of the Chinese producers' cases; (ii) not confidential within the meaning of Article 6.5; and (iii) used by the Commission in its calculation of dumping margins. The European Union argued that, for the purposes of its analysis under Article 6.4, the Panel should not have relied on its finding that the Commission had accorded confidential treatment to this information in a manner that did not conform to the requirements of Article 6.5. Instead, the European Union argued that the Panel was required to carefully and separately undertake an analysis of the information at issue in order to determine whether such information was confidential by nature within the meaning of Article 6.5.

In addressing the European Union's argument, the Appellate Body framed the issue as one concerning the meaning of the reference in Article 6.4 to information "that is not confidential as defined in paragraph 5". Recalling its earlier finding that Article 6.5 prescribes a showing of "good cause" by the party requesting confidential treatment of its information as a condition precedent for an investigating authority to accord such treatment, the Appellate Body noted that the treatment of information as confidential was, therefore, the legal consequence that flowed from the establishment of good cause, as determined pursuant to an objective assessment by the authority reviewing a party's request for confidential treatment. In light of this interpretation of Article 6.5, the Appellate Body considered that the reference in Article 6.4 to information that was not confidential as defined in paragraph 5 was properly to be understood as excluding from the scope of Article 6.4 information that has been accorded confidential treatment in accordance with Article 6.5. Conversely, the Appellate Body stated that if information has been accorded confidential treatment under Article 6.5 in a manner that did not conform to the requirements of that provision, there was no legal basis for according confidential treatment and such information would, for the purposes of Article 6.4, be considered as information that was not confidential as defined in paragraph 5. The Appellate Body therefore rejected the European Union's argument that, for the purposes of conducting an analysis under Article 6.4, a panel must carefully and separately undertake an examination of the information at issue in order to determine whether such information is confidential within the meaning of Article 6.5. Accordingly, the Appellate Body found that the Panel did not err in treating the information at issue as not requiring confidential treatment for the purposes of its analysis under Article 6.4.

The Appellate Body next turned to consider the European Union's claim that the Panel erred in finding that the information at issue was "relevant", within the meaning of Article 6.4, for the presentation of the Chinese producers' cases. The European Union argued that, in reaching this finding, the Panel erred by relying on the fact that the Chinese producers had requested the information at issue from the Commission. Recalling its finding in the original proceedings, the Appellate Body highlighted that whether information is "relevant" to the presentation of an interested party's case, within the meaning of Article 6.4, is to be determined from the perspective of that interested party, rather than the perspective of the investigating authority. Thus, the Appellate Body found that the Panel did not err in finding that the information at issue was "relevant" to the presentation of the Chinese producers' cases on the basis that the Chinese producers had repeatedly requested this information from the Commission.

The Appellate Body then turned to examine the European Union's claim that the Panel erred in finding that the information at issue was "used" by the Commission, within the meaning of Article 6.4. The Appellate Body recalled its finding in the original proceedings that whether information was "used" by the authority is dependent on whether the information relates to a required step in an anti-dumping investigation, rather than on whether such information was actually relied on by the authority in its determination. Thus, under Article 6.4, information is "used" by an authority when such information relates to issues which the authority is required to consider under the Anti-Dumping Agreement, or which it, in fact, considers, in the exercise of its discretion, during the course of an anti-dumping investigation. Turning to the facts of this case, the Appellate Body found that, although all of the specific data provided by Pooja Forge concerning its products and their characteristics may not have been specifically relied on by the Commission in its determinations,

the Commission extracted as much as possible from all of Pooja Forge's data in order to group the products at issue in accordance with the revised PCNs, and calculated dumping margins for the Chinese producers on this basis. The Appellate Body, thus, found that all of the information concerning the products sold by Pooja Forge and their characteristics was "used" by the Commission, within the meaning of Article 6.4, because it related to a required step in the investigation, namely, the calculation of the dumping margins.

The Appellate Body, thereafter, addressed the European Union's claim that the Panel erred in finding that the provision of information to the Chinese producers, at the time when the company-specific disclosures were issued, was too late to comply with the obligation under Article 6.4. The Appellate Body recalled that the Panel had found that information concerning Pooja Forge's products was not disclosed to the Chinese producers on the grounds of confidentiality. Thus, because the Commission did not provide an opportunity for the Chinese producers to see all information that was relevant to the presentation of their cases, within the meaning of Article 6.4, the Appellate Body found that the question of whether timely opportunities had been provided was a moot point that did not arise for consideration. The Appellate Body, however, clarified that the issue of whether timely opportunities, within the meaning of Article 6.4, have been provided to interested parties to see information that falls within the scope of that provision must be determined on a case-by-case basis, taking into account the specific information at issue, the step of the investigation to which such information relates, the practicability of disclosure at certain points of the investigation vis-à-vis other points, and the stage of the investigation at which interested parties have made a request to see the information at issue.

In light of these considerations, the Appellate Body upheld the Panel's finding that the European Union acted inconsistently with Article 6.4 of the Anti-Dumping Agreement because the Commission failed to provide the Chinese producers with information concerning the list and characteristics of Pooja Forge's products, which was not confidential within the meaning of Article 6.5 of the Anti-Dumping Agreement, was relevant to the presentation of the Chinese producers' cases, and was used by the Commission.

The Appellate Body next considered the European Union's claim that the Panel erred in finding that the European Union acted inconsistently with Article 6.2 *mutatis mutandis* as those argued by the European Union in the context of its claim under Article 6.4. The Appellate Body recalled its finding that the Panel did not err in concluding that the European Union acted inconsistently with Article 6.4 in the review investigation. Consequently, the Appellate Body found that the Panel did not err in finding that, by failing to disclose the information at issue to the Chinese producers in accordance with Article 6.4, the European Union denied these producers a full opportunity for the defence of their interests, in contravention of Article 6.2.

4.1.4 Article 6.1.2 of the Anti-Dumping Agreement

In respect of China's claim that the Panel erred in rejecting its claim that the European Union acted inconsistently with Article 6.1.2 of the Anti-Dumping Agreement, the Appellate Body first addressed China's contention that the Panel erred in finding that Pooja Forge was not an "interested party" in the review investigation within the meaning of Article 6.11 of the Anti-Dumping Agreement and that, therefore, the obligation under Article 6.1.2 did not apply to information submitted by Pooja Forge.

Turning to the Panel's interpretation of the term "interested parties", the Appellate Body noted the Panel's finding that the residual clause of that provision made clear that, in respect of entities not listed in the first part of Article 6.11, a decision by the investigating authority was necessary to include such entities as "interested parties" in an anti-dumping investigation. The Appellate Body then noted that the Panel had found that Pooja Forge was not an "interested party" in the review investigation, on the basis that there was no evidence on the record of the investigation that the Commission had formally decided to include Pooja Forge as an interested party. However, in reviewing the record of the investigation, the Appellate Body found that: (i) Pooja Forge had participated in the investigation at the request of the

Commission; (ii) the Commission selected Pooja Forge as the analogue country producer for the purposes of the investigation and used its data to determine normal values and calculate dumping margins for the Chinese producers; and (iii) the Commission treated Pooja Forge like an investigating authority is required to treat an "interested party" in an anti-dumping investigation by, for example, requesting Pooja Forge to provide a non-confidential summary of information submitted in confidence, and verifying the information submitted by Pooja Forge. The Appellate Body thus found that, although there was no evidence on the record of a formal declaration in which the Commission deemed Pooja Forge an "interested party" in the investigation at issue, the record of the investigation demonstrated that, by its actions in this particular case, the Commission treated Pooja Forge as an "interested party" in the review investigation and, consequently, allowed Pooja Forge to be included as an "interested party", within the meaning of the residual clause of Article 6.11. Accordingly, the Appellate Body reversed the Panel's findings that Pooja Forge was not an "interested party" in the review investigation and that, therefore, the obligation under Article 6.1.2 of the Anti-Dumping Agreement did not apply to evidence provided by Pooja Forge.

Having reversed this finding of the Panel, the Appellate Body recalled that, subject to the requirement to protect confidential information, Article 6.1.2 requires that evidence presented in writing by one interested party be made available promptly to other interested parties. Noting that it had upheld the Panel's conclusion that the European Union acted inconsistently with Article 6.5 because the Commission had accorded confidential treatment to the information at issue, the Appellate Body found that the information concerning the list and characteristics of Pooja Forge's products was, therefore, not excluded from the scope of the obligation under Article 6.1.2. Accordingly, the Appellate Body reversed the Panel's finding that China had not established that the European Union acted inconsistently with Article 6.1.2 of the Anti-Dumping Agreement in the review investigation at issue, and found, instead, that the European Union acted inconsistently with that provision because the Commission failed to make available to the Chinese producers information concerning the list and characteristics of Pooja Forge's products.

4.1.5 Article 2.4 of the Anti-Dumping Agreement

The European Union appealed the Panel's interpretation and application of the last sentence of Article 2.4 of the Anti-Dumping Agreement. For its part, China claimed that the Panel erred in its interpretation and application of Article 2.4 as regards the fair comparison requirement.

4.1.5.1 The procedural requirement under Article 2.4

The European Union challenged the Panel's interpretation and application of the last sentence of Article 2.4 of the Anti-Dumping Agreement, which provides that "[t]he authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties." The European Union submitted that the Panel erred in suggesting that this obligation differs based on the methodology used to establish normal values, and in finding that it requires the disclosure of raw data. In addition, the European Union claimed that the Panel erred in finding that the Commission deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments under Article 2.4. Finally, the European Union claimed that the Panel erred when it found that the confidential nature of the information should not have prevented the Commission from disclosing a summary of the product information submitted by Pooja Forge.

The Appellate Body recalled that Article 2.4 requires investigating authorities to ensure a fair comparison between the export price and the normal value and, to this end, to make due allowance, or adjustments, for differences affecting price comparability. As the Appellate Body further recalled, while the obligation to ensure a fair comparison lies on the investigating authorities, exporters bear the burden of substantiating, as constructively as possible, their requests for adjustments reflecting the due allowance within the meaning of Article 2.4. The last sentence of Article 2.4 further adds a procedural requirement to the general obligation to ensure a fair comparison, which takes the form of dialogue between the investigating authority and

interested parties. In the original proceedings, the Appellate Body had found that, as a starting point for the dialogue between the investigating authority and the interested parties to ensure a fair comparison, the authority must, at a minimum, inform the parties of the product groups with regard to which it will conduct the price comparisons. Addressing the issue of investigations where the normal value is established on the basis of the domestic sales in an analogue country, the Appellate Body had further found that, unless the foreign producers under investigation are informed of the specific products with regard to which the normal value is determined, they will not be in a position to request adjustments they deem necessary.

The Appellate Body then turned to each of the European Union's claims of error. First, the Appellate Body found that the fact that normal value was determined based on a methodology involving data of an analogue country producer did not affect the legal obligation imposed on investigating authorities under the last sentence of Article 2.4. In all anti-dumping investigations, the authorities shall indicate to the parties in question what information is necessary to ensure a fair comparison and shall not impose an unreasonable burden of proof on those parties as prescribed by Article 2.4. However, as the Appellate Body further found, depending on the factual circumstances at hand, this provision may require the investigating authority to provide certain information to parties requesting adjustments, in particular where the exporter under investigation is missing information pertaining to the normal value established by the investigating authority, because it is based on the domestic sales of an analogue country producer, rather than the exporter's own domestic sales. The Appellate Body concluded that the Panel correctly underlined that its findings were made in the context of a very particular factual situation and that the Panel did not find that a different legal obligation applied under the last sentence of Article 2.4 where normal value is determined based on the data of analogue country producers.

Second, looking at the relationship between Article 6 and Article 2.4, the Appellate Body found that, in light of the limited scope of the procedural obligation under Article 2.4, which is restricted to ensuring that interested parties be in a position to make requests for adjustments, this provision did not render any of the disclosure obligations under Article 6 redundant, as the European Union suggested. The Appellate Body further dismissed the European Union's submission that the Panel erred in finding that the last sentence of Article 2.4 required the disclosure of raw data. The Appellate Body found that a determination as to whether or not a given piece of information should be shared with interested parties under that provision has to be made in light of the specific circumstances of each investigation, not in the abstract. This is how the Panel proceeded when finding that, in the review investigation, information on the characteristics of Pooja Forge's products needed to be shared with the Chinese producers for them to be in a position to meaningfully request adjustments.

Third, the Appellate Body found that the Panel correctly applied the last sentence of Article 2.4 to the factual circumstances at hand. The Appellate Body noted that the Commission indicated to the Chinese producers the product groups that served as the basis for comparing the transactions by disclosing the revised PCNs. However, the Commission did not disclose all the information regarding the characteristics of Pooja Forge's products used for the purposes of price comparison. As the Appellate Body further held, the Commission did not indicate the specific products of Pooja Forge that it used in determining normal values, which would have enabled the Chinese producers to request the adjustments they deemed necessary. The Appellate Body, therefore, agreed with the Panel's finding that by failing to provide the Chinese producers with the information regarding the characteristics of Pooja Forge's products which were used in determining the normal value and which were then compared with the export prices, the Commission deprived the Chinese producers of the opportunity to make informed decisions on whether to request adjustments under Article 2.4. The Appellate Body added that, having found that the disclosures at issue did not contain sufficient information to meet the requirements of the last sentence of Article 2.4, the Panel was not required to address the question of whether such disclosures were made in a timely manner for the purposes of Article 2.4. However, the Appellate Body considered, in most cases, a disclosure under Article 6.9 of the Anti-Dumping Agreement, like the one at hand, would not fulfil the requirements of Article 2.4. Whether information shared at the end of an on-going dialogue under Article 2.4 is timely enough

to ensure fair comparison between normal value and export price must be examined on a case-by-case basis, by assessing whether interested parties had a meaningful opportunity to request adjustments in light of the information shared by the investigating authority towards the end of that dialogue. Therefore, the Appellate Body found that it could not be excluded that, in some instances, a disclosure under Article 6.9 of the Anti-Dumping Agreement could fulfil the requirements of Article 2.4.

Finally, the Appellate Body found that the Panel did not err in rejecting the European Union's argument that the information at issue was protected from disclosure under Article 6.5 and, therefore, could not be disclosed under Article 2.4. The Appellate Body added that even if the information had required confidential treatment pursuant to Article 6.5, the Commission would, under Article 2.4, have needed to make its best effort to disclose the information that was necessary for the Chinese producers to request adjustments. While such information could have been disclosed, with the permission of Pooja Forge under Article 6.5 or via a non-confidential summary prepared by Pooja Forge pursuant to Article 6.5.1, it could also have been disclosed by other means for the purposes of Article 2.4, such as via a non-confidential summary prepared by the investigating authority.

On the basis of the foregoing, the Appellate Body found that the European Union had not established that the Panel erred in its interpretation or application of the last sentence of Article 2.4 of the Anti-Dumping Agreement and upheld the Panel's finding of inconsistency under Article 2.4.

4.1.5.2 The fair comparison requirement under Article 2.4

China claimed that the Panel erred in the interpretation and application of Article 2.4 of the Anti-Dumping Agreement in finding that the European Union did not act inconsistently with the fair comparison requirement under this provision by rejecting the Chinese producers' requests for adjustments based on differences in: (i) taxation; (ii) certain costs; and (iii) physical characteristics.

China did not challenge the methodology used by the Commission, which was to base the normal values on the domestic prices of an analogue country producer, nor did it challenge the use of India as the analogue country or Pooja Forge as the analogue country producer. China, however, claimed that there was no legal basis in the Anti-Dumping Agreement, or in China's Accession Protocol, for a finding that Article 2.4 imposes a different and less stringent fair comparison obligation in investigations involving NME producers. The Appellate Body found that the fair comparison requirement of Article 2.4 applies in all anti-dumping investigations, irrespective of the methodology used to establish normal value. However, it further found, that Article 2.4 has to be read in the context of the second *Ad* Note to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol, which provide the legal basis for resorting to the analogue country methodology to determine the normal value in certain investigations. It follows that the investigating authority cannot be required to adjust for differences in costs between the NME producers under investigation and the analogue country producer, if making the requested adjustment would lead the investigating authority to adjust back to costs that were found to be distorted. Accordingly, an investigating authority has to take steps to achieve clarity as to the adjustment claimed, and determine whether, on its merits, the adjustment is warranted because it reflects a difference affecting price comparability or whether it would lead to adjusting back to costs or prices that were found to be distorted in the exporting country.

4.1.5.2.1 Differences in taxation

Prior to addressing China's claims of error, the Appellate Body recalled that the Chinese producers' requests for an adjustment were based on the fact that Pooja Forge's domestic prices included import duties and other indirect taxes on the raw materials that were not included in the Chinese export prices. The Commission had rejected the Chinese producers' requests on the basis that: (i) the Chinese producers did not show that they would benefit from a non-collection or refund of the import duties paid on the raw materials; and (ii) the prices of the raw materials were found to be distorted in China and therefore could not serve as a basis

for an adjustment. For its part, the Panel rejected China's claim on the grounds that such an adjustment would undermine the Commission's right to have recourse to the analogue country methodology; and the Chinese producers did not substantiate their requests for an adjustment. On appeal, China claimed that both of these findings by the Panel were in error.

The Appellate Body agreed with the Panel that the fact that the analogue country methodology was used did not relieve the Commission from the obligation to conduct a fair comparison, as required under Article 2.4. However, it disagreed with the Panel's approach, which was to find, in general terms and without more, that adjusting for differences in taxation would have undermined the Commission's right to have recourse to the analogue country methodology. As the Appellate Body further found, the Panel did not review whether the Commission had established that the differences in taxation on raw materials were related to the issue of the price of the domestic raw materials that was found to be distorted, or whether an adjustment was merited because price comparability was affected under Article 2.4. Moreover, the Appellate Body considered that the Commission's determination did not reflect that the Commission assessed whether the requested adjustment was warranted or whether it would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison. The Commission, hence, failed to take steps to achieve clarity as to the adjustment claimed and then determine, whether and to what extent that adjustment was merited as required by Article 2.4. The Appellate Body, therefore, found that: (i) the Panel erred in concluding that the Commission was not required to consider making an adjustment due to differences in taxation solely because the analogue country methodology was used in the review investigation; and (ii) the Commission failed to assess properly whether the requested adjustment, based on the differences in taxation was warranted, or, whether it would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison.

Second, China submitted that the Panel erred in its application of Article 2.4 when finding that the facts on the record did not show that the Chinese producers demonstrated to the Commission that the difference in taxation affected price comparability within the meaning of Article 2.4. China submitted that the Chinese producers had made such a showing, given that Pooja Forge's domestic prices included an amount for import duties and other indirect taxes on the raw material used to produce fasteners (i.e. wire rod) and that would not have been included in its export prices, whereas Chinese export prices did not include any import duties or indirect taxes given that the Chinese producers sourced their wire rod domestically.

Turning to the issue of whether the Chinese producers submitted a substantiated request for an adjustment, the Appellate Body recalled that the producers under investigation bear the burden of substantiating their requests as constructively as possible. Furthermore, the Appellate Body observed that the Commission's determination that the Chinese producers failed to substantiate their requests for an adjustment seemed to have been based on the erroneous premise that this adjustment could not be made because certain prices were distorted in China and that, accordingly, it was not possible to substantiate the corresponding requests any further. On this basis, the Appellate Body found that the Panel erred in the application of Article 2.4 and reversed the Panel's intermediate finding that the Chinese producers did not come forward with a substantiated request for an adjustment for the alleged difference in taxation.

In light of the above, the Appellate Body reversed the Panel's finding that the European Union did not act inconsistently with the fair comparison requirement under Article 2.4 by rejecting the Chinese producers' requests for adjustment based on differences in taxation. Instead, the Appellate Body found that, because the Commission's determination did not reflect an adequate assessment of the Chinese producers' requests for an adjustment for differences in taxation, the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement.

4.1.5.2.2 Differences in certain costs

As a preliminary matter, the Appellate Body recalled that the differences at issue related to: access to raw materials; use of self-generated electricity; efficiency in raw-material consumption; efficiency in electricity consumption; and productivity per employee. It further recalled that the Commission rejected these requests for adjustments on the basis that: (i) no evidence had been adduced that these differences in costs would translate into differences in prices; and (ii) where an analogue country is used, prices and costs in the NME that are not the result of market forces are not to be taken into account.

The Appellate Body further recalled that the Panel had found that the Chinese producers failed to demonstrate that the alleged differences in costs affected price comparability; and that the investigating authority was not obligated to make adjustments to reflect such differences in costs in an investigation where the analogue country methodology is used. China claimed that both findings were in error. In addition, China submitted that the Panel acted inconsistently with Article 11 of the DSU by focusing exclusively on differences in terms of efficiency in electricity consumption when addressing China's claim that the Commission should have made adjustments for all these differences and, further, by considering pieces of evidence in isolation from each other.

The Appellate Body disagreed with the Panel's approach, which was to find, in general terms and without more, that in an investigation involving an NME where the analogue country methodology is used, claiming adjustments for alleged differences in costs would undermine the investigating authority's recourse to that methodology, and that it is not obligated to make adjustments to reflect differences in costs in an investigation where the analogue country methodology is used. The Appellate Body further found that the Panel did not review whether the Commission had established that the differences in costs were related to prices found to be distorted or, whether adjustments were merited because price comparability was affected under Article 2.4 of the Anti-Dumping Agreement. Moreover, the Appellate Body considered that the Commission's determination did not reflect that the Commission assessed whether the requested adjustments were warranted or whether they would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison. The Commission, hence, failed to take steps to achieve clarity as to the adjustment claimed and then determine whether and to what extent that adjustment is merited, as required Article 2.4 of the Anti-Dumping Agreement.

The Appellate Body added that it did not agree with the distinction between the cost differences at issue and the differences in quality control, for which the Commission made an adjustment in the original investigation. The European Union claimed that these differences could not be compared because the quality control differences related to an additional step in the production process of Pooja Forge, whereas the cost factors at issue were incurred by both Pooja Forge and the Chinese producers. Under Article 2.4 of the Anti-Dumping Agreement, due allowance shall be made for differences affecting price comparability. The Appellate Body, therefore, concluded that adjustments are to be made for differences affecting price comparability, irrespective of whether the difference pertains to an additional step in the production process or to a step found to be carried out both by the analogue country producer and the NME-country producer. Finally, it noted that irrespective of whether there was an established past practice to adjust for differences in costs as alleged by China, the Commission had, in the past, made adjustments for certain differences in costs in the context of investigations involving NMEs.

On the basis of the foregoing, the Appellate Body found that the Panel erred in concluding that the Commission was not required to look at the cost factors relied upon by the Chinese producers solely because the analogue country methodology was used in review investigation. The Appellate Body further found that the Commission failed to assess properly whether the requested adjustments based on the differences at issue were warranted, or whether they would have had the effect of reintroducing distorted costs or prices in the normal value component of the comparison.

Second, China claimed that the Panel erred in finding that the Chinese producers did not put forward substantiated requests for adjustments. In particular, China argued that, using all the evidence reasonably available to them, the Chinese producers demonstrated that the differences in costs of production affected price comparability. The Appellate Body recalled that, under Article 2.4, the Chinese producers had to substantiate their requests for adjustments as constructively as possible. It noted that the Commission's determination in the review investigation seemed to associate the absence of evidence that the differences in costs affected price comparability with the fact that certain costs were distorted in China. In addition, as per the European Union's own submission, the Chinese producers could not have substantiated their requests for adjustments because such adjustments could not be made given that certain prices were distorted in China. Consequently, the Appellate Body reversed the Panel's intermediate finding that the Chinese producers failed to show that the alleged differences in costs affected price comparability and, thus, failed to come forward with substantiated requests for adjustments.

In light of the above, the Appellate Body reversed the Panel's finding that the European Union did not act inconsistently with the fair comparison requirement under Article 2.4 by rejecting the Chinese producers' requests for adjustments based on the alleged cost differences at issue. Instead, the Appellate Body found that because the Commission's determination did not reflect an adequate assessment of whether the Chinese producers' requests for adjustments for these differences were warranted, the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement. Having upheld the Panel's finding that the European Union acted inconsistently with the last sentence of Article 2.4, the Appellate Body did not address China's conditional claim concerning requests for adjustments due to differences in physical characteristics.

4.1.6 Article 2.4.2 of the Anti-Dumping Agreement

The European Union claimed that the Panel erred in its interpretation of the phrase "all comparable export transactions" in Article 2.4.2 of the Anti-Dumping Agreement. It also requested reversal of the Panel's finding that the European Union acted inconsistently with Article 2.4.2 because the Commission excluded, from its dumping determinations, the models exported by the Chinese producers that did not match with any of the models sold by Pooja Forge. According to the European Union, the use of the term "comparable" in Article 2.4.2 demonstrates the intention of the drafters of the agreement that only comparable export transactions should be taken into consideration in calculating dumping margins. The European Union also relied on Article 6.10 of the Anti-Dumping Agreement as evidence that not all transactions must be taken into consideration by the investigating authority in the determination of dumping margins.

The Appellate Body noted that the Commission used the weighted average-to-weighted average (W-W) methodology when comparing normal values with export prices in calculating dumping margins for the Chinese producers. The Appellate Body then recalled its earlier findings in *EC – Bed Linen* that Article 2.4.2 explains how investigating authorities must proceed in establishing the existence of dumping. With regard to the meaning of the phrase "all comparable export transactions" contained in Article 2.4.2, the Appellate Body found that, once an investigating authority has defined the product at issue and the like product on the domestic market it cannot, at a subsequent stage of the proceedings, take the position that some models within the like product are so different from each other that they cannot be "comparable" within the meaning of Article 2.4.2. According to the Appellate Body, the Anti-Dumping Agreement concerns the dumping of a product, and the margins of dumping to which Article 2.4.2 refers are the margins for the product as a whole, meaning that all models falling within the scope of a like product must necessarily be "comparable" within the meaning of Article 2.4.2.

The Appellate Body determined that the Commission's approach of determining first that the fasteners produced by Pooja Forge and the fasteners exported by the Chinese producers are like products, but then proceeding to exclude from the calculation certain models sold by the Chinese producers on the basis that these models did not match with any of those sold by Pooja Forge, was not compatible with

the requirement in Article 2.4.2 to establish margins of dumping by comparing the normal value with the price of "all comparable export transactions". The Appellate Body further noted that, pursuant to Article 2.4, the Commission could have made adjustments in order to account for the differences that affected price comparability rather than simply excluding the models sold by the Chinese producers that it considered not to match those by Pooja Forge. The Appellate Body also indicated that the Commission could have determined the normal values based on alternative methodologies, such as those referred to in Article 2.2 of the Anti-Dumping Agreement, that is, a comparable price of the like product when exported to an appropriate third country, or a constructed value.

With respect to the European Union's argument that Article 6.10 demonstrates that not all transactions must be taken into consideration by the investigating authority in the determination of dumping margins, the Appellate Body noted that the European Union had not suggested that the Commission had engaged in the sampling exercise contemplated in this provision. Rather, the European Union relied on Article 6.10 as evidence of the fact that not all export transactions must be included in the W-W comparisons. The Appellate Body, however, considered that Article 6.10 could not be construed as informing the dumping margin calculation methodology under Article 2.4.2. The Appellate Body noted that Articles 6.10 and 2.4.2 serve different purposes and found nothing in Article 6.10 that would allow derogating from the obligation in Article 2.4.2 to compare "all comparable export transactions".

Finally, with respect to the European Union's argument that the dumping margin calculations were consistent with Article 2.4.2 because the models included in the dumping calculations represented a qualitatively and quantitatively important proportion of the entire exports by the Chinese producers, the Appellate Body reiterated that in order to comply with the fair comparison requirement of Article 2.4, which provides context for the W-W methodology under Article 2.4.2, the investigating authority must compare the export transactions relating to the product under consideration as a whole. However substantial the proportion of models considered may have been, the Commission failed to take into consideration all export transactions involving all models of the like product (i.e. fasteners) exported by the Chinese producers.

The Appellate Body, therefore, upheld the Panel's finding that the European Union acted inconsistently with Article 2.4.2 because the Commission excluded, in its dumping determinations, the models exported by the Chinese producers that did not match with any of the models sold by Pooja Forge.

4.1.7 Articles 4.1 and 3.1 of the Anti-Dumping Agreement

The European Union appealed the Panel's finding that, because the Commission defined the domestic industry on the basis of the domestic producers that had come forward in response to the original Notice of Initiation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating, the European Union acted inconsistently with Article 4.1 of the Anti-Dumping Agreement. The European Union argued that including, in the review investigation, the domestic producers that were excluded in the original investigation, brought the European Union into conformity with the DSB's recommendations and rulings.

The Appellate Body recalled its finding in the original proceedings that Article 4.1 defines the domestic industry as either: (i) the domestic producers as a whole of the like products; or (ii) those producers whose collective output of the products constitutes a major proportion of the total domestic production of those products. The Appellate Body noted that, where an investigating authority adopts the second method for the definition of the domestic industry, Article 4.1 does not stipulate a specific proportion for evaluating whether a certain percentage constitutes a major proportion. The Appellate Body, however, indicated that the absence of a specific proportion does not mean that any percentage, no matter how low, could qualify as a major proportion. Rather, this phrase should be understood as referring to a relatively high proportion of the total domestic production.

Recalling further its findings in the original proceedings, the Appellate Body indicated that the requirements for defining the domestic industry, within the meaning of Article 4.1, must be read in conjunction with the obligations of Article 3.1 of the same agreement that the determination of injury be based on positive evidence and involve an objective examination of, *inter alia*, the impact of the dumped imports on domestic producers. The Appellate Body determined that in order to ensure the accuracy of an injury determination, an investigating authority must not act so as to give rise to a material risk of distortion in defining the domestic industry, for example, by excluding a whole category of producers of the like product. Therefore, where a domestic industry is defined as a major proportion of total domestic production, the higher the proportion relied upon by the investigating authority, the less likely the injury determination will be distorted.

According to the Appellate Body, when the domestic industry is defined as the domestic producers whose collective output constitutes a major proportion of total domestic production, a very high proportion that substantially reflects the total domestic production will very likely satisfy both the quantitative and the qualitative aspect of the requirements of Articles 4.1 and 3.1. However, if the proportion of the domestic producers' collective output included in the domestic industry definition is not sufficiently high that it can be considered as substantially reflecting the totality of the domestic production, then the qualitative element becomes crucial in establishing whether the definition of the domestic industry is consistent with Articles 4.1 and 3.1. While, in the special case of a fragmented industry with numerous producers the practical constraints on an authority's ability to obtain information may mean that what constitutes a major proportion may be lower than what is ordinarily permissible, in such cases the investigating authority bears the same obligation to ensure that the process of defining the domestic industry does not give rise to a material risk of distortion. An investigating authority would need to make a greater effort to ensure that the selected domestic producers are representative of the total domestic production by ascertaining that the process of the domestic industry definition, and ultimately the injury determination, does not give rise to a material risk of distortion.

With respect to its ruling in the original proceedings, the Appellate Body recalled that it had found that the proportion relied upon by the Commission in the original determination to define the domestic industry, representing 27% of total domestic production, was at the lower end of the spectrum and hardly a substantial reflection of the total. The fragmented nature of the fasteners industry might have permitted a lower proportion due to the impracticality of obtaining more information. However, the Appellate Body had found in the original proceedings that the process utilized by the Commission in order to define the domestic industry, which limited the definition to those domestic producers willing to be part of the injury sample, introduced a material risk of distortion of the injury determination and was, therefore, inconsistent with Articles 4.1 and 3.1. The Appellate Body had also considered a minimum benchmark of 25% of total domestic production, referred to in Article 5.4, irrelevant to the industry definition pursuant to Article 4.1.

The Appellate Body noted that, in the review investigation, the Commission included in the domestic industry definition the originally excluded domestic producers which were deemed not to cooperate for lack of willingness to be included in the injury sample. As a result, the proportion relied upon by the Commission increased from 27% to 36% of total domestic production. The Appellate Body however determined that the proportion relied upon by the Commission in the review determination remained low, even in the context of the fragmented fasteners industry. The Appellate Body further noted that, in the review investigation, the Commission did not issue a new notice of initiation, but, instead, relied on the Notice of Initiation of the original investigation, which stated that only those producers that agreed to be part of the injury sample would be considered as cooperating. The Commission, therefore, conditioned the producers' eligibility to be included in the domestic industry on their willingness to be included in the injury sample and, thus, continued to introduce a material risk of distortion in the process of the domestic industry definition.

With respect to the European Union's contention that it was the exclusion of certain domestic producers that had been considered by the Appellate Body to be inconsistent with Article 4.1 in the original proceedings, the Appellate Body determined that its ruling in the original proceedings made clear that the material risk of

distortion did not arise from the exclusion *per se*, but from conditioning the inclusion of domestic producers in the domestic industry definition on their willingness to be included in the injury sample. The Appellate Body indicated that the Notice of Initiation, stating that only those producers willing to be included in the injury sample would be considered as cooperating, in effect created a distortion in the sense that domestic producers may not have come forward unless they considered themselves to be injured by the alleged dumping of the product under consideration. Therefore, this Notice of Initiation provided for a self-selection process that may have skewed the composition of the domestic industry in favour of injured producers. The Appellate Body further found that defining the domestic industry in this manner could not be justified by the difficulty of obtaining information from a greater number of producers.

The Appellate Body, therefore, upheld the Panel's finding that the European Union acted inconsistently with Article 4.1 because the Commission defined the domestic industry on the basis of the domestic producers that had come forward, in response to the original Notice of Initiation, which stated that only those producers willing to be included in the injury sample would be considered as cooperating. The Appellate Body further found that a domestic industry definition based on a self-selection that introduces a material risk of distortion to the investigating authority's injury analysis would necessarily render the resulting injury determination inconsistent with the obligation to make an objective injury analysis based on positive evidence as laid down in Article 3.1. The Appellate Body, therefore, also upheld the Panel's finding that the Commission's injury determination was inconsistent with this provision.

4.2 Appellate Body Report, *Argentina – Measures Relating to Trade in Goods and Services*, WT/DS453/AB/R

This dispute concerned eight financial, taxation, foreign exchange, and registration measures imposed by Argentina on services and service suppliers of countries that Argentina classifies as "countries not cooperating for tax transparency purposes" (non-cooperative countries). These measures provide for differential treatment depending on whether a country is classified as cooperative or non-cooperative for tax transparency purposes. To be granted cooperative status, the country must either sign with Argentina an agreement on exchange of tax information or a convention on avoidance of international double taxation or initiate with Argentina the negotiations necessary for concluding such an agreement and/or convention. For many years, Panama was classified as a non-cooperative country. Following the establishment of the Panel, Panama was included in the list of cooperative countries even though it did not have in place a double taxation convention or an information exchange agreement with Argentina, and was not negotiating such a convention or agreement with Argentina. At the time that the Panel Report was issued to the parties, Panama remained on the list of cooperative countries.

Before the Panel, Panama claimed that the eight measures at issue are inconsistent with several provisions of the GATS and the GATT 1994. In particular, Panama challenged the following measures imposed by Argentina: (i) measure 1: withholding tax on payments of interest or remuneration; (ii) measure 2: presumption of unjustified increase in wealth; (iii) measure 3: transaction valuation based on transfer pricing; (iv) measure 4: rule on the allocation of expenditure; (v) measure 5: requirements relating to reinsurance services; (vi) measure 6: requirements for access to the Argentine capital market; (vii) measure 7: requirements for the registration of branches; and (viii) measure 8: foreign exchange authorization requirement.

Having found that the GATS is applicable to all eight measures, the Panel concluded that: (i) all eight measures are inconsistent with Article II:1 of the GATS because they do not accord, immediately and unconditionally, to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like services and service suppliers of cooperative countries; (ii) measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS because they accord to services and service suppliers of non-cooperative countries treatment no less favourable than that which they accord to like Argentine services and service suppliers, in the relevant services and modes of supply in which Argentina has undertaken specific commitments; (iii) measures 1, 2, 3, 4, 7, and 8 are not justified pursuant to the

exception of Article XIV(c) of the GATS because their application constitutes arbitrary and unjustifiable discrimination within the meaning of the *chapeau* of Article XIV of the GATS; and (iv) measures 5 and 6 are not covered by paragraph 2(a) of the Annex on Financial Services because they were not taken for prudential reasons within the meaning of that provision.

With respect to measure 5, the Panel rejected Panama's claims under Article XVI:2(a) and Article XVI:1 of the GATS finding, respectively, that this measure is not covered by Article XVI:2(a) and that Panama had failed to establish a *prima facie* case of inconsistency in this respect.

With respect to measures 2, 3, and 4, as the Panel had found that these measures are not inconsistent with Article XVII of the GATS, the Panel refrained from ruling on whether these measures are covered under the exception provided for in Article XIV(d) of the GATS.

Regarding Panama's claims under the GATT 1994 with respect to measures 2 and 3, the Panel rejected Panama's claims under Article I:1 because Panama had failed to demonstrate that measure 2 constitutes a rule or formality in connection with exportation or a charge imposed on the international transfer of payments for exports, within the meaning of Article I:1 of the GATT 1994 and that measure 3 constitutes a matter referred to in Article III:4 or a rule or formality in connection with exportation or importation, within the meaning of Article I:1 of the GATT 1994.

In addition, with respect to measure 3, the Panel rejected Panama's claims under Article III:4 and Article XI:1 of the GATT 1994 because Panama had failed to demonstrate that the measure is a matter referred to in Article III:4 of the GATT 1994, and the measure, being fiscal in nature, is not covered by Article XI:1 of the GATT 1994.

Finally, having rejected Panama's claims under Articles I:1, III:4, and XI:1 of the GATT 1994, the Panel refrained from ruling on whether measures 2 and 3 are justified pursuant to Article XX(d) of the GATT 1994.

4.2.1 Articles II:1 and XVII of the GATS – "Likeness"

Argentina appealed the Panel's findings that the services and service suppliers at issue are "like" under both Article II:1 and Article XVII of the GATS. With respect to the Panel's finding of "likeness" under Article II:1 of the GATS, Argentina alleged that the Panel erred in its interpretation of Article II:1 in finding that services and service suppliers may be considered "like" when a measure provides for differential treatment exclusively on the basis of origin. With regard to the Panel's finding of "likeness" under Article XVII of the GATS, Argentina alleged that the Panel erred in relying upon its "likeness" findings under Article II:1 in finding that the services and service suppliers at issue are "like" by reason of origin for purposes of Article XVII of the GATS.

The Appellate Body noted that the concept of "likeness" must be interpreted in light of its context and the object and purpose of the agreement in which it appears. The Appellate Body recalled that the word "like" refers to something sharing a number of identical or similar characteristics or qualities, and that it implies some kind of comparison. Furthermore, the Appellate Body considered that both Article II:1 and Article XVII:1 are concerned with the competitive relationship of services and service suppliers. This is so because if the services being compared are not in a competitive relationship, the conditions of competition cannot be affected.

The Appellate Body recalled that, in the context of trade in goods, the Appellate Body had held that there is a spectrum of degrees of competitiveness or substitutability of products in the marketplace and that the assessment of such a competitive relationship requires a market-based analysis. The Appellate Body

considered the same to be true with respect to "like services and service suppliers" in the ambit of the GATS, and, further held that the likeness of services and service suppliers can only be determined on a case-by-case basis, taking into account the specific circumstances of the particular case.

Moreover, the Appellate Body found that the reference to "services and service suppliers" indicates that considerations relating to both the service and the service supplier are relevant for determining "likeness" under Articles II:1 and XVII:1 of the GATS. The Appellate Body saw the phrase "like services and service suppliers" as one integrated element for the likeness analysis under Articles II:1 and XVII:1, respectively. The Appellate Body noted that the particular features of the competitive relationship, in the circumstances of any specific case, will determine the relative weight to be accorded in the analysis of "likeness" to considerations relating to the service and the service supplier, respectively.

The Appellate Body further clarified that to the extent that the criteria for assessing "likeness" traditionally employed as analytical tools in the context of trade in goods are relevant for assessing the competitive relationship of services and service suppliers, these criteria may be employed also in assessing "likeness" in the context of trade in services, provided that they are adapted as appropriate to account for the specific characteristics of trade in services. In that respect, the Appellate Body noted, in particular, that Articles II:1 and XVII:1 of the GATS refer to likeness of "services and service suppliers", and stated that, accordingly, these criteria may be applied both in regard to the service and the service supplier in a holistic analysis. As in the context of trade in goods, the Appellate Body considered that the criteria for analysing "likeness" of services and service suppliers are analytical tools to assist in the task of examining the relevant evidence, and that they are neither a treaty-mandated nor a closed list of criteria that will determine the legal characterization of services and service suppliers as "like". The Appellate Body also recalled that different modes of supply exist in trade in services under the GATS and that the analysis of "likeness" of services and service suppliers may require additional considerations of whether or how this analysis is affected by the modes of supply. The Appellate Body further emphasized that adapting the criteria for analysing "likeness" to the particular context of Articles II:1 and XVII:1 of the GATS must not change the fundamental purpose of the comparison to be undertaken in order to determine "likeness" in the context of trade in services, namely, to assess whether and to what extent the services and service suppliers at issue are in a competitive relationship.

Next, the Appellate Body turned to the question of whether, in order to establish "likeness", a complainant must always have recourse to the relevant criteria, or whether a complainant may establish "likeness" by demonstrating that the measure at issue makes a distinction between services and service suppliers based exclusively on origin (the presumption approach). The Appellate Body noted that in the context of trade in goods, several panels have found that when a measure makes a distinction between products based exclusively on the origin of the product, the likeness of such products can be presumed.

The Appellate Body considered that, because the determination of "likeness" under Articles II:1 and XVII:1 involves consideration of both the service and the service supplier, the analysis of whether or not a distinction is based exclusively on origin may be a more complex task, in particular, due to the role that domestic regulation may play in shaping, for example, the characteristics of services and service suppliers and consumers' preferences. The Appellate Body held that while this did not, as a matter of principle, render the presumption approach inapplicable in the context of trade in services, the scope of the presumption approach is more limited in trade in services than in trade in goods. Whether and to what extent such complexities have an impact on the determination of whether a distinction is based exclusively on origin in a particular case will depend on the nature, configuration, and operation of the measure at issue and the particular claims raised.

With respect to the burden of proof in establishing "likeness" relying on the presumption approach, the Appellate Body held that, in keeping with the general rule that the burden of proof rests upon the party that asserts the affirmative of a particular claim, the complainant bears the burden of making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin.

If a panel finds that the complainant has failed to make a *prima facie* case that a measure provides for differential treatment based exclusively on origin, then the panel must engage in an analysis of "likeness" on the basis of the relevant criteria adapted to trade in services.

In contrast, if a complainant succeeds in making a *prima facie* case that a measure draws a distinction between services and service suppliers based exclusively on origin, and this is not rebutted by the respondent, the services and service suppliers at issue may be presumed to be "like".

4.2.1.1 Argentina's claim under Article II:1

The Appellate Body then turned to Argentina's requests that it reverse the Panel's finding that services and service suppliers located in non-cooperative countries are "like" services and service suppliers located in cooperative countries and that, consequently, it reverse the Panel's conclusion that measures 1-8 are inconsistent with Article II:1 of the GATS. The Appellate Body was not persuaded by Argentina's contention that the presumption approach cannot be applied in trade in services. The Appellate Body found that, while the analysis of whether or not a distinction is based exclusively on origin is more complex in the context of trade in services, this does not render the presumption approach inapplicable in trade in services.

Next, the Appellate Body addressed Argentina's contention that the Panel erred in the application of Article II:1 of the GATS in finding that the services and service suppliers at issue are "like" in the absence of a finding that the measures at issue provide for differential treatment exclusively on the basis of origin. Having reviewed the Panel's analysis, the Appellate Body found that the Panel had not made a finding that the distinction between cooperative and non-cooperative countries in the measures at issue is based exclusively on origin. The Appellate Body considered that, in the absence of the finding that a measure provides for a distinction based exclusively on origin, the Panel was required to undertake an analysis of "likeness", considering various criteria relevant for an assessment of the competitive relationship of the services and service suppliers of cooperative and non-cooperative countries as set out above. Accordingly, the Appellate Body concluded that in the absence of a finding that the measures at issue provide for a distinction based exclusively on origin, and by failing to conduct an analysis of "likeness" on the basis of the arguments and evidence presented by the parties with respect to the "likeness" criteria, the Panel erred in finding "likeness" by reason of origin. Because the Panel's conclusion that measures 1-8 are inconsistent with Article II:1 of the GATS was based on the Panel's finding of likeness, the Appellate Body reversed the Panel's conclusion with respect to Article II:1 of the GATS.

In addition, the Appellate Body held that assuming *arguendo* that, as Panama suggested, Panama indeed made a *prima facie* case that the distinction between cooperative and non-cooperative countries in the measures at issue is based exclusively on origin, the Panel would have been required to assess whether Argentina had successfully rebutted such *prima facie* case based on the presumption approach. The Appellate Body noted that Argentina had presented to the Panel arguments and evidence in this respect.

The Appellate Body considered it unnecessary to address separately Argentina's claims that the Panel erred in the allocation of the burden of proof and that the Panel erred by making a *prima facie* case of "likeness" for Panama under Article II:1 of the GATS.

4.2.1.2 Argentina's claim under Article XVII

With respect to Article XVII:1 of the GATS, Argentina requested the Appellate Body to find that the Panel erred by relying upon its "likeness" findings under Article II:1 of the GATS in its analysis of "likeness" under Article XVII:1, and to sustain, on the basis of modified reasoning, the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII:1 of the GATS.

The Appellate Body noted that the Panel's conclusion under Article XVII:1 – that Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries – was based on the Panel's earlier finding of "likeness" under Article II:1. The Appellate Body recalled that it had found that the Panel erred in the finding of "likeness" under Article II:1, and found that this also removed the basis of the Panel's finding that Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries for purposes of Article XVII. Accordingly, the Appellate Body reversed the Panel's finding that Argentine services and service suppliers are like the services and service suppliers of non-cooperative countries for the purposes of its analysis under Article XVII of the GATS. Because the Panel's conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS was based on this finding, the Appellate Body also reversed this conclusion of the Panel.

4.2.2 Articles II:1 and XVII of the GATS – "Treatment no less favourable"

Panama claimed that the Panel erred in its interpretation of the term "treatment no less favourable" under Articles II:1 and XVII of the GATS in finding that the assessment of whether the measures in this dispute are inconsistent with these provisions has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition, that is, whether Argentina is able to have access to tax information on foreign suppliers. Panama additionally alleged that the Panel erred in its application of the term "treatment no less favourable" under Article XVII of the GATS. Panama requested the Appellate Body to sustain the Panel's finding that the measures at issue are inconsistent with Article II:1 of the GATS on the basis of the Panel's preliminary findings under that provision. Furthermore, Panama requested the Appellate Body to reverse the Panel's finding that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS and find, instead, that these measures are inconsistent with that provision. Argentina contended that Panama's appeal, as well as Argentina's other appeal, should be resolved on the grounds of "likeness". In Argentina's view, regulatory difference that affect competitive relationships among services and service suppliers should properly be examined in the first instance, as part of the evaluation of whether services and service suppliers may be considered "like".

The Appellate Body noted that, pursuant to Article XVII:3 of the GATS, a measure accords less favourable treatment if it modifies the conditions of competition in favour of services or service suppliers of a Member as compared to like services or service suppliers of any other Member. The Appellate Body also examined footnote 10 to Article XVII:1, which, in the Appellate Body's view, confirms that the standard of "treatment no less favourable" must be based on the impact on the conditions of competition that results from the contested measure. The Appellate Body further considered that, on substance, the concept of "treatment no less favourable" under both Article II:1 and Article XVII of the GATS is focused on a measure's modification of the conditions of competition. The Appellate Body noted that, in prior disputes, the fact that a measure modified the conditions of competition to the detriment of services or service suppliers of any other Member was, in itself, sufficient for a finding of less favourable treatment under Articles II:1 and XVII of the GATS.

In the Appellate Body's view, the Panel correctly stated that the concept of "treatment no less favourable" in Article II:1 of the GATS also hinges on the conditions of competition. Nonetheless, the Panel considered two specific aspects in the text of Article II:1 to be relevant to its interpretation of the term "treatment no less favourable", namely, the broad scope of the obligation under Article II:1 and the reference to "services and service suppliers". In the Appellate Body's view, although Article III:4 of the GATT 1994 also has a broad scope of application, the broad scope has not been perceived as a reason for requiring an analysis as to the regulatory aspect relating to the products for purposes of determining "less favourable treatment". Furthermore, the Appellate Body did not consider that the mere reference to "service suppliers" in the GATS would alter the legal standard of "treatment no less favourable" under the GATS, that is, whether the measure modifies the conditions of competition to the detriment of like services or service suppliers of any other Member.

The Appellate Body considered that its interpretation of the legal standard of "treatment no less favourable", on the basis of the text of Articles II:1 and XVII of the GATS, is also supported by the structure of the GATS. Under this structure, Members can utilize certain flexibilities when undertaking their GATS commitments, such as those pursuant to Article XX of the GATS. In the Appellate Body's view, through these flexibilities and exceptions, the GATS seeks to strike a balance between a Member's obligations assumed under the Agreement and its right to pursue national policy objectives referred to in the preamble of the GATS. In view of this balance, the Appellate Body considered that, where a measure is inconsistent with the non-discrimination provisions, regulatory aspects or concerns that could potentially justify such a measure are more appropriately addressed in the context of the relevant exceptions.

The Appellate Body recalled the concern expressed by the Panel that equating national policy objectives with the situations covered by the few general exceptions would mean that any regulation adopted in order to meet national policy objectives would necessarily be in violation of the basic principle of non-discrimination, and would require justification under Articles XIV and XIV *bis*. The Appellate Body agreed with the Panel that the national policy objectives referred to in the preamble to the GATS cover a broader range of objectives than those reflected in the exceptions. However, the Appellate Body also noted that, as long as Members comply with their GATS obligations and commitments, they are free to pursue national policy objectives that they consider appropriate without the need to invoke exceptions. Therefore, the Appellate Body found that an interpretation of the term "treatment no less favourable" that is based on a measure's detrimental impact on the conditions of competition does not prevent a Member from pursuing a wide range of national policy objectives beyond those identified in the exceptions. On this basis, the Appellate Body disagreed with the Panel's view that Members' right to regulate in accordance with their national policy objectives confirms the relevance of the regulatory aspects concerning service suppliers in the interpretation of "treatment no less favourable".

The Appellate Body recalled that, under both Article II:1 and Article XVII of the GATS, the Panel came to the "preliminary" conclusions that all of the relevant measures modify the conditions of competition to the detriment of like service suppliers of non-cooperative countries and that, consequently, they fail to accord "treatment no less favourable" to such service suppliers. Nonetheless, the Panel went on to conduct an additional analytical step regarding the regulatory aspects in this dispute, that is, the possibility for Argentina to have access to tax information on foreign suppliers providing services in Argentina. The Appellate Body found that the Panel's consideration of relevant regulatory aspects in its analysis under Article II:1 did not actually speak to the question of whether the measures at issue modify the conditions of competition to the detriment of services and service suppliers of non-cooperative countries. Rather, statements made by the Panel indicate that it effectively examined whether detrimental impact on like services and service suppliers stems exclusively from a legitimate regulatory distinction. Having examined the Panel's analysis of the relevant regulatory aspects under Article XVII, the Appellate Body concluded that the Panel adopted an erroneous legal interpretation of "treatment no less favourable" under Article XVII of the GATS.

The Appellate Body further noted the Panel's finding that, given the objective of measures 2, 3, and 4, which was to neutralize an unintended competitive advantage enjoyed by non-cooperative jurisdictions owing to the lack of exchange of tax information with Argentina, these measures do not modify the conditions of competition in favour of domestic service suppliers and are therefore not inconsistent with Article XVII. In the Appellate Body's view, ensuring equal competitive conditions, which is required by the legal standard of "treatment no less favourable", is not the same as guaranteeing that one group of services or products does not have any competitive advantage over another group. Yet, in reaching the above finding, the Panel erroneously equated these two concepts. Having found that the Panel adopted an erroneous legal interpretation of "treatment no less favourable" under Article XVII, the Appellate Body did not consider it necessary to address Panama's additional allegations that the Panel had erred in its application of that interpretation to the facts of this dispute.

In conclusion, the Appellate Body found that the Panel erred in finding that an assessment of "treatment no less favourable" under Articles II:1 and XVII of the GATS in this dispute has to take into account regulatory aspects relating to services and service suppliers that may affect the conditions of competition, in particular, whether Argentina is able to have access to tax information on foreign suppliers. The Appellate Body considered that, had "likeness" between services and service suppliers of cooperative and non-cooperative countries been established in this dispute, the preliminary findings under Articles II:1 and XVII would, in themselves, have been sufficient to lead to the conclusions that the relevant measures are inconsistent with these provisions. However, recalling its reversal of the Panel's findings on "likeness", the Appellate Body found that the Panel's findings on "treatment no less favourable" lack a proper basis and could not stand. Therefore, it reversed the Panel's conclusion that the eight measures at issue are inconsistent with Article II:1 of the GATS, as well as its conclusion that measures 2, 3, and 4 are not inconsistent with Article XVII of the GATS.

4.2.3 Article XIV(c) of the GATS

Neither participant appealed the Panel's analysis of the conformity of Argentina's measures with the chapeau of Article XIV of the GATS, or the Panel's ultimate finding that Argentina had not made out its defence. Panama, however, alleged that the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 are provisionally justified under Article XIV(c). In particular, Panama argued that the Panel failed properly to apply the relevant legal standard for an Article XIV(c) defence to the measures before it.

Panama first claimed that the Panel erred by failing to focus its analysis under Article XIV(c) on the aspects of the measures that gave rise to the findings of inconsistency under Article II:1 of the GATS.

The Appellate Body recalled that it had clarified in *EC – Seal Products* that the aspects of a measure to be justified under the paragraphs of Article XX are those that give rise to the finding of inconsistency under the GATT 1994. The Appellate Body explained that relevant aspects of the measure are typically those that specify the treatment that such measure gives to imported goods or services in specific circumstances, and that it is these aspects of the measure providing for differences in treatment that form the starting point of the analysis under, and ultimately lead to findings of inconsistency with, the GATT 1994 or the GATS. When analysing provisional justification under a general exception the focus of the analysis should be on the relevant aspects of the measure itself, rather than on how, for example, the measure affects the conditions of competition in the relevant market.

The Appellate Body further observed that the mere fact that a panel does not repeat, in its Article XIV analysis, the entirety of its discussion of the measure from its inconsistency analysis, or includes more than the particular aspects that it discussed in reaching its finding of inconsistency, does not, in itself, mean that the panel erred and based its assessment of the measure's justification under Article XIV on different aspects of the measure.

Turning to the dispute at hand, the Appellate Body found that, for each measure, the Panel focused on the same aspects in its Article XIV(c) analysis as it did in its Article II:1 analysis. The Appellate Body therefore concluded that, although the Panel's identification of the aspects of measures 1, 2, 3, 4, 7, and 8 that were relevant to its assessment under Article XIV(c) of the GATS was at times rather brief or imprecise, the Panel did not fail to focus on the same aspects of measures 1, 2, 3, 4, 7, and 8 in both its analyses under Article II:1 and Article XIV(c).

Panama raised two other allegations in connection with the Panel's findings that measures 1, 2, 3, 4, 7, and 8 are provisionally justified under Article XIV(c) of the GATS, namely: (i) that the Panel erred in finding that measures 1, 2, 3, 4, and 8 are designed "to secure compliance with" the relevant Argentine laws or regulations, and (ii) that the Panel erred in finding that measures 1, 2, 3, 4, 7, and 8 are "necessary" to secure compliance with such laws or regulations.

The Appellate Body recalled its explanation in *Korea – Various Measures on Beef* that, for a respondent to justify provisionally a measure under Article XX(d) of the GATT 1994, two elements must be shown. First, the measure must be one designed to secure compliance with laws or regulations that are not themselves inconsistent with some provision of the GATT 1994. Second, the measure must be necessary to secure such compliance. The Appellate Body explained that, with respect to the first element, the phrase "to secure compliance" calls for an initial examination of the relationship between the inconsistent measure and the relevant laws or regulations. A measure can be said "to secure compliance" with GATS-consistent laws or regulations when its design reveals that it secures compliance with specific rules, obligations, or requirements under such laws or regulations, and the more precisely a respondent is able to identify such specific rules or requirements, the more likely it will be able to elucidate how and why the inconsistent measure secures compliance with the laws or regulations. Where the assessment of the design of the measure, including its content and expected operation, reveals that the measure is incapable of securing compliance with specific rules or requirements under the relevant law or regulation, further analysis with regard to whether this measure is necessary to secure such compliance may not be required. At the same time, a panel must not structure its analysis of the first element in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the "necessity" analysis. This second element entails a more in-depth, holistic analysis of the relationship between the inconsistent measure and the relevant laws or regulations, and, in particular, of whether, in light of all relevant factors in the "necessity" analysis, this relationship is sufficiently proximate, such that the measure can be deemed to be necessary to secure compliance with such laws or regulations. The Appellate Body considered that the analyses of the two elements of the Article XIV(c) defence may overlap, and that the way in which a panel organizes its examination of these elements in scrutinizing a defence in any given dispute will be influenced by the measures and laws or regulations at issue, as well as by the way in which the parties present their respective arguments.

With respect to the first element in the Article XIV(c) analysis, Panama argued that the Panel improperly focused its analysis on the issue of whether measures 1, 2, 3, and 4 secure compliance with the objectives of the relevant laws or regulations, rather than on whether those measures secure compliance with specific provisions of such laws or regulations. The Appellate Body noted that, while the Panel observed that measures 1, 2, 3, and 4 are designed to secure compliance with the overall objective of the Gains Tax Law, it went on to explain that measures 1, 2, 3, and 4 are also designed to secure compliance with certain key provisions of the Gains Tax Law. The Appellate Body observed that, in its analysis, the Panel examined the content of Articles 1 and 5 of the Gains Tax Law, and addressed whether measures 1, 2, 3, and 4 are designed to secure compliance with these provisions. Thus, the Appellate Body considered that, contrary to Panama's contention, the Panel had examined whether the measures secure compliance with the specific obligation set forth in Articles 1 and 5 of the Gains Tax Law, namely, to establish properly the tax base for purposes of the gains tax.

Panama also contended that a demonstration that a specific measure secures compliance with laws or regulations requires identification of an underlying risk of non-compliance with such laws or regulations that the measure is intended to address. Thus, in Panama's view, although the Panel found that measures 1, 2, 3, and 4 are meant to discourage simulated transactions between related parties, the Panel failed to assess whether such related-party transactions are inconsistent – or pose a threat of non-compliance – with the relevant provisions of the Argentine laws and regulations. The Appellate Body understood Panama's argument to be based on the assumption that the Panel found Argentina's concern in connection with those measures to be limited to simulated transactions between related parties. Yet, in the Appellate Body's view, such assumption was not supported by the Panel record, because the Panel framed the practices that were the subject of Argentina's concern more broadly, as "transactions which cover up harmful tax practices". Moreover, the Appellate Body understood Panama's argument to refer to the fact that measures 1, 2, 3, and 4 apply both to transactions with fraudulent purposes (i.e. simulated transactions between related parties to evade taxes), as well as transactions with legitimate purposes (i.e. transactions between unrelated parties or transactions between related parties at arm's length), and that, therefore, these measures go beyond

what is necessary to secure compliance with the relevant laws or regulations. The Appellate Body however agreed with the Panel's reasoning that these measures must be designed to cover all transactions because they apply *ex ante*, and their purpose is to detect fraudulent transactions.

With respect to Panama's argument that the Panel did not take proper account of the broad scope of measure 2, the Appellate Body considered that Panama had not explained why the fact that measure 2 may have a broader scope would, in itself, preclude a finding that measure 2 is designed to secure compliance with Articles 1 and 5 of the Gains Tax Law.

With respect to the second element of Article XIV(c) , Panama challenged the following aspects of the Panel's "necessity" analysis: (i) the Panel's assessment of the contribution made by measures 1, 2, 3, 4, 7, and 8 to the end pursued; (ii) the Panel's assessment of the trade-restrictiveness of these measures; and (iii) the Panel's weighing and balancing of the relevant necessity factors. The Appellate Body observed that, although there is no single correct way to structure a multi-faceted analysis of multiple measures, it had some concerns regarding the way in which the Panel had structured its "necessity" analysis with respect to the relevant six measures. The Panel first considered the importance of the objectives pursued. The Panel then considered the contribution made by the six measures to the end pursued. Next, the Panel looked at the trade-restrictiveness of the six measures. The Panel subsequently addressed whether any reasonably available alternative measures had been identified by Panama. Finally, the Panel conducted a single weighing and balancing exercise of these factors for all six measures, collectively. To the Appellate Body, the initial parts of the Panel's reasoning were somewhat disaggregated and compartmentalized in that, for any given measure, the Panel's consideration of each of the relevant "necessity" factors was found in separate parts of its reasoning. This separation of the different parts of the Panel's analysis, combined with its collective weighing and balancing exercise, in turn rendered it somewhat difficult to ascertain whether, for each measure, the Panel conducted the holistic analysis of all of the relevant elements that is called for, and properly weighed and balanced the relevant elements and compared them against any proposed alternative measures.

Turning to Panama's specific allegations of error, the Appellate Body first noted that many of its arguments on appeal appeared to challenge the Panel's assessment of the facts and evidence on the record and did not fall within the scope of appellate review in the absence of any claim by Panama that the Panel failed to comply with its duties under Article 11 of the DSU to make an objective assessment of the facts.

Panama also argued that the Panel improperly based its assessment of the contribution of measures 1, 2, 3, 4, and 7 on whether these measures contribute to attaining the objectives of the relevant laws or regulations, rather than on whether they contribute to securing compliance with specific provisions of such laws or regulations. The Appellate Body observed that, in *Korea – Various Measures on Beef*, it had explained that one factor to be considered under the "necessity" analysis is the extent to which the measure contributes to the realization of the end pursued, the securing of compliance with the law or regulation at issue. The Appellate Body concluded that, similarly to the analysis of the design of a measure, a panel's assessment of the contribution of such measure to securing compliance with the law or regulation at issue should focus on specific rules, obligations, or requirements set out in such law or regulation. At the same time, the objective of, or the common interest or value protected by, the "laws or regulations" at issue is not irrelevant to the analysis of a measure's contribution, as, in many instances, the specific obligations and individual provisions of a law or regulation will reflect and be closely tied to the objective(s) of the instrument within which they are contained.

Turning to the Panel's application of Article XIV(c) of the GATS to measures 1, 2, 3, and 4, the Appellate Body found that, by addressing the measures' contribution to safeguarding the tax base of Argentine taxpayers, the Panel had conducted an examination of the contribution of these measures to securing compliance with the obligation to establish properly the tax base subject to the gains tax, as provided for in Articles 1 and 5 of the Gains Tax Law. Similarly, for measure 7, the Appellate Body understood the Panel to have focused on

the requirements in Article 118.3 of the Commercial Companies Law and Article 188 of the Resolution on Companies Incorporated Abroad when referring to the need to verify that branches of foreign companies have a legitimate commercial purpose, have genuine activities, and have not been set up solely for the purpose of simulating transactions with Argentine taxpayers. Thus, despite its reservations with the Panel's analytical framework for the contribution analysis, the Appellate Body considered that the Panel undertook an appropriate analysis of the contribution made by measures 1, 2, 3, 4, and 7 to securing compliance with specific rules, obligations, or requirements under the relevant laws and regulations.

The Appellate Body further called attention to the Panel's finding, for each measure, that it contributes to the objective pursued. The Appellate Body pointed out that in a "necessity" analysis, a panel's duty is to assess, in a qualitative or quantitative manner, the extent of the measure's contribution to the end pursued, rather than merely ascertaining whether or not the measure makes any contribution. The Appellate Body noted that, similarly, a panel must seek to assess the degree of a measure's trade-restrictiveness, rather than merely ascertaining whether or not the measure involves some restriction on trade. The Appellate Body emphasized that, without having undertaken such analyses, a panel would be unable to undertake a proper weighing and balancing of all of the relevant factors.

In addition, Panama argued that the Panel erred in finding, and failed to explain why it considered, that the absence of a ban automatically implies that measures 1, 2, and 3 do not have a trade-restrictive effect. In the view of the Appellate Body, however, the Panel did not, in its analysis of measures 1, 2, and 3, simply accept that the absence of a ban automatically implies that a measure has no trade-restrictive effect. Rather, the Panel took a more nuanced position and examined the structure, operation and effect of each measure and reached separate conclusions as to the measures' trade restrictiveness.

In light of the above, the Appellate Body found that Panama had not demonstrated that the Panel erred in the application of Article XIV(c) of the GATS to measures 1, 2, 3, 4, 7, and 8 by failing to focus its analysis on the relevant aspects of the measures that gave rise to the findings of inconsistency with Article II:1 of the GATS, or that the Panel erred in finding that these measures are designed and "necessary" to secure compliance with the relevant Argentine laws or regulations.

4.2.4 Paragraph 2(a) of the Annex on Financial Services

Panama requested the Appellate Body to reverse the Panel's finding that paragraph 2(a) of the GATS Annex on Financial Services covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of this Annex. Panama alleged that the Panel failed to give meaning to the term "domestic regulation" in the title of the prudential exception. For Panama, the reference to "domestic regulation" in the title delimits the scope of the provision and defines the type of measures that may be covered by the provision. In response, Argentina contended that there are no limitations on the types of measures covered by the exception other than the prudential rationale that leads to their adoption.

The Appellate Body recalled that, having found measures 5 (requirements relating to reinsurance services) and 6 (requirements for access to the Argentine capital market) to be inconsistent with Article II:1 of the GATS, the Panel proceeded to examine Argentina's defence under paragraph 2(a) of the Annex on Financial Services and ultimately found that measures 5 and 6 were not justified by this provision because they were not taken for prudential reasons. The Appellate Body further recalled that, as the Panel had noted, paragraph 2(a) contains three requirements that must be fulfilled for a measure to be justified under this provision. First, there is the threshold question of what types of measures may potentially fall within the scope of paragraph 2(a). Second, a measure must have been taken for prudential reasons. Finally, the measure shall not be used as a means of avoiding the Member's commitments or obligations under the Agreement. The Appellate Body noted that Panama's appeal was limited to the Panel's analysis of the threshold question.

The Appellate Body noted that paragraph 2(a) of the Annex on Financial Services does not identify a particular type of measures falling within its scope. In addition, the use of the phrase "measures affecting the supply of financial services" in paragraph 1(a) of the Annex, which establishes the scope of the Annex, supports the view that paragraph 2(a) does not impose specific restrictions on the types of measures falling within its scope. The Appellate Body further noted that, pursuant to the introductory clause "[n]otwithstanding any other provisions of the Agreement" in the first sentence of paragraph 2(a), paragraph 2(a) could be invoked to justify inconsistencies with all of a Member's obligations under the GATS. For the Appellate Body, this indicated that, for example, measures imposing market access restrictions for prudential reasons, of the types listed in Article XVI:2, could potentially fall within the scope of paragraph 2(a). The Appellate Body recalled Panama's argument that measures justifiable for prudential reasons must take the form of domestic regulations, as opposed, for example, to market access restrictions. In the Appellate Body's view, however, by excluding market access restrictions from the scope of paragraph 2(a), Panama's interpretation effectively meant that paragraph 2(a) could not be invoked to justify inconsistencies with Article XVI, contrary to the introductory clause of paragraph 2(a).

The Appellate Body considered that the meaning and function to be attributed to the title of paragraph 2(a) should be consistent with a proper interpretation of paragraph 2(a) itself. In this regard, the Appellate Body examined the context provided by Article VI of the GATS, which is also entitled "domestic regulation". The Appellate Body noted that the provisions of Article VI refer to a variety of measures, and the broad scope of measures potentially covered by Article VI indicates that its title, "Domestic Regulation", should not serve the function of restricting the types of measures falling under that provision. Similarly, the Appellate Body found that the title of paragraph 2(a) does not serve such a function. The Appellate Body went on to examine the context provided by Article XXVIII(a) of the GATS, which defines the term "measure" as "any measure by a Member, whether in the form of a law, regulation, rule, procedure, decision, administrative action, or any other form". The Appellate Body considered that the text of paragraph 2(a) of the Annex on Financial Services, read in light of the scope and definition of the word "measure" in both paragraph 1(a) of the Annex and Article XXVIII(a) of the GATS, indicates no restrictions on the type or form of a measure falling under paragraph 2(a) of the Annex. Finally, noting the references to national policy objectives in the third and fourth recitals of the preamble of the GATS, the Appellate Body considered that an interpretation limiting the types of measures that could potentially fall under paragraph 2(a) would not be in consonance with the balance of rights and obligations expressly recognized in the preamble.

On the basis of these considerations, the Appellate Body disagreed with Panama's argument that the title of paragraph 2(a) delimits the scope of this provision or defines the type of measures that may be covered by the prudential exception. In conclusion, the Appellate Body found that the Panel did not err in finding that paragraph 2(a) of the Annex on Financial Services covers all types of measures affecting the supply of financial services within the meaning of paragraph 1(a) of the Annex.

4.3 Appellate Body Report, *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/AB/R

This dispute concerned Panama's challenge to tariffs imposed by Colombia on the importation of certain textiles, apparel, and footwear. Colombia's measure, referred to as a "compound tariff", is composed of an *ad valorem* levy, expressed as a percentage of the customs value of goods, and a specific levy, expressed in units of currency per unit of measurement. While the *ad valorem* component of the compound tariff is 10% for all products regardless of their value, the specific component varies depending on the product and the declared free on board (f.o.b.) price in respect of two thresholds. With respect to certain imports of goods, the compound tariff does not apply.

Before the Panel, Panama claimed that the compound tariff imposed by Colombia is inconsistent with Article II:1(a) and (b) of the GATT 1994 and Colombia's Schedule of Concessions. Furthermore, in response to the defences invoked by Colombia, Panama requested the Panel to reject the argument that the compound tariff is justified under the general exceptions set out in Article XX(a) and Article XX(d) of the GATT 1994.

The Panel found that the measure at issue is structured and designed to be applied to all imports of the products concerned, without distinguishing between "licit" and "illicit" trade, and that no provision in Colombia's legal system bans the importation of goods whose declared prices are below the thresholds established in the measure. In light of these findings, the Panel did not consider it necessary to rule on Colombia's claim that the obligations contained in Article II:1(a) and (b) of the GATT 1994 are not applicable to illicit trade. The Panel found that the compound tariff constitutes an ordinary customs duty that exceeds the levels bound in Colombia's Schedule of Concessions, and is therefore inconsistent with the first sentence of Article II:1(b) of the GATT 1994, and accords treatment less favourable than that envisaged in Colombia's Schedule of Concessions, in a manner inconsistent with Article II:1(a) of the GATT 1994, in certain instances. With respect to Colombia's recourse to the general exceptions under Article XX of the GATT 1994, the Panel found that Colombia had failed to demonstrate that the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a), or necessary to secure compliance with Article 323 of Colombia's Criminal Code within the meaning of Article XX(d). The Panel further found that, even assuming that Colombia had succeeded in demonstrating that its measure is provisionally justified under Article XX(a) or Article XX(d), the compound tariff is not applied in a manner that meets the requirements of the chapeau of Article XX.

4.3.1 Article 11 of the DSU

On appeal, Colombia contended that the Panel, in stating that it was not necessary for the Panel to make a finding on whether or not the obligations of Article II:1 of the GATT 1994 extend to illicit trade, failed to make an objective assessment of the matter before it, as required under Article 11 of the DSU, including an objective assessment of the applicability of the relevant covered agreements. For Colombia, the only conceivable way the Panel could have escaped the interpretative question was if it had found that none of the imports subject to the measure involved illicit trade. Colombia pointed out that the Panel never made such a finding.

The Appellate Body first recalled that Article 11 of the DSU imposes upon panels a comprehensive obligation to make an "objective assessment of the matter", which embraces all aspects of a panel's examination of the matter, both factual and legal. With respect to "the applicability of … the relevant covered agreements", a panel is required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to the case at hand. The Appellate Body also pointed out that, in its assessment of facts, a panel is expected to provide reasoned and adequate explanations and coherent reasoning. By the same token, a panel would be expected to provide reasoned and adequate explanations and coherent reasoning when assessing the applicability of the covered agreements.

The Appellate Body recalled that the Panel considered that it would be required to address the interpretative issue under Article II:1(a) and (b) of the GATT 1994 only if it were to find that the trade affected by the measure was illicit trade. The Appellate Body further noted that, while panels have a degree of discretion to structure the order of their analysis as they see fit, a panel must not structure its analysis in a manner that prevents it from acting in accordance with its duty to conduct an objective assessment of the matter, as required under Article 11 of the DSU, including an objective assessment of the applicability of the relevant covered agreements.

The Appellate Body disagreed with the Panel's conclusion that it was not necessary for the Panel to interpret Article II:1(a) and (b) of the GATT 1994 because the compound tariff is not structured or designed to apply solely to operations which have been classified as illicit trade. Rather, the Appellate Body considered that the Panel's statement that the measure does not apply "solely" to illicit trade operations implies that the measure applies, or could apply, to some transactions classified by Colombia as illicit trade. The fact that there is no legal rule establishing that every transaction priced at or below the thresholds is deemed an illegal or illicit transaction does not preclude the possibility that some such transactions nevertheless involve

what Colombia considers to be illicit trade. For the Appellate Body, the Panel's finding that the compound tariff does not distinguish between licit and illicit trade further indicates that the measure does or could cover what Colombia considers to be illicit trade.

Thus, the Appellate Body did not consider that the Panel could properly have refrained from ruling on the interpretative issue before it simply because the challenged measure did not "solely" cover the type of transactions that Colombia maintained was outside the scope of the applicable provision. Rather, given that the Panel's statement implies that the measure at issue applies, or could apply, to some transactions considered by Colombia to be illicit trade, in the Appellate Body's view, the Panel was required to address the interpretative issue before it. The Appellate Body concluded that the Panel did not provide coherent reasoning, and that the basis upon which it refrained from interpreting Article II:1(a) and (b) of the GATT 1994 was flawed.

On this basis, the Appellate Body found that the Panel acted inconsistently with Article 11 of the DSU in finding that it was unnecessary for the Panel to interpret the scope of Article II:1(a) and (b) of the GATT 1994. Consequently, the Appellate Body reversed the Panel's finding that it was unnecessary for the Panel to issue a finding as to whether or not Article II:1(a) and (b) of the GATT 1994 applies to illicit trade.

4.3.2 Whether Colombia acted inconsistently with Article II:1(a) and (b) of the GATT 1994

Colombia requested the Appellate Body to complete the legal analysis and find that Article II:1(a) and (b) does not apply to illicit trade and that, because imports priced at or below the thresholds are imported at artificially low prices that do not reflect market conditions, the compound tariff does not violate Article II:1(a) and (b) of the GATT 1994. Colombia argued that the term "commerce" in Article II:1(a) and the term "importation" in Article II:1(b) do not cover what Colombia considers to be illicit trade. Colombia submitted that other provisions of the covered agreements, in particular, Article VII:2(a) and (b) of the GATT 1994 and Article 1.1 of the Customs Valuation Agreement, provide contextual support for its interpretation of Article II:1 of the GATT 1994.

Having examined the ordinary meaning of the term "commerce" in Article II:1(a) and "importation" in Article II:1(b), the Appellate Body did not see that the scope of these terms is qualified in respect of the nature or type of commerce or imports, or the reason or function of the transaction, in a manner that excludes what Colombia considers to be illicit trade. The Appellate Body further noted that Article II:2 of the GATT 1994, which sets out a closed list of instances in which bound tariff rates may be exceeded, provides further support for a reading of Article II:1 that does not exclude what Colombia considers to be illicit trade. With regard to Article VII:2 of the GATT 1994 and the Customs Valuation Agreement, the Appellate Body observed that these provisions have a different focus than Article II:1 of the GATT 1994 in that they set out conditions in which customs authorities may adjust or reject the declared value of goods and instead rely upon alternative methods for determining the value of those goods for customs purposes. Thus, where a declared value of a transaction is rejected because it is unduly low, the result under the Customs Valuation Agreement would be that the value for customs purposes would be adjusted or determined in an alternative manner. For the Appellate Body, the existence of such alternative methods for determining the customs value under these provisions confirms that the underlying transaction remains subject to the bound tariff rates pursuant to Article II:1 of the GATT 1994 and the relevant part of a Member's Schedule. The Appellate Body concluded that this further supported its understanding that the scope of Article II:1(a) and (b) of the GATT 1994 does not exclude what Colombia considers to be illicit trade.

The Appellate Body further recalled that the GATT 1994 strikes a balance between Members' obligations, including the obligation not to exceed scheduled tariff bindings, on the one hand, and their rights to adopt measures seeking to achieve legitimate policy objectives, on the other hand. To effectuate such a balance, Article XX of the GATT 1994 contains a number of exceptions that reflect important societal objectives other than trade liberalization, which may be relied upon in seeking to justify an otherwise GATT-inconsistent

measure. The Appellate Body thus observed that the GATT 1994 preserves the right of Members to pursue legitimate policy objectives, including addressing concerns relating to, *in casu*, money laundering, through the general exceptions set out in Article XX.

Moreover, the Appellate Body noted that Colombia's interpretation would allow a Member to exclude from the scope of Article II:1(a) and (b) of the GATT 1994 trade activities that it has unilaterally determined to be illicit. Such an interpretation would mean that, in respect of concessions inscribed in a Member's Schedule, the scope of a Member's obligation could vary depending on what is defined as illicit or asserted to be illicit under that Member's domestic law. For the Appellate Body, such an approach to the interpretation of Article II:1(a) and (b) would create uncertainty as to the scope of coverage of tariff concessions undertaken by Members.

The Appellate Body then addressed Colombia's argument that Article II:1(a) and (b) does not impose an obligation on Members to ensure that their bound rates are not exceeded when goods are imported at artificially low prices. On the basis of its interpretation of Article II:1(a) and (b) of the GATT 1994, the Appellate Body did not find support for Colombia's argument that a legislative ceiling need not apply to imports priced at or below the thresholds incorporated in the measure at issue. The Appellate Body did not see that Article II:1(a) and (b) excludes from its scope transactions that Colombia considers to be illicit because they are at artificially low or below market prices for money laundering purposes. Therefore, the Appellate Body did not consider that a measure that fails to ensure that such transactions do not exceed Colombia's bound tariff rates can operate as a legislative ceiling. The Appellate Body also noted that Colombia did not contest the Panel's finding that imports classified under heading 6305.32 of the Customs Tariff, entering at prices above US$10/kg but below US$12/kg, exceed the rate bound in Colombia's Schedule of Concessions. The Appellate Body further recalled that, in *Argentina – Textiles and Apparel*, the Appellate Body explained that it is possible, under certain circumstances, for a Member to design a legislative ceiling or cap on the level of duty applied which would ensure that, even if the type of duty applied differs from the type provided for in that Member's Schedule, the *ad valorem* equivalents of the duties actually applied would not exceed the ad valorem duties provided for in the Member's Schedule. The Appellate Body considered that, contrary to the notion of a legislative ceiling articulated by the Appellate Body, the price thresholds set out in Colombia's measure do not ensure that duties imposed on certain imports do not exceed Colombia's bound tariff rates.

The Appellate Body found that, in the instances identified in the Panel Report, the compound tariff exceeds the bound tariff rates in Colombia's Schedule of Concessions, and is therefore inconsistent with Article II:1(a) and (b) of the GATT 1994. Consequently, the Appellate Body upheld the relevant Panel findings.

4.3.3 Article XX(a) of the GATT 1994

4.3.3.1 Whether Colombia demonstrated that the compound tariff is a measure "designed" to protect public morals

Colombia argued that the Panel erred under Article XX(a) of the GATT 1994 by requiring Colombia to demonstrate the effectiveness of the challenged measure as part of establishing that the measure is designed to protect public morals. According to Colombia, the effectiveness of the challenged measure goes to the contribution of the measure to the objective pursued, which is a matter that is relevant to the necessity analysis, rather than to the consideration of whether the measure is designed to protect public morals. Colombia also submitted that, even if it was appropriate for the Panel to examine the contribution of the measure in the context of assessing its design, the Panel erred by imposing an overly demanding standard of the term "to protect" public morals that is inconsistent with Article XX(a).

The Appellate Body began by indicating that, in order to establish whether a measure is justified under Article XX(a), the analysis proceeds in two steps. First, the measure must be designed to protect public morals. Second, the measure must be necessary to protect such public morals. With respect to the analysis

of the design of the measure, the phrase "to protect public morals" calls for an initial, threshold examination of the measure's content, structure, and expected operation in order to determine whether there is a relationship between an otherwise GATT-inconsistent measure and the protection of public morals. If this initial examination of the design of the measure, including its content, structure, and expected operation, reveals that the measure is incapable of protecting public morals, further examination with regard to whether the measure is necessary to protect such public morals would not be required. This is because there can be no justification under Article XX(a) for a measure that is not designed to protect public morals.

The Appellate Body indicated that it did not see the examination of the design of the measure as a particularly demanding step of the Article XX(a) analysis. By contrast, the assessment of the necessity of a measure entails a more in-depth, holistic analysis of the relationship between the measure and the protection of public morals. The Appellate Body also observed that the design and necessity steps of the analysis under Article XX(a) are conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is necessary to protect public morals. As the assessment of these two steps is not entirely disconnected, there may, in fact, be some overlap in the sense that certain evidence and considerations may be relevant to both aspects of the defence under Article XX(a). Thus, in the context of the design step of the analysis, a panel is not precluded from taking into account evidence and considerations that may also be relevant to the examination of the contribution of the measure in the context of the necessity analysis.

The Appellate Body emphasized that a panel must not structure its analysis of the design step in such a way as to lead it to truncate its analysis prematurely and thereby foreclose consideration of crucial aspects of the respondent's defence relating to the necessity analysis. In particular, once an analysis of the design of a measure reveals that the measure is not incapable of protecting public morals, such that there is a relationship between the measure and the protection of public morals, a panel may not refrain from conducting the necessity step of the analysis. Whether a particular degree of contribution is sufficient for a measure to be considered necessary cannot be answered in isolation from an assessment of the degree of the measure's trade-restrictiveness and of the relative importance of the interest or value at stake. For example, a measure making a limited contribution to protecting public morals may be justified under Article XX(a) in circumstances where the measure has only a very low trade-restrictive impact, taking into account the importance of the specific interest or value at stake; similarly, it may be that a measure making a significant contribution is not justified under Article XX(a) if that measure is highly trade restrictive. Thus, if a panel finds some degree of contribution, but ceases to analyse the other factors (the degree of trade-restrictiveness and the relative importance of the interest or value at stake), a weighing and balancing exercise cannot be conducted, and thus a proper consideration of a respondent's defence that the measure is necessary is foreclosed.

Turning to Colombia's challenge to the Panel's finding that Colombia failed to demonstrate that the measure is designed to protect public morals, the Appellate Body disagreed with Colombia's view that the Panel erred in its analysis of the design of the measure for the mere reason that it examined evidence and considerations related to an analysis of the contribution of the measure. However, the Appellate Body emphasized that the thrust of Colombia's claim of error is that the Panel applied an overly demanding legal standard in assessing whether the compound tariff is measure designed to protect public morals. With this in mind, the Appellate Body turned to review the relevant findings by the Panel.

The Panel noted that the text of the measure does not contain any statement of reasons indicating that the objective of the compound tariff is to combat money laundering. Then, the Panel reached the following conclusions regarding a series of interconnected assumptions that, in the Panel's view, were the basis of Colombia's argument: (i) Colombia had not shown that the thresholds could be decisive in establishing that the importation of goods at prices below those thresholds is necessarily taking place at artificially low prices that do not reflect real prices or market conditions; (ii) there was no indication that products imported at prices below the thresholds are necessarily being undervalued; and (iii) even assuming that

products imported at prices below the thresholds established in the measure are being undervalued, there was no evidence that this necessarily means that the undervaluation in question is for money laundering purposes. On the basis of these conclusions and certain additional considerations, the Panel concluded that a connection between the compound tariff and the alleged objective of combating money laundering had not been demonstrated. Accordingly, the Panel concluded that Colombia had failed to demonstrate that the compound tariff is designed to combat money laundering.

The Appellate Body noted a tension between some of the Panel's intermediate findings and the conclusions it reached concerning the design of the measure. The Appellate Body considered that, although the Panel concluded that Colombia had failed to establish a relationship between the compound tariff and the objective of combating money laundering, this was belied by findings indicating that the compound tariff is not incapable of combating money laundering. Therefore, the Appellate Body considered that there is a relationship between that measure and the protection of public morals in a way that meets the design step of the analysis under Article XX(a).

In respect of the question of whether prices below the thresholds set out in the measure are artificially low, the Panel found that it cannot be ruled out that the importation of goods at prices below the thresholds could, in practice, reflect artificially low prices that do not reflect market conditions. The Appellate Body considered that, in making this finding, the Panel acknowledged that at least some transactions at or below the thresholds could reflect such prices. The Appellate Body also noted the Panel's finding that the information available suggests that the undervaluation of imports is, in fact, one of the methods used for money laundering detected by the Colombian authorities. According to the Appellate Body, this finding indicates recognition by the Panel that, in Colombia, one of the methods used to launder money is the undervaluation of imports.

In addition, the Appellate Body noted that, in assessing the contribution of the measure under the necessity analysis, the Panel addressed Colombia's contention that the compound tariff reduces the incentives for using textile, apparel, and footwear imports to launder money. The Appellate Body indicated that, while the Panel did not make a definitive finding that the compound tariff discouraged undervaluation practices carried out for money laundering purposes, the Panel did make several findings that support Colombia's position that the compound tariff could reduce the incentive of using undervalued imports to launder money.

Taking the above Panel findings together, the Appellate Body considered that the Panel itself recognized that the compound tariff is not incapable of combating money laundering, such that there is a relationship between that measure and the protection of public morals. Therefore, the Appellate Body indicated that the Panel was not in a situation in which the measure at issue is incapable of protecting public morals.

For the foregoing reasons, the Appellate Body concluded that the Panel should not have ceased its analysis at this stage of its review of Colombia's defence under Article XX(a). Rather, it was incumbent on the Panel to turn to the analysis of the necessity of the measure. Therefore, the Appellate Body found that the Panel erred in concluding that Colombia had failed to demonstrate that the measure is designed to combat money laundering given its recognition that the compound tariff is not incapable of combating money laundering, such that there is a relationship between that measure and the protection of public morals.

The Appellate Body therefore reversed the Panel's findings that Colombia had failed to demonstrate that the compound tariff is designed to combat money laundering and that Colombia had not shown that the compound tariff is a measure designed to protect public morals. Since the Panel's ultimate findings in respect of Article XX(a) were based exclusively on these erroneous findings, the Appellate Body also reversed the Panel's findings that Colombia had failed to demonstrate that the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.

Next, the Appellate Body turned to consider Colombia's request that the Appellate Body complete the legal analysis and find that the measure at issue is necessary to protect public morals and is thus justified under Article XX(a) of the GATT 1994. The Appellate Body began by noting that, in a finding that was not contested on appeal, the Panel concluded that combating money laundering is one of the policies designed to protect public morals in Colombia. The Appellate Body therefore proceeded to examine whether the findings by the Panel were sufficient to establish that the compound tariff is a measure designed to combat money laundering and thus to protect public morals under Article XX(a) of the GATT 1994.

The Appellate Body's prior examination of Colombia's claim of error had revealed that, when several findings by the Panel are read together, it is clear from its analysis that the compound tariff is not incapable of combating money laundering, such that there is a relationship between that measure and the protection of public morals. Therefore, on the basis of the Panel's findings, the Appellate Body found that the measure at issue is designed to protect public morals in Colombia within the meaning of Article XX(a) of the GATT 1994.

4.3.3.2 Whether Colombia demonstrated that the compound tariff is "necessary" to protect public morals

The Appellate Body proceeded to examine whether the compound tariff is a measure "necessary" to protect public morals under Article XX(a) of the GATT 1994. First, regarding the *importance of the interests or values* pursued by the challenged measure, the Appellate Body noted that the Panel had found that, in Colombia, the objective of combating money laundering reflects societal interests that can be described as vital and important in the highest degree.

Turning to the *contribution* of the measure to combating money laundering, the Appellate Body considered that the same findings of the Panel that led it to conclude that the compound tariff is not incapable of combating money laundering, such that there is a relationship between that measure and the protection of public morals, also indicate that there may be at least some contribution by the compound tariff to the objective of combating money laundering. However, the Appellate Body pointed out that, while the Panel's findings indicated that there may be at least some contribution, they were indeterminate as to the degree of such contribution. Moreover, the Appellate Body considered that certain other findings by the Panel highlight the lack of sufficient clarity surrounding the amount or proportion of import transactions involving the products at issue that are actually used for money laundering purposes. The Appellate Body understood that, in making such findings, the Panel emphasized that Colombia had not established with sufficient clarity the amount or proportion of import transactions involving the relevant products that are, in fact, undervalued for money laundering purposes. The Appellate Body further pointed out that Panel did not have much clarity as to how effective the disincentive of the compound tariff is as a means of combating money laundering. In the Appellate Body's view, these considerations regarding the uncertainty surrounding the amount or proportion of imported goods below the thresholds that are actually used for money laundering purposes, as well as the extent to which the compound tariff acts as a disincentive to money laundering, indicated the Panel's view that Colombia had not demonstrated with sufficient clarity the degree of contribution made by the compound tariff to the objective of combating money laundering.

Turning to the *trade-restrictiveness* of the measure at issue, the Appellate Body noted the Panel's finding that the compound tariff is less restrictive on international trade than an import ban or a measure having the effects of a ban. The Appellate Body added that, despite acknowledging that the measure is less restrictive than an import ban, the Panel also raised the possibility that the compound tariff can be highly trade restrictive, and in some circumstances as restrictive as a ban. Therefore, in the Appellate Body's view, the findings by the Panel indicated the uncertainty as to the degree to which the compound tariff can be considered to be less trade restrictive than an import ban, and thus supported the view that Colombia had not established with sufficient clarity the degree of trade-restrictiveness of the measure.

Finally, the Appellate Body noted that, before the Panel, the parties also advanced arguments as to whether there are any less trade-restrictive alternatives that are reasonably available. Given the lack of sufficient clarity regarding the degree of contribution of the measure to the objective of combating money laundering, and the degree of trade-restrictiveness of the measure, the Appellate Body saw no basis to proceed with a comparison of the measure at issue with any possible alternative measures that are reasonably available and achieve an equivalent level of protection.

In the Appellate Body's view, the Panel's findings thus supported the conclusion that Colombia had not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is necessary to protect public morals. Therefore, on the basis of the Panel's findings, the Appellate Body found that Colombia had not demonstrated that the compound tariff is a measure necessary to protect public morals within the meaning of Article XX(a) of the GATT 1994.

4.3.4 Article XX(d) of the GATT 1994

4.3.4.1 Whether Colombia demonstrated that the compound tariff is a measure "designed" to secure compliance with laws or regulations that are not GATT-inconsistent

Colombia also appealed the Panel's finding that Colombia had failed to demonstrate that the compound tariff is a measure designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, within the meaning of Article XX(d) of the GATT 1994. Colombia argued that the Panel's conclusions regarding whether the measure is designed to secure compliance with Article 323 of Colombia's Criminal Code, and whether the measure is necessary to secure such compliance, are based entirely on its previous analysis under Article XX(a). Colombia thus argued that the Panel's analysis under Article XX(d) necessarily suffered from the same flaws as its analysis under Article XX(a).

The Appellate Body observed that the Panel's examination of whether the measure is designed to secure compliance with Article 323 of Colombia's Criminal Code relied mainly on reasoning and findings it had developed in the context of its analysis under Article XX(a). The Appellate Body explained that, both under Article XX(a) and Article XX(d), the design and necessity steps of the legal standard are conceptually distinct, yet related, aspects of the overall inquiry to be undertaken into whether a respondent has established that the measure at issue is necessary to protect public morals, and that such an assessment is not entirely disconnected in the sense that certain evidence and considerations may be relevant to both aspects of the defence. The examination of a defence under both Article XX(a) and Article XX(d) requires an initial, threshold examination of the design of the measure at issue, including its content, structure, and expected operation. If the assessment of the design of the measure, including its content, structure, and expected operation, reveals that the measure is incapable of, in the case of Article XX(a), protecting public morals, or, in the case of Article XX(d), securing compliance with relevant provisions of laws or regulations that are not GATT-inconsistent, there is not a relationship that meets the requirements of the design step.

According to the Appellate Body, provided that its reasoning accounts for the differences in the legal standards under paragraph (a) and paragraph (d) of Article XX, the Panel did not act improperly simply because it relied, in the context of its application of the legal standard under Article XX(d), on reasoning it had developed in assessing Colombia's defence under Article XX(a). The Appellate Body further noted that Colombia itself had presented the same arguments and evidence in respect of both paragraph (a) and paragraph (d) of Article XX. In both instances, Colombia maintained that the compound tariff seeks to combat money laundering so as to secure compliance with Article 323 of Colombia's Criminal Code because, by its design, it reduces the incentives for criminal groups to use imports of apparel and footwear for money laundering purposes, by means of artificially low prices. In these circumstances, the Appellate Body considered that the Panel did not act improperly by relying on similar considerations and reasoning in reaching its conclusions under Article XX(a) and Article XX(d).

The Appellate Body considered, however, that the concerns it raised in the context of the Panel's assessment of whether the compound tariff is designed to protect public morals under Article XX(a) were also relevant in the context of the assessment under Article XX(d). In particular, the Appellate Body noted that, by stating that it cannot be ruled out that goods priced below the thresholds reflect artificially low prices, the Panel acknowledged that at least some transactions at or below the thresholds could reflect such prices. The Appellate Body further noted the Panel's acknowledgement that, in Colombia, one of the methods used to launder money is the undervaluation of imports. Moreover, the Appellate Body considered that additional findings by the Panel show a relationship between the compound tariff and the money laundering activities that Colombia seeks to discourage through the application of the challenged measure. In the Appellate Body's view, these findings demonstrate the Panel's recognition, in respect of its analysis under both Article XX(a) and Article XX(d), that at least some goods priced at or below the thresholds could be imported into Colombia at artificially low prices for money laundering purposes, and would thus be subject to the disincentive created by the higher specific duties that apply to these goods. Thus, the Appellate Body considered that the Panel itself recognized that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance.

The Appellate Body stated that, although the Panel concluded that Colombia had failed to establish a relationship between the compound tariff and Article 323 of Colombia's Criminal Code, this conclusion was belied by the Panel findings it had examined. The Panel's own analysis indicated that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance. Consequently, the Panel should not have ceased its analysis at this stage of its review of Colombia's defence under Article XX(d).

For these reasons, the Appellate Body found that the Panel erred in concluding that Colombia had failed to demonstrate that the measure is designed to secure compliance with laws or regulations that are not GATT-inconsistent given its recognition that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance. Thus, the Panel failed to assess the necessity of the measure on the basis of a weighing and balancing exercise.

The Appellate Body therefore reversed the Panel's finding that Colombia had failed to demonstrate that the compound tariff is designed to secure compliance with Article 323 of Colombia's Criminal Code. Since the Panel's findings under Article XX(d) were based on this erroneous finding, the Appellate Body also reversed the Panel's findings that Colombia had failed to demonstrate that the compound tariff is a measure necessary to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, within the meaning of Article XX(d) of the GATT 1994.

The Appellate Body then considered whether it could complete the legal analysis and find that the measure at issue meets the requirements set out in Article XX(d) of the GATT 1994. The Appellate Body stated that, when several findings by the Panel are read together, it is clear from its analysis that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, such that there is a relationship between that measure and securing such compliance. Therefore, on the basis of the Panel's findings, the Appellate Body found that the measure at issue is designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, namely, Article 323 of Colombia's Criminal Code, within the meaning of Article XX(d) of the GATT 1994.

4.3.4.2 Whether Colombia demonstrated that the compound tariff is a measure "necessary" to secure compliance with laws or regulations that are not GATT-inconsistent

The Appellate Body then turned to examine whether the compound tariff is a measure necessary to secure compliance with laws or regulations that are not GATT-inconsistent, within the meaning of Article XX(d) of the GATT 1994.

With respect to the *importance of the interests or values* at stake, the Panel considered that, for reasons similar to those mentioned in its analysis under Article XX(a), securing compliance with Article 323 of Colombia's Criminal Code reflects societal interests that can be characterized as vital and important in the highest degree.

Turning to the *contribution* of the measure to the objective it pursues, the Appellate Body considered that the same findings of the Panel that supported the conclusion that the compound tariff is not incapable of securing compliance with Article 323 of Colombia's Criminal Code, also indicate that there may be at least some contribution by the compound tariff to securing such compliance. However, while the Panel's findings indicated that there may be at least some contribution, they were also indeterminate as to the degree of such contribution. The Panel's findings highlight the lack of sufficient clarity surrounding the amount or proportion of import transactions involving the products at issue that are actually used for money laundering purposes, and indicate that the Panel did not have much clarity as to how effective the disincentive of the compound tariff is as a means of combating money laundering. According to the Appellate Body, these considerations indicate the Panel's view that Colombia had not demonstrated with sufficient clarity the degree of contribution made by the compound tariff to the objective of combating money laundering.

The Appellate Body then examined the *trade-restrictiveness* of the measure at issue. Noting the Panel's finding that the compound tariff is less trade-restrictive than a ban on imports, the Appellate Body considered that this finding reflects uncertainty as to the degree of trade-restrictiveness of the measure at issue because it does not indicate how much less trade restrictive the measure is in comparison to an import ban. The Appellate Body also noted that, despite acknowledging that the measure at issue is less restrictive than an import ban, the Panel had previously raised the possibility that the compound tariff can be highly trade restrictive, and in some circumstances as restrictive as a ban. These findings by the Panel, the Appellate Body considered, support the view that Colombia had not established with sufficient clarity the degree of trade-restrictiveness of the measure.

Having examined the relevant Panel findings, the Appellate Body understood that the Panel's weighing and balancing of the necessity factors revealed that Colombia had failed to demonstrate that the measure is necessary to secure compliance with laws or regulations that are not GATT-inconsistent.

In the Appellate Body's view, the Panel's findings thus supported the conclusion that Colombia has not demonstrated that the conclusion resulting from a weighing and balancing exercise is that the measure at issue is necessary to secure compliance with Article 323 of Colombia's Criminal Code. On the basis of the Panel's findings, the Appellate Body found that Colombia has not demonstrated that the compound tariff is a measure necessary to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994, within the meaning of Article XX(d) of the GATT 1994.

4.3.5 Whether Colombia demonstrated that its measure satisfies the requirements of the chapeau of Article XX of the GATT 1994

Colombia also appealed the Panel's findings pertaining to the chapeau of Article XX of the GATT 1994. Having recalled its findings that Colombia has not demonstrated that the compound tariff is provisionally justified under Article XX(a) or Article XX(d) of the GATT 1994, the Appellate Body did not consider it necessary to examine Colombia's claims on appeal pertaining to the chapeau of Article XX of the GATT 1994. The Appellate Body expressed no view on the Panel's reasoning or findings in that regard.

4.4 Appellate Body Report, *India – Certain Measures Relating to Solar Cells and Solar Modules*, WT/DS456/AB/R

This dispute concerned a challenge by the United States to certain domestic content requirements (DCR measures) imposed by India on solar power developers (SPDs) selling electricity to governmental agencies under its Jawaharlal Nehru National Solar Mission. The DCR measures at issue required that certain types of solar cells and modules used by SPDs be made in India.

Before the Panel, the United States claimed that the measures at issue are inconsistent with Article III:4 of the GATT 1994 because they accord less favourable treatment to imported products (solar cells and modules) than to like products of national origin. The United States also claimed that the measures at issue are inconsistent with Article 2.1 of the TRIMs Agreement because they are trade-related investment measures that make the purchase of domestic products a requirement to obtain an advantage, thus falling under paragraph 1(a) of the Illustrative List in the Annex to the TRIMs Agreement (Illustrative List).

The Panel found that India's DCR measures at issue are inconsistent with WTO non-discrimination obligations under Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement. The Panel also found that the measures are not covered by the government procurement exemption under Article III:8(a) of the GATT 1994, because the product being procured (electricity) was not in a competitive relationship with the product discriminated against (solar cells and modules).

Moreover, the Panel found that India had not demonstrated that its measures are justified under Article XX(j) of the GATT 1994, applicable to measures that are essential to the acquisition or distribution of "products in general or local short supply", and/or Article XX(d), which establishes a general exception for measures necessary to "secure compliance" with a WTO Member's "laws or regulations", which are not themselves GATT-inconsistent.

4.4.1 Article III:8(a) of the GATT 1994

India appealed the Panel's conclusion that the DCR measures at issue are not covered by the derogation under Article III:8(a) of the GATT 1994. India contended that the Panel acted inconsistently with its duties under Article 11 of the DSU because it mechanically applied the Appellate Body's test of competitive relationship developed in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, and refused to consider the facts, evidence and legal arguments advanced by India in the present case. In particular, India maintained that the Panel: (i) ignored a fundamental basis of India's argument that solar cells and modules are indistinguishable from solar power generation; (ii) erred in its factual and legal assessment that it is not necessary to consider whether solar cells and modules qualify as inputs for solar power generation; (iii) erred in dismissing India's arguments that sole reliance on the competitive relationship test would unduly restrict the scope of Article III:8(a), and that Article III:8(a) should not be interpreted to envisage direct acquisition of products purchased, in all cases; and (iv) erred in reasoning that it could not go beyond the tests applied by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* since India had not asked it to deviate from this reasoning.

The Appellate Body first recalled that Article 11 of the DSU imposes upon panels a comprehensive obligation to make an objective assessment of the matter, which embraces all aspects of a panel's examination of the matter, both factual and legal. Thus, panels are required to make an objective assessment of the facts, the applicability of the covered agreements, and the conformity of the measure at issue with the covered agreements. With respect to the applicability of and conformity with the relevant covered agreements, a panel is required to conduct an objective assessment of whether the obligations in the covered agreements, with which an inconsistency is claimed, are relevant and applicable to the case at hand, and whether the measures at issue conform to, or are inconsistent with, the specific obligations provided for in those agreements.

The Appellate Body recalled that the Panel had not considered it necessary to resolve whether the Appellate Body left room for an alternative to the competitive relationship standard, or to decide, in the abstract, the meaning of inputs and processes of production as used by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-In Tariff Program*, in view of its conclusion that the DCR measures at issue in this dispute are not distinguishable in any relevant respect from those examined by the Appellate Body in those earlier disputes. The Appellate Body noted in this regard that, under Article 11 of the DSU, the Panel was required to consider all factual and legal arguments of the parties that were pertinent for ruling on whether the DCR measures are covered by the derogation under Article III:8(a) of the GATT 1994.

The Appellate Body observed that a primary issue of contention between the parties in the Panel proceedings related to the pertinence of the reasoning and findings of the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* regarding the scope of Article III:8(a) of the GATT 1994 with respect to "products purchased". The Appellate Body had found, in those disputes, that the coverage of Article III:8(a) extends to products purchased that are "like" the products discriminated against under Articles III:2 and III:4, or, in accordance with the *Ad* Note to Article III:2, to products that are directly competitive with or substitutable for such products, and had referred to these as "products that are in a competitive relationship". The Appellate Body had agreed that a close relationship between the product purchased and the product discriminated against could be relevant for a separate element of Article III:8(a) – namely, assessing whether a measure can be said to be governing procurement of products purchased. However, the Appellate Body had explained that this was not dispositive of whether Article III:8(a) applies, because the products purchased were not in a "competitive relationship" with the products being discriminated against. Therefore, the Appellate Body disagreed with India that the Appellate Body's interpretation of Article III:8(a) in *Canada – Renewable Energy / Canada – Feed-in Tariff Program* suggests that the scope of this provision may extend, in some cases, to "inputs" and "processes of production" regardless of whether the product subject to discrimination is in a competitive relationship with the product purchased. The Appellate Body further recalled in this appeal that the issue of whether the cover of Article III:8(a) may extend to discrimination relating to inputs and processes of production used in respect of products purchased by way of procurement was a matter which the Appellate Body, in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, had explicitly said it was not deciding. The Appellate Body added that this question arises only after the product subject to discrimination has been found to be like, directly competitive with, or substitutable for – in other words, in a competitive relationship with – the product purchased. In respect of the latter issue – i.e. whether products are in a competitive relationship – the Appellate Body explained that, while a consideration of inputs and processes of production may inform the question of whether the product purchased is in a competitive relationship with the product being discriminated against, it does not displace the competitive relationship standard. The Appellate Body concluded that, under Article III:8(a) of the GATT 1994, the foreign product discriminated against must necessarily be in a competitive relationship with the product purchased by way of procurement.

The Appellate Body observed that India's appeal under Article III:8(a) of the GATT 1994 hinged largely on its reading of that provision, and in particular on what India saw as the limited scope of the competitive relationship standard, as developed by the Appellate Body in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. The Appellate Body further noted that India had not argued before the Panel that a competitive relationship exists between electricity and solar cells and modules or that the Government of India takes title or custody of solar cells and modules. Nevertheless, in order fully to dispose of the issues raised by India on appeal, the Appellate Body went on to examine India's arguments to the extent they related to the approach adopted by the Panel in its assessment of India's claims.

With regard to India's contention that the Panel failed to consider the fundamental characteristics of solar cells and modules, and disregarded India's argument that solar cells and modules are indistinguishable from solar power generation, the Appellate Body found that the Panel had properly addressed, and rejected, India's arguments that solar cells and modules cannot be treated as distinct from solar power and that, by

purchasing electricity generated from such cells and modules, India was effectively procuring the cells and modules. Moreover, regarding India's claim that the Panel summarily dismissed its argument that solar cells and modules are integral inputs for the generation system as contrasted with all other components of a PV generation plant that can be classified as ancillary equipment, the Appellate Body found that the Panel had sufficiently considered this argument by India.

Regarding India's argument that the word "procurement" should not be read to require direct acquisition of the product purchased in all cases, the Appellate Body noted that the fact that "procurement" may refer to the process of obtaining products, rather than to an acquisition itself does not mean that, in order to be covered under Article III:8(a), government procurement can be effectuated by means of a contractual arrangement other than a purchase as India appeared to suggest. Furthermore, the Appellate Body considered that India had reiterated, in essence, its argument, rejected by the Appellate Body, that Article III:8(a) should cover situations where the discrimination involves inputs or processes of production, regardless of whether the product discriminated against is in a competitive relationship with the product purchased. The Appellate Body also agreed with the Panel that India's arguments regarding the policy options left for WTO Members in case of an overly narrow interpretation of Article III:8(a), did not have a bearing on the proper determination of the scope of that provision.

Finally, the Appellate Body recalled that, before the Panel, India had sought to distinguish from *Canada – Renewable Energy / Canada – Feed-in Tariff Program* on the facts of the present case, rather than to have the Panel re-assess the merits of the Appellate Body's interpretation and application of Article III:8(a) and relevant reasoning. Based on its review, the Appellate Body found that the Panel was rightly guided by the Appellate Body's interpretation and application of Article III:8(a) in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, having found that India's arguments were insufficient to distinguish the facts at issue in the present case from those before the Appellate Body in those disputes.

For all these reasons, the Appellate Body found that the Panel did not fail to make an objective assessment of the matter before it pursuant to Article 11 of the DSU in finding that discrimination under the DCR measures is not covered by the terms of the government procurement derogation contained in Article III:8(a) of the GATT 1994. Consequently, the Appellate Body upheld the Panel's finding that the discrimination relating to solar cells and modules under the DCR measures is not covered by the derogation of Article III:8(a) of the GATT 1994, and that, therefore, the DCR measures are inconsistent with Article 2.1 of the TRIMs Agreement and Article III:4 of the GATT 1994.

With regard to the remaining elements under Article III:8(a) of the GATT 1994, the Appellate Body noted that India's request for completion of the legal analysis was premised on the condition that the Appellate Body reverse the Panel's finding that the DCR measures are not covered by the derogation under Article III:8(a) of the GATT 1994. Having upheld this finding by the Panel, the Appellate Body considered that it did not need to address India's further claims and related arguments concerning the Panel's interpretation and application of the remaining elements under Article III:8(a).

4.4.2 Article XX(j) of the GATT 1994

India argued that the Panel erred in its interpretation of the phrase "products in general or local short supply" because it did not read "short supply" in Article XX(j) of the GATT 1994 in the context of the specific terms used in that provision. Therefore, India requested the Appellate Body to find that the lack of manufacturing capacity of solar cells and modules in India amounts to a situation of local and general short supply, and that the DCR measures are measures relating to the acquisition of such products. India further alleged that the Panel acted inconsistently with Article 11 of the DSU in rejecting India's arguments regarding the relevance of sufficient manufacturing capacity in interpreting and applying the elements of Article XX(j).

The Appellate Body recalled that an evaluation of a defence under Article XX of the GATT 1994 involves a two-tiered analysis, in which a measure must first be provisionally justified under one of the paragraphs of Article XX, and then shown to be consistent with the requirements of the chapeau of Article XX. Regarding the first part of the analysis, the Appellate Body recalled that two elements must be shown: first, that the measure addresses the particular interest specified in that paragraph; and, second, that there is a sufficient nexus between the measure and the interest protected, which is specified through the use of terms such as "necessary to" in Article XX(d), and, in the case of Article XX(j), "essential to".

This was the first case in which the Appellate Body was called upon to interpret the requirements of Article XX(j). The Appellate Body began by reviewing its jurisprudence under the other paragraphs of Article XX and, in particular, its recent jurisprudence under Article XX(d) in *Colombia – Textiles* and *Argentina – Financial Services*. The Appellate Body considered the analytical framework for the "design" and "necessity" elements of the analysis contemplated under Article XX(d) to be relevant *mutatis mutandis* to an analysis of Article XX(j). The Appellate Body stated that the examination of a defence under Article XX(j) would therefore appear to include an initial threshold examination of the design of the measure at issue, including its content, structure, and expected operation. It added that the responding party must demonstrate the relationship between the measure and "the acquisition or distribution of products in general or local short supply". If the assessment of the design of a measure, including its content, structure, and expected operation, reveals that the measure is incapable of addressing "the acquisition or distribution of products in general or local short supply", there is no relationship that meets the requirements of the design element, and further analysis with regard to whether the measure is essential would not be required. The Appellate Body explained that this is because there can be no justification under Article XX(j) for a measure that is not designed to address the "acquisition or distribution of products in general or local short supply".

The Appellate Body further recalled that the "design" and "necessity" elements are conceptually distinct, but related, aspects of the overall inquiry to be carried out under Article XX(d). Thus, the way a panel organizes its examination of these elements may be influenced not only by the measures at issue or the laws or regulations identified by the respondent, but also by the manner in which the parties present their respective arguments and evidence. The Appellate Body found these considerations to be equally relevant for the analysis under Article XX(j) in assessing whether a measure is "essential to the acquisition or distribution of products in general or local short supply".

Concerning the interpretation of the term "essential" in Article XX(j), the Appellate Body recalled that, in a continuum ranging from "indispensable" to "making a contribution to", a "necessary" measure is located significantly closer to the pole of "indispensable" than to the opposite pole of simply "making a contribution to". Noting that the word "essential" is defined as absolutely indispensable or necessary, the Appellate Body observed that the plain meaning of the term thus suggests that this word is located at least as close to the "indispensable" end of the continuum as the word "necessary". Having said this, the Appellate Body recalled that a "necessity" analysis under Article XX(d) involves a process of weighing and balancing a series of factors, and considered the same process of weighing and balancing to be relevant in assessing whether a measure is "essential" within the meaning of Article XX(j). In particular, the Appellate Body considered it relevant to assess the extent to which the measure sought to be justified contributes to "the acquisition or distribution of products in general or local short supply", the relative importance of the societal interests or values that the measure is intended to protect, and the trade-restrictiveness of the challenged measure. In most cases, a comparison between the challenged measure and reasonably available alternative measures should then be undertaken.

The Appellate Body further stated that it must therefore be established that there are "products in general or local short supply", and that the challenged measures are "essential to the acquisition or distribution of" such products. The Appellate Body noted that measures covered by the general exception under Article XX(j) are subject to the requirement that they "shall be consistent with the principle that all Members

are entitled to an equitable share of the international supply of such products", and that Members may take GATT-inconsistent measures under that provision, subject to the requirement that such measures "shall be discontinued as soon as the conditions giving rise to them have ceased to exist". In light of this language, the Appellate Body considered that a proper interpretation of Article XX(j) requires careful consideration of how the different terms used in that provision inform one another, and should thus be holistic in nature.

Regarding the meaning of the phrase "products in general or local short supply", the Appellate Body observed that the words "products in … short supply" refer generally to products available only in limited quantity, scarce, and therefore to products in respect of which there is a shortage, that is, a deficiency in quantity; or an amount lacking. The Appellate Body further observed that "supply" is defined as the amount of any commodity actually produced and available for purchase, and that it is correlative to the word "demand". An assessment of whether there is a deficiency or amount lacking in the quantity of a product that is available would therefore appear to involve a comparison between supply and demand, such that products can be said to be "in short supply" when the quantity of a product that is available does not meet demand for that product.

As to the extent of the geographical area or market in which the quantity of "available" supply of a product should be compared to demand, the Appellate Body observed that Article XX(j) refers to products in "general or local" short supply. The Appellate Body noted that the definitions of the terms "local" and "general" suggest that the terms "general or local" refer to a range of product shortages, which may cover shortages that occur locally, within a region, or a territory within a country, or continuing beyond the boundaries of a particular country. In the context of Article XX(j), however, the Appellate Body understood the phrase "products in general or local short supply" to be focused on products for which a situation of short supply exists within the territory of the Member invoking Article XX(j). A situation of general short supply could extend beyond the boundaries of that territory, as long as it also occurs within that territory. The Appellate Body further read the terms "general" and "local", together with the disjunctive "or", to indicate that there is no requirement for a Member to demonstrate that the shortage extends to all parts of its territory, but that, depending on the circumstances, it may be sufficient to demonstrate that the existence of such a situation of shortage occurs locally, or is limited to certain parts of its territory.

Regarding the question of whether Article XX(j) speaks to the origin of products that may be available in a particular geographical area or market, the Appellate Body observed that the phrase "products in general or local short supply" is immediately preceded by the terms "acquisition or distribution of". Article XX(j) therefore contemplates measures that seek to redress situations of "short supply" by providing for the "acquisition or distribution of" given products. The Appellate Body noted that, by its terms, Article XX(j) does not limit the scope of potential sources of supply to domestic products manufactured in a particular country that may be available for purchase in a given market, nor does it exclude the possibility that products from sources outside a particular geographical area or market may also be available to satisfy demand. Thus, in determining whether products are in general or local short supply, it is relevant to consider the quantity of products produced in the particular geographical area or market where the alleged shortage exists. However, there is no reason not to give due regard to the quantity of products produced in other parts of a particular country, as well as in other countries, provided that such quantities are available for purchase in the relevant geographical area or market. Further, the Appellate Body noted that, while an increase in manufacturing capacity or production in a particular geographical area may lead to an increase in the total quantity of a product available for purchase in that area, it does not follow from such increase that domestic manufacturers will necessarily sell their production to domestic buyers, as opposed to exporting their production by selling to buyers abroad. The Appellate Body concluded therefore that an assessment of whether there is a situation of "products in general or local short supply" should not focus exclusively on availability of supply from domestic sources, as opposed to foreign or international sources.

The Appellate Body further noted that Article XX(j) contemplates situations of "short supply" that may continue over time, but are nonetheless expected not to last indefinitely, and that Article XX(j) requires a careful scrutiny of the relationship between supply and demand based on a holistic consideration of trends in supply and demand as they evolve over time.

In sum, the Appellate Body found that Article XX(j) of the GATT 1994 reflects a balance of different considerations to be taken into account when assessing whether products are "in general or local short supply". In particular, a panel should examine the extent to which a particular product is available for purchase in a particular geographical area or market, and whether this is sufficient to meet demand in the relevant area or market. This analysis may take into account not only the level of domestic production of a particular product and the nature of the products that are alleged to be "in general or local short supply", but also such factors as the relevant product and geographic market, potential price fluctuations in the relevant market, the purchasing power of foreign and domestic consumers, and the role that foreign and domestic producers play in a particular market, including the extent to which domestic producers sell their production abroad. Due regard should be given to the total quantity of imports that may be available to meet the demand in a particular geographical area or market. Thus, it may be relevant to consider the extent to which international supply of a product is stable and accessible, including by examining factors such as the distance between a particular geographical area or market and production sites, as well as the reliability of local or transnational supply chains. Whether and which factors are relevant will necessarily depend on the particularities of each case. Just as there may be factors that have a bearing on availability of imports in a particular case, it is also possible that, despite the existence of manufacturing capacity, domestic products are not available in all parts of a particular country, or are not available in sufficient quantities to meet demand. In all cases, the responding party has the burden of demonstrating that the quantity of available supply from both domestic and international sources in the relevant geographical market is insufficient to meet demand.

The Appellate Body added that its interpretation of Article XX(j) is in consonance with the preamble of the WTO Agreement, which refers to the "optimal use of the world's resources in accordance with the objective of sustainable development, seeking both to protect and preserve the environment and to enhance the means for doing so in a manner consistent with [Members'] respective needs and concerns at different levels of economic development", and that the different levels of economic development of Members could, depending on the circumstances, impact the availability of supply of a product in a given market.

Turning to India's claims on appeal, the Appellate Body disagreed that a lack of sufficient domestic manufacturing capacity would necessarily constitute a product shortage in a particular market, as India appeared to suggest. The Appellate Body understood India's arguments regarding the alleged risks inherent to the continued dependence on imported solar cells and modules to relate to the issue of supply availability, and agreed that such considerations could, in principle, be relevant in assessing whether a situation of "short supply" exists. Yet, while a consideration of potential risks of disruption in supply of a given product may inform the question of whether a situation of "short supply" exists, the Appellate Body noted the Panel's finding that India had not identified any actual disruptions in imports of solar cells and modules to date, and that SPDs in India had not experienced an actual disruption in the supply of affordable foreign solar cells and modules.

The Appellate Body further disagreed with India to the extent that it assumed, first, that all imports, in and of themselves, entail supply-related risks and, in that sense, are not available to meet demand; and, second, that such risks are intolerable when a sufficient level of domestic manufacturing capacity of solar cells and modules has not been met and that a situation of "short supply" exists, as long as domestic manufacturing capacity lies below this level. For the Appellate Body, in assessing whether products are available in a particular area or market, consideration must be given to all relevant factors, such that an analysis of whether a respondent has identified a situation of "short supply" is carried out on a case-by-case basis for each and every source of supply concerned, both foreign and domestic supply.

The Appellate Body further noted India's argument that the DCR measures should be seen in light of India's policy objectives of: (i) energy security and sustainable development; and (ii) ecologically sustainable growth, while addressing the challenges of climate change. The Appellate Body explained that, while policy considerations such as those referred to by India may inform the nature and extent of supply and demand, they do not relieve the responding party invoking the exception in Article XX(j) from the burden of demonstrating that the products at issue are "in general or local short supply".

India further contended that, under the Panel's interpretation of Article XX(j), measures taken to redress a situation of short supply can only take the form of export restrictions, and, hence, the Panel's interpretation of Article XX(j) could not be correct. The Appellate Body noted that, while the text of Article XX(j) does not contain express language referring to either import or export restraints, in contrast with Article XI:2(a) and Article XX(i) of the GATT 1994 which refer to export restrictions, a proper interpretation of the phrase "products in general or local short supply" cannot be based merely on textual differences or similarities between Article XX(j) and other provisions of the GATT 1994. The Appellate Body further disagreed with India that it follows from the Panel's interpretation of the phrase "products in general or local short supply" that export restrictions are the only type of measure that may be used to redress a situation of "short supply", or that Article XX(j) cannot cover measures taking the form of import restrictions. On this basis, the Appellate Body disagreed with India that "short supply" can be determined without regard to whether supply from all sources is sufficient to meet demand in the relevant market.

The Appellate Body turned next to consider India's claim that the Panel acted inconsistently with Article 11 of the DSU in addressing India's arguments and evidence regarding the notion of sufficient domestic manufacturing capacity. The Appellate Body noted that India's claim under Article 11 of the DSU hinged on India's reading of Article XX(j), and, in particular, India's contention that the existence of a situation of "short supply" within the meaning of Article XX(j) is to be determined by reference to whether there is sufficient domestic manufacturing of a given product. The Appellate Body observed that the fact that India did not agree with the Panel's interpretation and application of Article XX(j) did not mean that the Panel had committed an error amounting to a violation of Article 11 of the DSU. The Appellate Body also considered that India was recasting the arguments that it had made before the Panel under the guise of an Article 11 claim. The Appellate Body therefore rejected India's claim that the Panel acted inconsistently with its duties under Article 11 of the DSU.

Based on its analysis, the Appellate Body upheld the Panel's finding that solar cells and modules are not "products in general or local short supply" in India within the meaning of Article XX(j), and the Panel's ultimate finding that the DCR measures are not justified under Article XX(j) of the GATT 1994.

4.4.3 Article XX(d) of the GATT 1994

India claimed that the Panel erred in its interpretation and application of Article XX(d) of the GATT 1994 in finding that the international instruments identified by India do not have direct effect in India and are therefore not "laws or regulations" within the meaning of Article XX(d). India further argued that the Panel erred in finding that three of the domestic instruments identified by India, namely, the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change, do not constitute "laws or regulations"; and by consequently focusing its analysis on Section 3 of India's Electricity Act 2003, in isolation of these three other instruments.

In interpreting the meaning of "laws or regulations" in Article XX(d), the Appellate Body recalled its statement in *Mexico – Taxes on Soft Drinks* that the term refers to rules that form part of the domestic legal system of a WTO Member, including rules deriving from international agreements that have been incorporated into the domestic legal system of a WTO Member or have direct effect according to that WTO Member's legal system. The Appellate Body concluded that "laws or regulations" refer to rules of conduct and principles governing behaviour or practice that form part of the domestic legal system of a Member. Moreover, it

noted its observation in *Mexico – Taxes on Soft Drinks* that "laws or regulations" encompass rules adopted by a WTO Member's legislative or executive branches of government. Therefore, in ascertaining whether an alleged rule falls within the scope of "laws or regulations" for purposes of Article XX(d), it may be relevant to assess whether the rule at issue has been adopted or recognized by an authority that is competent to do so under the domestic legal system of the Member concerned.

Turning to the immediate context of the terms "laws or regulations", the Appellate Body noted that the text of Article XX(d) refers to "laws or regulations" in respect of which compliance can be secured. The Appellate Body explained that a measure can be said "to secure compliance" with "laws or regulations" when it seeks to secure observance of specific rules, even if the measure cannot be guaranteed to achieve such result with absolute certainty. The Appellate Body did not consider that the scope of "laws or regulations" is limited to instruments that are legally enforceable (including, e.g. before a court of law), or that are accompanied by penalties and sanctions to be applied in situations of non-compliance. Instead, the Appellate Body explained that, in assessing whether a rule falls within the scope of "laws or regulations" under Article XX(d), a panel should consider the degree to which an instrument containing the alleged rule is normative in nature, and that it is therefore relevant for a panel to examine whether a rule is legally enforceable, or whether it provides for penalties or sanctions to be applied in situations of non-compliance.

The Appellate Body recalled its observation in *Argentina – Financial Services* that the more precisely a respondent is able to identify specific rules, obligations, or requirements contained in the relevant "laws or regulations", the more likely it will be able to elucidate how and why the inconsistent measure secures compliance with such "laws or regulations". The Appellate Body added that a panel should also consider the degree of specificity or precision with which the relevant instrument lays down a particular rule of conduct or course of action within the domestic legal system of a Member, as opposed to simply providing a legal basis for action that may be consistent with certain objectives. The Appellate Body observed that, while in certain cases a respondent may be able to identify a specific provision of a single domestic instrument that contains a given rule, obligation, or requirement with which it seeks "to secure compliance", it is also possible to envisage situations where a respondent seeks to identify a given rule, obligation, or requirement by reference to, or deriving from, several elements or parts of one or more instruments under its domestic legal system. The Appellate Body saw nothing in the text of Article XX(d) that would exclude, from the scope of "laws or regulations", rules, obligations, or requirements that are not contained in a single domestic instrument or a provision thereof. For the Appellate Body, insofar as a respondent seeks to rely on a rule deriving from several instruments or parts thereof, it would still bear the burden of establishing that the instruments or the parts that it identifies actually set out the alleged rule. Moreover, the Appellate Body noted that, while the form and title given to an instrument may shed light on its legal status and content, a determination of whether an alleged rule falls within the scope of "laws or regulations" for purposes of Article XX(d) cannot be made simply by reference to the label given to an instrument under the domestic law of a Member, and should, instead, focus on the specific features and characteristics of the instruments at issue, including the alleged rules that they may contain.

The Appellate Body found therefore that, in determining whether a responding party has identified a rule that falls within the scope of "laws or regulations" under Article XX(d) of the GATT 1994, a panel should evaluate and give due consideration to all the characteristics of the relevant instrument(s) and should avoid focusing exclusively or unduly on any single characteristic. Specifically, the Appellate Body indicated that it may be relevant for a panel to consider, among others: (i) the degree of normativity of the instrument and the extent to which the instrument operates to set out a rule of conduct or course of action that is to be observed within the domestic legal system of a Member; (ii) the degree of specificity of the relevant rule; (iii) whether the rule is legally enforceable, including, e.g. before a court of law; (iv) whether the rule has been adopted or recognized by a competent authority possessing the necessary powers under the domestic legal system of a Member; (v) the form and title given to any instrument or instruments containing the rule under the domestic legal system of a Member; and (vi) the penalties or sanctions that may accompany the relevant

rule. The Appellate Body stressed that this assessment must always be carried out on a case-by-case basis, in light of the specific characteristics and features of the instruments at issue, the rule alleged to exist, and the domestic legal system of the Member concerned.

Turning to the Panel's assessment of the domestic instruments identified by India, the Appellate Body began by addressing India's contention that the Panel erred in its interpretation of the terms "laws or regulations" in Article XX(d) as referring to legally enforceable rules of conduct under the domestic legal system of a Member. The Appellate Body recalled that the determination of whether an instrument qualifies as a "law or regulation" within the meaning of Article XX(d) includes an assessment of whether the responding party has identified specific rules, obligations, or requirements that operate with a sufficient degree of normativity under its domestic legal system so as to set out a rule of conduct or course of action. According to the Appellate Body, although the legal enforceability of an instrument under the domestic legal system of a Member may be an important, even determinative, factor in demonstrating that such an instrument operates with a high degree of normativity within the domestic legal system of that Member, there may be other ways to demonstrate that an instrument operates with a sufficient degree of normativity. The Appellate Body therefore disagreed with the Panel to the extent that it may have suggested that the scope of "laws or regulations" under Article XX(d) is limited to legally enforceable rules of conduct under the domestic legal system of a Member.

Next, the Appellate Body considered India's argument that the Panel erred in its interpretation of the phrase "to secure compliance" to the extent that it suggested that this phrase limits the scope of Article XX(d) to measures that prevent actions that would be illegal under the laws or regulations at issue. Noting the Panel's statement that it saw no link or nexus between the DCR measures and Section 3 of the Electricity Act, the Appellate Body did not consider the Panel to have found that "to secure compliance" in Article XX(d) restricts the scope of that provision only to measures that prevent actions that would be illegal under the "laws or regulations" at issue.

Finally, the Appellate Body addressed India's argument that the Panel erred in its application of Article XX(d) by examining Section 3 of India's Electricity Act 2003 in isolation, although India had argued that the domestic instruments that it had identified, when considered together, mandate achieving ecologically sustainable growth, and that the DCR measures are required for securing compliance with this rule. The Appellate Body recalled that the Panel analysed each of the domestic instruments that India had identified to assess whether they qualify as "laws or regulations" within the meaning of Article XX(d). In the Appellate Body's view, given how India presented its case alleging the existence of the obligation of ensuring ecologically sustainable growth deriving from several instruments, the Panel could also have begun by assessing whether the passages and provisions of the domestic instruments that India had identified, when considered together, set out the rule alleged by India, and whether this qualified as a "law or regulation" under Article XX(d).

Looking at the passages and provisions of the National Electricity Policy, the National Electricity Plan, and the National Action Plan on Climate Change identified by India, the Appellate Body noted that there are differences in the substantive content of the passages and provisions of these three instruments, on the one hand, and the substance of the rule that India alleges they contain, on the other hand. Agreeing with the Panel that the text of these passages and provisions is hortatory, aspirational, declaratory, and at times solely descriptive, the Appellate Body considered that relevant texts of these instruments, whether seen in isolation or read together, do not set out, with a sufficient degree of normativity and specificity, a rule to ensure ecologically sustainable growth, as alleged by India. Turning to Section 3 of the Electricity Act 2003, the Appellate Body noted that the obligation set out in that provision, namely, to periodically prepare, publish, and review the National Electricity Policy, and the National Electricity Plan, is different in content from the rule the existence of which India seeks to establish, i.e. to ensure ecologically sustainable growth. Moreover, the Appellate Body observed that Section 3 sets out the legal basis and authority for the development of the National Electricity Policy and the National Electricity Plan. Thus, the Appellate Body

found the content of Section 3 to be different from the rule alleged to exist by India, and noted that Section 3 does not speak to the degree of normativity of the other domestic instruments identified by India. The Appellate Body therefore did not see how Section 3 of the Electricity Act 2003, would have the effect of adding to the degree of normativity of these otherwise "non-binding" domestic instruments. For these reasons, the Appellate Body disagreed with India that the passages and provisions of the domestic instruments identified by India, when read together, set out a rule to ensure ecologically sustainable growth while addressing India's energy security challenge, and ensuring compliance with its obligations relating to climate change, as alleged by India.

The Appellate Body next considered the Panel's assessment of the international instruments identified by India. India identified four international instruments: (a) the preamble of the WTO Agreement; (b) the United Nations Framework Convention on Climate Change; (c) the Rio Declaration on Environment and Development; and (d) the United Nations General Assembly Resolution adopting the Rio+20 Document: "The Future We Want", adopted by the UN General Assembly in 2012. Recalling that "laws or regulations" refer to rules that form part of the domestic legal system of a WTO Member, the Appellate Body noted that, in *Mexico – Taxes on Soft Drinks* it identified two ways by which rules deriving from international agreements may become part of the domestic legal system of a Member: Members may incorporate such rules, including through domestic legislative or executive acts intended to implement an international agreement; and certain international rules may have direct effect within the domestic legal systems of a Member without specific domestic action to implement such rules. The Appellate Body explained that, subject to the domestic legal system of a Member, there may well be other ways in which international instruments or rules can become part of that domestic legal system, and an assessment of whether a given international instrument or rule forms part of the domestic legal system of a Member must be carried out on a case-by-case basis, in light of the nature of the instrument or rule and the subject matter of the law at issue, and taking into account the functioning of the domestic legal system of the Member in question. The Appellate Body emphasized that, even if a particular international instrument can be said to form part of the domestic legal system of a Member, this does not, in and of itself, establish the existence of a rule, obligation, or requirement within the domestic legal system of the Member that falls within the scope of a "law or regulation" within the meaning of Article XX(d). This is so because an assessment of whether an instrument operates with a sufficient degree of normativity and specificity under the domestic legal system of a Member so as to set out a rule of conduct or course of action, and thereby qualifies as a "law or regulation", must be carried out on a case-by-case basis, taking into account all the other relevant factors relating to the instrument and the domestic legal system of the Member.

The Appellate Body then addressed India's contention that the international instruments it had identified have direct effect in India's legal system because the Indian legislature is not required to enact legislation with a view to incorporating international law into domestic law before the executive branch can take action to implement or execute international instruments. The Appellate Body noted India's submission that the very fact that the executive branch can take action to execute the international instruments or rules at issue (e.g. by enacting the DCR measures), when they are not in conflict with domestic legislation, shows that these international instruments may already form part of its domestic legal system and therefore may be acted upon by the executive branch. Nonetheless, the Appellate Body did not consider that the issue of which branch of the Central Government has the power to implement, execute, or otherwise give effect to an international instrument within the domestic legal system is, in and of itself, determinative of whether such an instrument falls within the scope of "laws or regulations" under Article XX(d). Instead, the Appellate Body explained that whether a rule set out in an international instrument forms part of the domestic legal system of a Member and falls within the scope of "laws or regulations" under Article XX(d) has to be determined in light of all the relevant factors in a given case, including the characteristics of the instrument at issue and the features of the domestic legal system of the Member concerned.

The Appellate Body next considered India's contention that the "direct effect" of the identified international instruments under its domestic legal system is established by the fact that the principles of sustainable

development under international environmental law have been recognized by the Supreme Court of India to be part of the environmental and developmental governance in India. The Appellate Body was of the view that the decisions and observations by the Supreme Court of India identified by India may serve to highlight the relevance of the international instruments and rules for purposes of interpreting provisions of India's domestic law, as well as for guiding the exercise of the decision-making power of the executive branch of the Central Government. However, these Supreme Court decisions and observations were not sufficient to demonstrate that the international instruments identified by India are rules that form part of its domestic legal system and fall within the scope of "laws or regulations" under Article XX(d). Insofar as India relied on this material to reinforce its point that the executive branch, by enacting the DCR measures, was merely executing the international instruments identified, the Appellate Body recalled that the mere fact that the executive branch takes actions in pursuance of the international instruments at issue is not sufficient to demonstrate that such international instruments fall within the scope of "laws or regulations" under Article XX(d).The Appellate Body therefore upheld the Panel's finding that India failed to demonstrate that the international instruments identified by it fall within the scope of "laws or regulations" under Article XX(d) of the GATT 1994 in the present dispute.

For these reasons, the Appellate Body upheld the Panel's finding that India had not demonstrated that the DCR measures are measures to secure compliance with laws or regulations which are not inconsistent with the provisions of the GATT 1994, and the Panel's ultimate finding that the DCR measures are not justified under Article XX(d) of the GATT 1994.

4.4.4 "Essentiality" and "necessity" under Articles XX(j) and XX(d), and the chapeau of Article XX of the GATT 1994

The Appellate Body recalled that it had upheld the Panel's finding that solar cells and modules are not "products in local or general short supply" in India, within the meaning of Article XX(j), as well as the Panel's finding that India did not demonstrate that the DCR measures are measures "to secure compliance with laws or regulations which are not inconsistent with the provisions of [the GATT 1994]", as well as the Panel's conclusion that the DCR measures are not justified under either Article XX(j) or Article XX(d) of the GATT 1994. Given these findings, the Appellate Body did not consider it necessary to examine further India's claims on appeal pertaining to the Panel's limited review and analysis of whether the DCR measures are "essential" to the acquisition of solar cells and modules for the purpose of Article XX(j), or whether they are "necessary" within the meaning of Article XX(d). Nor did the Appellate Body consider it necessary to examine India's arguments as they relate to the requirements of the chapeau of Article XX of the GATT 1994.

4.4.5 Separate opinion by one Appellate Body member

One Appellate Body member provided a separate opinion offering remarks on how he viewed the Appellate Body's adjudicatory function, as well as its limits, both in the context of the present appeal and in other appeals.

The Appellate Body member concerned noted that the DSU describes the Appellate Body's function in broad terms: to "hear appeals from panel cases". Referring to Article 17.12 of the DSU, he added that the Appellate Body is called upon to review any aspect of a panel's analysis, including a panel's legal reasoning, provided that it has been properly raised on appeal.

The Appellate Body member in question recalled that, in deciding how to address each of the issues raised by the parties, the Appellate Body is guided by certain overarching principles. First, the Appellate Body, as a part of the WTO dispute settlement mechanism, contributes to the objectives of the prompt settlement of a dispute or positive solution to a dispute, which are enunciated in the DSU. Second, there is the need to safeguard the due process rights of the parties, for example, in cases where a particular issue has not been sufficiently

explored before the panel. This places an important constraint on the Appellate Body's ability to rule on particular issues raised on appeal. Against this background, the Appellate Body member concerned added that the decision of the Appellate Body on how to address each of the issues on appeal should be understood as an extension of its duty to properly exercise its adjudicative function. Given the express language contained in Article 17.12 of the DSU, i.e. "shall address", the Appellate Body is not required to provide reasons as to why it adjudicates a particular issue properly raised by the parties on appeal. However, when the Appellate Body considers, for example, that further findings on issues appealed are not necessary in order to facilitate the prompt settlement and effective resolution of the dispute, it will explain this in its report.

Turning to Article 3.2 of the DSU, the Appellate Body member recalled that there is nothing in that provision that would encourage the Appellate Body to make law by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute. At the same time, WTO Members have a systemic interest in receiving an Appellate Body report that properly clarifies the existing provisions of the covered agreements. Such a report by the Appellate Body is not only required under the DSU, it is also important in that it allows the DSB to make sufficiently precise recommendations and rulings in order to ensure effective resolution of disputes to the benefit of all Members.

4.5 Appellate Body Report, *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea*, WT/DS464/AB/R

This dispute concerned the definitive anti-dumping and countervailing duties applied by the United States as a result of anti-dumping and countervailing duty investigations conducted by the United States Department of Commerce (USDOC) concerning imports of large residential washers (LRWs) from Korea.

Korea challenged certain aspects of the USDOC's approach to the weighted average-to-transaction (W-T) comparison methodology provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Specifically, Korea challenged the so-called "Nails II methodology" used in the anti-dumping investigation conducted by the USDOC concerning imports of LRWs from Korea (*Washers* anti-dumping investigation). The Nails II methodology consisted of a two-stage test. First, following an allegation of targeted dumping, the standard deviation test aimed at establishing whether there were export prices differing among different purchasers, regions, or time periods. Second, the gap test aimed at establishing whether observed price differences were significant. The USDOC then evaluated the difference between the weighted average dumping margin calculated using the weighted average-to-weighted average (W-W) comparison methodology (without zeroing) and that calculated using the weighted average-to-transaction (W-T) comparison methodology (with zeroing). In case of a meaningful difference, the W-T comparison methodology (with zeroing) was applied to all export transactions.

In addition, Korea challenged the so-called "Differential Pricing Methodology" (DPM) that replaced the Nails II methodology as of March 2013: (i) "as such"; (ii) "as applied" in the first administrative review of the anti-dumping order imposing anti-dumping duties on LRWs from Korea; and (iii) the ongoing and future application of the DPM in connection with this investigation. Under the DPM, the "Cohen's *d* test" first evaluates the extent to which the prices to a particular purchaser, region, or time period differ significantly from other prices. Second, the "ratio test" assesses the extent of the significant price differences for all sales as measured by the Cohen's *d* test. Third, the "meaningful difference" test examines whether using the W-W comparison methodology can appropriately account for these price differences. If the first two tests are met, using the W-W methodology cannot appropriately account for the differences, and the result of the ratio test is above 66%, the W-T comparison methodology (with zeroing) is applied to all export transactions. Where the result of the ratio test is between 33% and 66%, the W-T comparison methodology (with zeroing) is applied to those sales that pass the Cohen's *d* test and the W-W comparison methodology is applied to the remaining sales. Where the result of the ratio test is below 33%, the USDOC does not apply the W-T comparison methodology.

Korea also challenged the USDOC's use of zeroing under the W-T comparison methodology, both "as such" and "as applied" in the *Washers* anti-dumping investigation. This challenge was raised in relation to the USDOC's application of the W-T comparison methodology with zeroing to all transactions in the *Washers* anti-dumping investigation and the USDOC's use of zeroing in respect of those sales to which it applies the W-T comparison methodology under the DPM.

With regard to the United States' countervailing measures, Korea challenged under the SCM Agreement the USDOC's determinations that two tax credit programmes were specific. Moreover, Korea raised claims under the SCM Agreement and the GATT 1994 challenging the manner in which the USDOC calculated the *ad valorem* subsidy rate for Samsung Electronics Co., Ltd (Samsung) under those programmes.

With regard to the *Washers* anti-dumping investigation, the Panel found that the United States acted inconsistently with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement by: (i) applying the W-T comparison methodology to transactions other than those constituting the patterns of transactions that the USDOC had determined to exist; and (ii) merely focusing on the difference between the margin of dumping calculated using the W-W comparison methodology and the margin of dumping calculated using the W-T comparison methodology, and by failing to consider whether the factual circumstances surrounding the relevant price differences were suggestive of something other than targeted dumping. In addition, the Panel found that Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 by determining the existence of a pattern of export prices which differ significantly among purchasers, regions or time periods on the basis of purely quantitative criteria, without any qualitative assessment of the reasons for the relevant price differences and by failing to explain why the relevant price differences could not be taken into account appropriately by the transaction-to-transaction (T-T) comparison methodology.

With regard to the DPM, the Panel found that the DPM is inconsistent with the second sentence of Article 2.4.2 because: (i) it applies the W-T comparison methodology to non-pattern transactions when the aggregated value of sales to purchasers, regions, and time periods that pass the "Cohen's *d* test" accounts for 66% or more of the value of total sales; (ii) in applying the "meaningful difference test", the DPM focuses on the difference between the margin of dumping calculated using the W-W comparison methodology and the margin of dumping calculated using the W-T comparison methodology or the mixed comparison methodology; and (iii) by aggregating random and unrelated price variations, the DPM does not properly establish a pattern of export prices which differ significantly among different purchasers, regions or time periods. The Panel also found that Korea had failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 for several other reasons.

With respect to zeroing, the Panel found that the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Articles 2.4.2 and 2.4 of the Anti-Dumping Agreement and "as applied" in the *Washers* anti-dumping investigation. Furthermore, the Panel found that the United States' use of zeroing when applying the W-T comparison methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

Finally, with respect to the countervailing duties, the Panel found the USDOC's original and remand determinations that the RSTA Article 10(1)(3) tax credit programme is *de facto* specific because Samsung received subsidies under that programme in disproportionately large amounts to be inconsistent with Article 2.1(c) of the SCM Agreement. Moreover the Panel found the USDOC's original and remand determinations that the RSTA Article 10(1)(3) tax credit programme is *de facto* specific because Samsung received subsidies under that programme in disproportionately large amounts to be inconsistent with Article 2.1(c) of the SCM Agreement. In addition, the Panel found that Korea failed to establish that: (i) the USDOC's determination of regional specificity in respect of the RSTA Article 26 tax credit programme is inconsistent with Article 2.2 of the SCM Agreement; (ii) the USDOC's failure to tie the subsidies claimed

by Samsung under the RSTA Article 10(1)(3) and Article 26 tax credit programmes to Samsung's digital appliance products (including LRWs) is inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994; and (iii) the USDOC acted inconsistently with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994 by limiting the denominator to the sales value of products produced by Samsung in Korea when allocating the benefit conferred to Samsung under the RSTA Article 10(1)(3) tax credit programme.

4.5.1 Claims under the Anti-Dumping Agreement and related claims under the GATT 1994

4.5.1.1 The relevant "pattern" for purposes of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

On appeal, the United States claimed that the Panel erred in its interpretation of the relevant pattern under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement because it concluded that the relevant pattern comprises only low-priced export transactions to each particular target (a purchaser, or a region, or a time period), while other higher-priced export transactions to other purchasers, regions, or time periods are non-pattern transactions. In particular, the United States submitted that a pattern includes both lower and higher export prices that differ significantly from each other and that the relevant pattern is one that would transcend multiple purchasers, regions, or time periods. The United States also argued that the focus does not need to be on export sales that are priced lower than other export sales and that identifying a pattern does not require an assessment of how export prices relate to normal value.

The Appellate Body, first, considered that, in the context of the second sentence of Article 2.4.2, a pattern can be defined as a regular and intelligible form or sequence discernible in certain actions or situations. This means that there must be regularity to the sequence of export prices which differ significantly and this sequence must be capable of being understood. The Appellate Body hence excluded the possibility of a pattern merely reflecting random price variation.

The Appellate Body considered that, whereas an investigating authority would analyse the prices of all export sales made by the relevant exporter or producer to identify a pattern, the distinguishing factor that allows that authority to discern which export prices form part of the pattern would be that the prices in the pattern differ significantly from the prices not in the pattern. As the Appellate Body noted, its interpretation: (i) accords with the ordinary meaning of the word pattern; and (ii) gives meaning and effect to the second sentence of Article 2.4.2, whose function is to allow investigating authorities to identify and address targeted dumping.

On this basis, the Appellate Body agreed with the Panel that, under the second sentence of Article 2.4.2, a sub-set of export transactions is set aside for specific consideration and that once prices are identified as being different from other prices, they constitute the relevant pattern. Although the Appellate Body recognized that a pattern may be identified in a variety of factual circumstances, it considered, in light of the function of the second sentence of Article 2.4.2 to address targeted dumping and in light of the fact that the Anti-Dumping Agreement is concerned with injurious dumping, that the relevant pattern for the purposes of the second sentence of Article 2.4.2 comprises prices that are significantly lower than other export prices.

The Appellate Body turned next to the issue of whether a pattern can be found to exist across purchasers, regions, or time periods, as argued by the United States. The Appellate Body recalled that, pursuant to the second sentence of Article 2.4.2, a pattern involves export prices which differ significantly in relation to specified sub-groups, namely, among different purchasers, regions or time periods. The Appellate Body agreed with the Panel that the word "among" refers to something in relation to the rest of the group it belongs to, and, as such, serves to specify the dimensions in relation to which export prices which differ

significantly may be discerned. According to the Appellate Body, this suggests that each category should be considered on its own. As such, a pattern of prices which differ significantly among different purchasers must be found in the price variation within purchasers, as between one or more particular purchasers and the other purchasers (with the same applying to regions and time periods, respectively).

Consistent with the Appellate Body's statement in *EC – Bed Linen* that there are three kinds of targeted dumping, namely dumping that is targeted to certain purchasers, targeted to certain regions, or targeted to certain time periods, the Appellate Body concluded that the words "or" and "among", as used in the phrase "among different purchasers, regions or time periods", cannot be interpreted to mean that the three categories can be considered cumulatively to find one single pattern. Accordingly, in order to find a pattern, the export prices to one or more particular purchasers must differ significantly from the prices to the other purchasers, or the export prices in one or more particular regions must differ significantly from the prices in the other regions, or the export prices during one or more particular time periods must differ significantly from the prices during the other time periods. The Appellate Body clarified that its interpretation does not exclude the possibility that the same exporter or producer could be practicing more than one of the three types of targeted dumping in parallel and that a pattern of significantly differing prices to a certain category may overlap with a pattern of significantly differing prices to another category (e.g. the same transactions could target certain purchasers as well as certain regions).

Based on the foregoing, the Appellate Body considered that a pattern for the purposes of the second sentence of Article 2.4.2 comprises all the export prices to one or more particular purchasers which differ significantly from the export prices to the other purchasers because they are significantly lower than those other prices, or all the export prices in one or more particular regions which differ significantly from the export prices in the other regions because they are significantly lower than those other prices, or all the export prices during one or more particular time periods which differ significantly from the export prices during the other time periods because they are significantly lower than those other prices. The Appellate Body thus upheld the Panel's conclusions regarding the relevant pattern.

4.5.1.2 Whether the Panel erred in finding that "the DPM is inconsistent 'as such' with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish 'a pattern of export prices which differ significantly among different purchasers, regions or time periods'"

The Appellate Body then turned to the United States' claim that the Panel erred in finding that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish a pattern of export prices which differ significantly among different purchasers, regions or time periods.

The Appellate Body recalled that the DPM aggregates prices found to differ among different purchasers, among different regions, and among different time periods as well as aggregates prices that are higher and lower than other export prices within a given category for the purposes of identifying a single pattern. The Appellate Body further recalled its earlier conclusions regarding the pattern, namely, that a single pattern cannot be found to exist across purchasers, regions, and time periods, and that it cannot be identified by considering prices that are higher than other prices. On this basis, the Appellate Body upheld the Panel's finding that the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 because, by aggregating random and unrelated price variations, it does not properly establish a pattern of export prices which differ significantly among different purchasers, regions or time periods.

4.5.1.3 Whether the Panel erred in finding that the W-T comparison methodology should only be applied to "pattern transactions"

The United States appealed the Panel's findings regarding the scope of application of the W-T comparison methodology. The United States challenged the Panel's finding that the W-T comparison methodology should only be applied to the transactions constituting the pattern. Rather, the United States considered that, once the conditions for its use are met, this methodology can be applied to all transactions. In particular, recalling that the second sentence of Article 2.4.2 of the Anti-Dumping Agreement refers to "individual export transactions", the United States contended that the word "individual" merely suggests that prices of single, separate export transactions may be compared to a normal value established on a weighted average basis.

The Appellate Body recalled that the second sentence of Article 2.4.2 refers to "[a] normal value established on a weighted average basis [that] may be compared to prices of individual export transactions". The Appellate Body considered that the term "individual export transactions" draws meaning from the immediate context in which it appears. It observed that the second sentence of Article 2.4.2 requires that the investigating authority provide an explanation as to why such differences cannot be taken into account appropriately by the use of a W-W or T-T comparison, whereby the term "such differences" refers back to the export prices which differ significantly forming part of the pattern. On this basis, the Appellate Body considered that recourse to the W-T comparison methodology is permissible only to the extent that it is necessary to remedy the inability of the normally applicable comparison methodologies to take into account appropriately the identified pattern. Furthermore, under the first sentence of Article 2.4.2, the consideration is in respect of all export transactions, whereas the emphasis in the second sentence of Article 2.4.2 is on a pattern. Finally, the Appellate Body noted that the structure of Article 2.4.2, which distinguishes the normally applicable W-W and T-T comparison methodologies from the exceptional W-T comparison methodology, further indicates that the W-T comparison methodology should only be applied to those transactions justifying its use, namely, the pattern transactions.

The Appellate Body observed that this interpretation: (i) gives meaning and effect to the second sentence of Article 2.4.2, whose function is to allow investigating authorities to identify and address targeted dumping; (ii) accords with the object and purpose of the Anti-Dumping Agreement, which allows Members to take anti-dumping measures to counteract injurious dumping and imposes disciplines on the use of such anti-dumping measures; and (iii) is in line with the Appellate Body's observations in *US – Zeroing (Japan)*. In that case the Appellate Body read the phrase "individual export transactions" as referring to the transactions that fall within the relevant pricing pattern. Thus, it considered that this universe of export transactions would necessarily be more limited than the universe of export transactions to which the symmetrical comparison methodologies in the first sentence of Article 2.4.2 would apply.

Based on the foregoing, the Appellate Body upheld the Panel's finding that the W-T comparison methodology should only be applied to transactions that constitute the pattern of export prices which differ significantly among different purchasers, regions, or time periods. It further upheld the Panel's consequential findings: (i) that the United States acted inconsistently with the second sentence of Article 2.4.2, by applying the W-T comparison methodology to transactions other than those constituting the patterns of transactions that the USDOC had determined to exist in the *Washers* anti-dumping investigation; and (ii) that the DPM is inconsistent "as such" with Article 2.4.2, because it applies the W-T comparison methodology to non-pattern transactions when the aggregated value of sales to purchasers, regions, and time periods that pass the Cohen's d test accounts for 66% or more of the value of total sales.

4.5.1.4 The extent to which price differences are to be assessed quantitatively, qualitatively, and in light of the "reasons" for these price differences

Korea claimed that the Panel erred in finding that a pattern of export prices which differ significantly can be established solely based on quantitative differences, regardless of the factual context of the prices and the

differences. Korea also argued that the Panel mischaracterized its claim as if it were solely that the authority must state the reasons why prices differ, rather than more generally assess qualitatively the price differences at issue.

The Appellate Body first addressed the question of whether the Panel mischaracterized Korea's claim. The Appellate Body considered that Korea's claim, as set out in its panel request, was not limited to claiming that the investigating authority must consider the reasons for the price differences to find a pattern. The Appellate Body understood the Panel to have concluded that both the Nails II methodology and the DPM involve a purely quantitative analysis, which the Panel did not consider to be inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. As such, the Appellate Body understood the Panel not to have limited its analysis to the question of whether the investigating authority must consider the reasons for the price differences, but to have addressed more generally the issue of whether a qualitative analysis needs to be conducted. The Appellate Body thus found that the Panel sufficiently addressed Korea's claims and arguments regarding the need for a qualitative analysis, and not only whether the USDOC would have needed to consider the reasons for the price differences.

Next, the Appellate Body considered whether the Panel erred in finding that a pattern of export prices which differ significantly can be established on the basis of purely quantitative criteria. The Appellate Body was of the view that the word "significant" can be defined as "important, notable or consequential" and that it has both quantitative and qualitative dimensions. Accordingly, assessing the extent of the differences in export prices to establish whether those export prices differ significantly for the purposes of the second sentence of Article 2.4.2 entails both quantitative and qualitative assessments. The Appellate Body considered that, as part of the qualitative assessment, circumstances pertaining, *inter alia*, to the nature of the product or the markets may be relevant for the assessment of whether differences are significant in the circumstances of a particular case. Therefore, the Appellate Body disagreed with the Panel to the extent the Panel considered that an investigating authority may properly find that certain prices differ significantly within the meaning of the second sentence of Article 2.4.2 if they are notably greater in purely numerical terms.

The Appellate Body, however, took the view that the words "significantly" and "pattern" in the second sentence of Article 2.4.2 do not imply an examination into the cause of (or reasons for) the differences in prices. As the Appellate Body recalled, the second sentence of Article 2.4.2 requires an investigating authority to find a pattern of export prices which differ significantly among different purchasers, regions or time periods. The text of this provision does not impose an additional requirement to ascertain whether the significant differences found to exist are unconnected with targeted dumping, nor does it imply an examination of the motivation for, or intent behind, the differences in prices.

Based on the foregoing, the Appellate Body found that the requirement to identify prices which differ significantly means that the investigating authority is required to assess quantitatively and qualitatively the price differences at issue. This assessment may require the investigating authority to consider certain objective market factors, such as circumstances regarding the nature of the product under consideration, the industry at issue, the market structure, or the intensity of competition in the markets at issue, depending on the case at hand. The Appellate Body agreed, however, with the Panel that an investigating authority is not required to consider the cause of (or reasons for) the price differences to establish the existence of a pattern under the second sentence of Article 2.4.2.

Consequently, the Appellate Body reversed the Panel's finding in respect of the *Washers* anti-dumping investigation to the extent that the Panel found that a pattern of export prices which differ significantly among purchasers, regions or time periods can be established on the basis of purely quantitative criteria. The Appellate Body also reversed the Panel's finding in respect of the DPM to the extent that the Panel found that the existence of a pattern of export prices which differ significantly among purchasers, regions or time periods can be established on the basis of purely quantitative criteria.

4.5.1.5 Whether an explanation needs to be provided with respect to both the W-W and the T-T comparison methodologies

The Appellate Body then turned to consider Korea's claims regarding the requirement in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement that the investigating authority provide an explanation as to why such price differences cannot be taken into account appropriately by the use of a W-W or T-T comparison. Korea claimed that an explanation has to be provided with respect to both the W-W and the T-T comparison methodologies that are normally used when the application of the exceptional W-T comparison methodology is considered under the second sentence of Article 2.4.2.

Looking, first, at the text of the explanation requirement in the second sentence of Article 2.4.2, the Appellate Body observed that, depending on the context in which it is used, the conjunction "or" can be exclusive or inclusive. It further observed that, if the second sentence of Article 2.4.2 were to include the conjunction "and" instead of the conjunction "or", this would suggest that the authority is required to use the W-W and the T-T comparison methodologies in combination. Using the conjunction "and" instead of the conjunction "or" was, therefore, not viable to indicate that both methodologies should be addressed in the investigating authority's explanation. Turning to the indefinite article "a" and the singular form of the word "comparison" in this provision, the Appellate Body disagreed with the Panel that these suggest that an explanation with regard to only one of the two normally applicable comparison methodologies comports with the second sentence of Article 2.4.2.

Second, the Appellate Body considered that interpreting the second sentence of Article 2.4.2 as requiring that an explanation be provided with respect to both the W-W and the T-T comparison methodologies gives proper recognition to the text of that provision and to the distinction between the normally applicable methodologies in the first sentence of Article 2.4.2 and the exceptional W-T comparison methodology in the second sentence. The Appellate Body specified that, although the W-W and T-T comparison methodologies are likely to yield substantially equivalent results, the possibility that, in a particular case, they might yield different results and might impact differently the possible use of the W-T comparison methodology, should not be excluded.

Finally, the Appellate Body disagreed with the Panel's reasoning that the investigating authority's initial discretion of choosing between the W-W and T-T comparison methodologies under the first sentence of Article 2.4.2 would be undermined by requiring that an explanation be provided with respect to both these methodologies. The Appellate Body acknowledged that an investigating authority has a choice between the W-W and T-T comparison methodologies under the first sentence of Article 2.4.2. However, the Appellate Body considered that this choice is unrelated to the requirement to explain why these two methodologies are not appropriate to unmask targeted dumping such that the investigating authority contemplates the application of the W-T comparison methodology.

For these reasons, the Appellate Body considered that an investigating authority has to explain why both the W-W and the T-T comparison methodologies cannot take into account appropriately the differences in export prices that form the pattern. The Appellate Body added that, in circumstances where the W-W and T-T comparison methodologies would yield substantially equivalent results and where an explanation has been provided with respect to one of these two methodologies, the explanation to be included with respect to the other may not need to be as elaborate.

Accordingly, the Appellate Body reversed the Panel's finding that Korea failed to establish that the United States acted inconsistently with the second sentence of Article 2.4.2 in the Washers anti-dumping investigation by failing to explain why the relevant price differences could not be taken into account appropriately by the T-T comparison methodology. The Appellate Body also reversed the Panel's finding that Korea failed to establish that the DPM is inconsistent with the second sentence of Article 2.4.2 when, having concluded that the W-W comparison methodology cannot appropriately take into account the observed pattern of significantly different prices, it does not also consider whether the relevant price differences could be taken into account appropriately by the T-T comparison methodology.

4.5.1.6 Systemic disregarding

4.5.1.6.1 Korea's other appeal under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement

The Appellate Body began by recalling that the USDOC applies a mixed comparison methodology as part of the DPM. In cases where the value of the transactions that pass the Cohen's *d* test is between 33% and 66% of the value of the total export transactions, the W-T comparison methodology with zeroing is applied to these transactions. For the remaining transactions, i.e. the transactions that do not pass the Cohen's d test, the W-W comparison methodology is used. The Appellate Body noted that, in the first administrative review of the *Washers* anti-dumping order, the issue of "systemic disregarding" arose when, in aggregating the comparison results, the USDOC did not permit the overall negative comparison result arising from the application of the W-W comparison methodology to offset the evidence of dumping from the application of the W-T comparison methodology.

The Panel rejected Korea's claim that the USDOC's use of systemic disregarding under the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. On appeal, Korea asserted that the Panel's approach essentially created two margins of dumping, one for the subset to which the W-T comparison methodology is applied, and another for the subset using the W-W comparison methodology. Korea argued that, although the Panel correctly found that zeroing could not apply to either of these two subsets, the Panel allowed the functional equivalent of zeroing by permitting the combining of the two subsets while refusing offsets from the subset based on the normal comparison methodologies when determining the overall dumping and margin of dumping. Korea claimed that the Panel's reasoning had no basis in the text or context of Article 2.4.2.

The Appellate Body recalled that Article 2.4.2 contains two sentences, which set out the methodologies that investigating authorities may use to establish margins of dumping. It recalled its prior jurisprudence that the concepts of "dumping" and "margins of dumping" are the same throughout the Anti-Dumping Agreement and that the definition of "dumping" in Article 2.1 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994 are central to the interpretation of other provisions of the Anti-Dumping Agreement. The Appellate Body further recalled that the Anti-Dumping Agreement prescribes that dumping determinations are to be made in respect of each exporter or foreign producer examined because dumping is the result of the pricing behaviour of individual exporters or foreign producers.

In respect of the W-W comparison methodology, the Appellate Body recalled its findings in *EC – Bed Linen* that the word "all" in the phrase "all comparable export transactions" in the first sentence of Article 2.4.2 makes it clear that Members may only compare those export transactions which are comparable, but they must compare all such transactions. Moreover, it recalled the findings in *US – Softwood Lumber V*, that, although an investigating authority may undertake multiple averaging to establish margins of dumping for a product under investigation, the results of the multiple comparisons at the sub-group level are not margins of dumping within the meaning of Article 2.4.2. Thus, it is only on the basis of aggregating all intermediate values that an investigating authority can establish margins of dumping for the product under investigation. As regards the T-T comparison methodology, the Appellate Body noted that the absence of the phrase "all comparable export transactions" in the latter part of the first sentence of Article 2.4.2 does not suggest that an investigating authority is free to disregard certain export transactions from the applicable universe of export transactions when establishing margins of dumping. It also recalled the considerations in *US – Zeroing (Japan)* that the phrase "all comparable export transactions" is not pertinent for this methodology because under the T-T comparison methodology, all export transactions are taken into account on an individual basis and matched with the most appropriate transactions in the domestic market.

Accordingly, in the Appellate Body's view, an investigating authority is not allowed to disregard, in establishing dumping and margins of dumping under the normally applicable W-W or T-T comparison methodologies,

any transactions that make up the universe of export transactions to be examined thereunder. In other words, all the export transactions of the like product by a given exporter or foreign producer have to be taken into account.

The Appellate Body turned next to the W-T comparison methodology set forth in the second sentence of Article 2.4.2. It noted that this methodology envisaged an asymmetrical comparison between a normal value established on a weighted average basis and prices of individual export transactions. Recalling its earlier findings that these individual export transactions refer to the pattern transactions, the Appellate Body next turned to consider the question of how dumping and margins of dumping are to be established under the second sentence of Article 2.4.2.

The Appellate Body recalled the Panel's statement, referring to the Appellate Body report in *US – Zeroing (Japan)*, that there appears to be some tension between the Appellate Body's understanding of the limited scope of application of the W-T comparison methodology and its reference to the fundamental disciplines that "dumping" and "margins of dumping" pertain to an exporter or foreign producer, and to the product as a whole, taking into account all export transactions of the exporter or foreign producer concerned. The Appellate Body observed that the findings in *US – Zeroing (Japan)* referred to by the Panel concerned the first sentence of Article 2.4.2 and should be read in the context of the Appellate Body's findings regarding model zeroing.

The Appellate Body further noted that the establishment of dumping and margins of dumping, for the product under investigation as a whole and by taking into account all export transactions of a given exporter or foreign producer, is to be carried out in respect of the applicable universe of export transactions for each of the comparison methodologies set forth in Article 2.4.2. Recalling its findings in *US – Zeroing (Japan)* and *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body found that, under the W-T comparison methodology set forth in the second sentence of Article 2.4.2, the applicable universe of export transactions is more limited than under the first sentence. The Appellate Body, thus, concluded that, not only is the application of the W-T comparison methodology limited to pattern transactions, but also the second sentence provides for establishing dumping and margins of dumping on the basis of the limited universe of export transactions to which the W-T comparison methodology applies – i.e. the pattern transactions.

The Appellate Body was also of the view that the function of the second sentence of Article 2.4.2 supported a reading of that provision as providing for the establishment of margins of dumping on the basis of pattern transactions. It recalled that the function of the second sentence is to allow an investigating authority to identify and address targeted dumping. According to the Appellate Body, it is only certain export transactions – those that constitute the pattern under the second sentence by differing significantly from the remaining export transactions of an exporter or foreign producer – that are aimed at or targeted to a purchaser, region, or time period. In light of this function, the second sentence permits an investigating authority to establish margins of dumping through the application of the W-T comparison methodology exclusively to pattern transactions. The Appellate Body observed that the second sentence says nothing about including transactions that are not part of the pattern (i.e. the non-pattern transactions) in the comparison process required to establish margins of dumping. According to the Appellate Body, if an investigating authority were required to conduct comparisons for non-pattern transactions, by applying one of the two normally applicable comparison methodologies, and then aggregate the result of this comparison with the result of the W-T comparison methodology applied to pattern transactions, the targeted dumping found in respect of pattern transactions would be re-masked. This would occur when the comparison results arising from non-pattern transactions yield an overall negative comparison result.

Moreover, the Appellate Body found no basis in the second sentence of Article 2.4.2 to conclude, as Korea asserted, that the function of the second sentence is to allow an investigating authority to undertake a more careful and granular examination of individual export prices. The Appellate Body considered that Korea's

proposed interpretation was no different from what is already contemplated under the T-T comparison methodology. Accordingly, the Appellate Body found that the Panel did not err in characterizing the function of the second sentence of Article 2.4.2 as addressing or unmasking targeted dumping.

The Appellate Body considered next the question of how to calculate the margin of dumping as a percentage of the exports of a given exporter or foreign producer. According to the Appellate Body, while the numerator should comprise only pattern transactions to the exclusion of non-pattern transactions, the denominator must reflect the universe of all export transactions of a given exporter or foreign producer and, thus, should comprise the value of all the sales of a given exporter or foreign producer of the like product. It recalled that Article 6.10 of the Anti-Dumping Agreement provides for the determination of an individual margin of dumping for each known exporter or producer concerned of the product under investigation. The Appellate Body stated that in order to address targeted dumping, the margin of dumping under the second sentence of Article 2.4.2 is to be determined for each exporter or producer, and not just for the targeted sales by that exporter or producer. The Appellate Body found that, on the one hand, the existence of a "pattern" within the meaning of the second sentence of Article 2.4.2, and thus targeting by exporters or foreign producers, justifies determining dumping on the basis of the W-T comparison methodology applied to pattern transactions, while excluding from consideration non-pattern transactions. On the other hand, this amount of dumping based on the targeted sales must be divided by all the export sales of a given exporter or foreign producer in order to determine the margin of dumping and the corresponding anti-dumping duty for that exporter or foreign producer.

The Appellate Body turned next to Korea's challenge of the systemic disregarding of non-pattern transactions by the USDOC in the establishment of margins of dumping under the DPM. The Appellate Body noted that this argument was premised on the assumption that the second sentence of Article 2.4.2 permits the combining of the W-T comparison methodology with the W-W or T-T comparison methodology. The Appellate Body recalled its earlier findings in this dispute that the second sentence of Article 2.4.2 permits the establishment of margins of dumping on the basis of the W-T comparison methodology applied to pattern transactions, while excluding from consideration non-pattern transactions. It further observed that, although the second sentence of Article 2.4.2 mentions the W-W and T-T comparison methodologies, this reference appears in the context of the requirement to explain why neither of these symmetrical comparison methodologies is capable of taking into account the "export prices which differ significantly". The second sentence, however, does not provide for the application of the W-W and T-T comparison methodologies anew. The Appellate Body, thus, concluded that there is nothing in the text of the second sentence read in the context of the entire Article 2.4.2 that supports a reading of Article 2.4.2 as permitting the application of the W-W and T-T comparison methodologies to a reduced universe of export transactions, whether these are pattern transactions or non-pattern transactions.

Moreover, the Appellate Body reasoned that, conducting a separate comparison under one of the two symmetrical comparison methodologies (i.e. W-W or T-T) for non-pattern transactions would undermine the function of the second sentence of Article 2.4.2 to address targeted dumping. According to the Appellate Body, it is on the basis of the pattern transactions that are targeted to purchasers, regions, or time periods, that margins of dumping are established under the second sentence. In the Appellate Body's view, to aggregate the results of a symmetrical comparison methodology applied to non-pattern transactions may either mask the targeted dumping (if the overall comparison result is negative) or inflate the margin of dumping (if the overall comparison result is positive) in a manner that is not provided for in the second sentence and that would compromise its function of effectively addressing targeted dumping.

The Appellate Body concluded that the second sentence of Article 2.4.2 does not allow the combining of the normal W-W or T-T comparison methodology with the exceptional W-T comparison methodology. The Appellate Body explained that this provision does not provide for conducting separate comparisons for transactions within the "pattern" under the W-T comparison methodology and for those outside the pattern under the W-W or T-T comparison methodology. The second sentence neither contemplates the

exclusion from consideration of the result of the latter, if it yields an overall negative comparison result, nor its aggregation with the results of the W-T comparison, if it yields an overall positive comparison result. Accordingly, the Appellate Body found that this provision does not envisage systemic disregarding as described by the Panel.

The Panel found that the exclusion of systemic disregarding of negative comparison results obtained from an application of the W-W comparison methodology to "non-pattern transactions" would lead to mathematical equivalence with the results of the application of the W-W comparison methodology to all export transactions. On appeal, Korea asserted that the Panel found mathematical equivalence despite the fact that mathematical equivalence has been considered and rejected by the Appellate Body previously on numerous occasions. The Appellate Body found that comparing weighted average normal value with pattern transactions only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the W-W comparison methodology to all export transactions. Noting that mathematical equivalence or substantial equivalence would arise only if one were to take the view that the second sentence of Article 2.4.2 envisages the combining of comparison methodologies, the Appellate Body observed that it had already rejected this interpretation of the second sentence of Article 2.4.2 as permitting the combination of comparison methodologies.

In light of the above, the Appellate Body declared moot the Panel's finding that Korea failed to establish that the United States' use of systemic disregarding under the DPM is inconsistent "as such" with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Instead, the Appellate Body concluded that, when the requirements of the second sentence of Article 2.4.2 are fulfilled, an investigating authority may establish margins of dumping by comparing a weighted average normal value with export prices of pattern transactions, while excluding non-pattern transactions from the numerator, and dividing the resulting amount by all the export sales of a given exporter or foreign producer.

4.5.1.6.2 Korea's other appeal under Article 2.4 of the Anti-Dumping Agreement

Korea argued that the Panel's finding that systemic disregarding is not inconsistent with Article 2.4 of the Anti-Dumping Agreement, repeats the same legal errors that Korea identified with regard to the Panel's interpretation of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, that dumping can exist within a subset of the export sales. Korea requested the Appellate Body to reverse the Panel's findings under Article 2.4 and to complete the legal analysis to find that systemic disregarding is inconsistent with the "fair comparison" requirement in Article 2.4.

The Appellate Body began by recalling that the introductory clause of Article 2.4.2 expressly makes this provision subject to the provisions governing fair comparison in Article 2.4. The Appellate Body considered that the application of all three comparison methodologies (i.e. W-W, T-T, and W-T) set out in Article 2.4.2 is expressly made subject to the "fair comparison" requirement in Article 2.4. The Appellate Body explained that the obligation to undertake a fair comparison between normal value and export prices arises in respect of the applicable universe of export transactions to which each of the three comparison methodologies set out in Article 2.4.2 applies and further that Articles 2.4 and 2.4.2 not only inform each other, but must be read together harmoniously. The Appellate Body stated that the exceptional nature of the W-T comparison methodology, consistent with the function of the second sentence of Article 2.4.2 to address targeted dumping by considering a limited universe of export transactions, confirmed that the "fair comparison" requirement in Article 2.4 applies only in respect of pattern transactions. The Appellate Body, thus, concluded that, the exclusion of non-pattern transactions from the establishment of dumping and margins of dumping under the second sentence of Article 2.4.2 comports with the notions of impartiality, even-handedness, and lack of bias reflected in the "fair comparison" requirement in Article 2.4.

The Appellate Body noted that, although the Panel considered that an investigating authority could establish the existence of margins of dumping by focusing on pattern transactions to the exclusion of non-pattern

transactions, the underlying assumption of the Panel was that the combined application of comparison methodologies was not excluded under the second sentence of Article 2.4.2. Recalling that it had already rejected an interpretation of the second sentence as allowing the combining of comparison methodologies, the Appellate Body declared moot the Panel's finding that Korea failed to establish that the United States' use of systemic disregarding under the DPM is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement.

4.5.1.7 Zeroing under the W-T comparison methodology

4.5.1.7.1 The United States' appeal under Article 2.4.2 of the Anti-Dumping Agreement

The United States claimed that the Panel erred in finding that the use of zeroing in connection with the application of the W-T comparison methodology is inconsistent with the second sentence of Article 2.4.2 of the Anti-Dumping Agreement, when the conditions for recourse to this methodology have been fulfilled. The United States argued that, an examination of the text and context of Article 2.4.2 leads to the conclusion that zeroing is permissible, and indeed necessary, when applying the W-T comparison methodology.

The Appellate Body recalled that in establishing dumping and margins of dumping pursuant to the W-W and T-T comparison methodologies under the first sentence of Article 2.4.2, an investigating authority is under an obligation to take into account all transactions that make up the applicable universe of export transactions. These prior findings that zeroing is not permitted under either of the two symmetrical comparison methodologies set forth in the first sentence, flow from the Appellate Body's jurisprudence that the concepts of "dumping" and "margins of dumping" are the same throughout the Anti-Dumping Agreement. Thus margins of dumping are established for the product under investigation as a whole, and for each exporter or foreign producer, by including in the comparison all the export transactions of the like product by that exporter or foreign producer.

Then the Appellate Body turned to the question of whether zeroing is permitted under the W-T comparison methodology set forth in the second sentence of Article 2.4.2. It recounted its earlier finding that the term "individual export transactions" mentioned in the second sentence refers to the pattern of export prices identified by the investigating authority which differ significantly from other export prices. The Appellate Body noted that this conclusion is supported by the text and context of Article 2.4.2, taking into account the function of the second sentence of allowing an investigating authority to identify and address targeted dumping. The Appellate Body also explained that the reference to the term "individual export transactions" in the second sentence highlights the asymmetrical nature of the W-T comparison methodology, whereby a normal value established on a weighted average basis is compared to prices of individual export transactions. Thus, the Appellate Body found no basis in the second sentence to read the term "individual export transactions" as permitting the exclusion of individual pattern transactions priced above normal value from the establishment of margins of dumping pursuant to the asymmetrical W-T comparison methodology.

The Appellate Body further reasoned that zeroing within the pattern would necessarily amount to a definition of the pattern as limited to those export transactions involving one or more particular purchasers, regions, or time periods that are below normal value, as it is only those sales that would be taken into account when establishing margins of dumping with the use of zeroing. The pattern, as the Appellate Body found, is composed of all the export prices to one or more particular purchasers, particular regions, or particular time periods. Accordingly, it considered that to allow zeroing within the pattern would disconnect the notion of pattern as properly identified under the second sentence (as comprising all export sales to one or more particular purchasers, regions, or time periods) from the pattern to which the W-T comparison methodology is applied when establishing margins of dumping in order to address targeted dumping. The Appellate Body found no legal basis under the second sentence of Article 2.4.2 for considering only those sales to one or more purchasers, regions, or time periods that are below normal value for establishing margins of dumping.

The Appellate Body further recalled that the second sentence of Article 2.4.2 provides for an exception to the normally applicable symmetrical comparison methodologies under the first sentence in order to allow investigating authorities to identify and address targeted dumping. The Appellate Body considered that, by conducting a comparison between normal value and all transactions included in the identified "pattern", an investigating authority is able to address the targeted dumping that is identified and that corresponds to that particular pattern. The Appellate Body explained that there would be nothing more to unmask once the comparison had been conducted between normal value and export prices for pattern transactions (to the exclusion of non-pattern transactions). While zeroing within a pattern that includes sales above normal value increases the margin of dumping, it does not unmask the targeted dumping that corresponds to the properly identified pattern of significantly lower sales, whereby such pattern includes sales below and above normal value. The Appellate Body explained that this interpretation gives meaning and effect to the second sentence of Article 2.4.2 because it allows for the identification of the relevant pattern within the meaning of that provision and allows an investigating authority to address targeted dumping by applying the W-T comparison methodology to the limited universe of individual export transactions that form the properly identified pattern.

The Appellate Body next turned to consider the United States' reliance on the Appellate Body's statement in *US – Softwood Lumber V (Article 21.5 – Canada)* that, it could be argued that the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting targeted dumping, thus rendering the third methodology inutile. The United States asserted that this observation by the Appellate Body implies that it is possible to use zeroing to capture pricing patterns constituting targeted dumping. The Appellate Body recalled that the referenced dispute (which dealt with the T-T comparison methodology under the first sentence of Article 2.4.2), was addressing the second sentence in view of the panel's contextual reliance on that provision. The Appellate Body explained that, it had considered that the use of zeroing under the comparison methodologies provided in the first sentence of Article 2.4.2 to unmask targeted dumping would have deprived the second sentence, the function of which is to address targeted dumping, of its *effet utile*. However, in that dispute the Appellate Body did not pronounce on how targeted dumping should be addressed under the second sentence of Article 2.4.2. In any event, in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body had not suggested that giving effect to the second sentence of Article 2.4.2 would require establishing margins of dumping by applying the W-T comparison methodology with zeroing to the applicable universe of export transactions, i.e. the pattern transactions.

The Appellate Body next addressed the United States' argument that, assuming that under both the W-W and W-T comparison methodologies the margins of dumping are based on the same normal value and export sales data, if zeroing is prohibited under both comparison methodologies, then they will yield mathematically equivalent results. The Appellate Body explained that, under the second sentence of Article 2.4.2, comparing normal value with pattern transactions (identified consistently with that provision) only will not normally yield results that are mathematically or substantially equivalent to the results obtained from the application of the W-W comparison methodology to all export transactions. The Appellate Body then turned to consider the United States' assertion that the Panel's approach of applying the W-T comparison methodology to a subset of transactions without zeroing is in essence equivalent to the application of the W-W comparison methodology to the same subset of transactions without zeroing. The Appellate Body explained that, in keeping with the function of the second sentence to address targeted dumping, once the relevant pattern has been identified, the fact that the application of the W-T comparison methodology to that identified pattern leads to equivalent results as the application of the W-W comparison methodology to the same pattern does not undermine the *effet utile* of the second sentence. Nor does it lead to equivalent results between the application of the symmetrical comparison methodologies normally used under the first sentence to the universe of all export transactions and the application of the W-T comparison methodology to the limited universe of pattern transactions.

Finally, the Appellate Body addressed the United States' argument that the negotiating history of the Anti-Dumping Agreement confirms that zeroing is permissible when applying the asymmetrical and exceptional W-T comparison methodology set forth in the second sentence of Article 2.4.2. The Appellate Body recalled its earlier findings that, under the second sentence, an investigating authority can use the W-T comparison methodology to address targeted dumping by establishing margins of dumping based on the properly identified pattern of export prices which differ significantly and which are targeted at purchasers, regions, or time periods. In so doing, an investigating authority is not allowed to use zeroing under the W-T methodology. The Appellate Body stated that it had reached this conclusion based on the text and context of Article 2.4.2 read in light of the object and purpose of the Anti-Dumping Agreement. Accordingly, the Appellate Body considered that it was not necessary to have recourse to the negotiating history of the Anti-Dumping Agreement in order to confirm the meaning of the second sentence of Article 2.4.2. Nevertheless, having considered the United States' arguments regarding the negotiating history of the Anti-Dumping Agreement, the Appellate Body concluded that these documents did not support a reading of the second sentence of Article 2.4.2 as permitting zeroing.

In light of the foregoing considerations, the Appellate Body found that the exceptional W-T comparison methodology in the second sentence of Article 2.4.2 requires a comparison between a weighted average normal value and the entire universe of export transactions that fall within the pattern as properly identified under that provision, and irrespective of whether the export price of individual pattern transactions is above or below normal value. Zeroing the negative intermediate comparison results within the pattern, according to the Appellate Body, is neither necessary to address targeted dumping, nor is it consistent with the establishment of dumping and margins of dumping as pertaining to the universe of export transactions identified under the second sentence of Article 2.4.2. Therefore, the Appellate Body upheld the Panel's findings, that the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Article 2.4.2 of the Anti-Dumping Agreement and that the USDOC acted inconsistently with Article 2.4.2 by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation.

4.5.1.7.2 The United States' appeal under Article 2.4 of the Anti-Dumping Agreement

The United States argued that the Panel's findings of inconsistency regarding the use of zeroing in the application of the W-T comparison methodology with Article 2.4 of the Anti-Dumping Agreement rest on its earlier findings of inconsistency under the second sentence of Article 2.4.2 of the Anti-Dumping Agreement. Thus, the United States submitted that, since the Panel's findings under Article 2.4.2 are erroneous, the Panel's findings under Article 2.4 likewise are erroneous and should be reversed.

The Appellate Body recalled its earlier findings that the second sentence of Article 2.4.2 allows an investigating authority to establish dumping and margins of dumping by applying the W-T comparison methodology to pattern transactions without having recourse to zeroing. The Appellate Body recalled that it had upheld the Panel's findings in this regard. It considered that zeroing the intermediate negative comparison results has the effect of not only inflating the magnitude of dumping, but it also makes a positive determination of dumping more likely in circumstances where the export prices above normal value exceed those that are below normal value. The Appellate Body further explained that by setting to zero individual export transactions that yield a negative comparison result, an investigating authority fails to compare all comparable export transactions that form the applicable universe of export transactions as required under the second sentence of Article 2.4.2, thus failing to make a fair comparison within the meaning of Article 2.4.

The Appellate Body thus upheld the Panel's findings that the United States' use of zeroing when applying the W-T comparison methodology is inconsistent "as such" with Article 2.4 of the Anti-Dumping Agreement and that the USDOC acted inconsistently with Article 2.4 by using zeroing when applying the W-T comparison methodology in the *Washers* anti-dumping investigation.

4.5.1.7.3 The United States' appeal under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994

The United States argued that the Panel's findings under Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 were based on the Panel's earlier flawed findings under Article 2.4.2 of the Anti-Dumping Agreement and therefore had to be reversed. The United States submitted that a margin of dumping established on the basis of the W-T comparison methodology when the conditions for its use have been fulfilled, is a margin of dumping properly determined under Article 2 of the Anti-Dumping Agreement and, consequently, any anti-dumping duty levied pursuant thereto, would not breach either Article 9.3 of the Anti-Dumping Agreement, or Article VI:2 of the GATT 1994.

The Appellate Body explained that Article 9.3 refers to the margin of dumping as established under Article 2, which represents the ceiling for anti-dumping duties levied pursuant to Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994. Accordingly, if margins of dumping are established inconsistently with Article 2.4.2 by using zeroing under the W-T comparison methodology, the corresponding anti-dumping duties that are levied will also be inconsistent with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, as they will exceed the margin of dumping that should have been established under Article 2. According to the Appellate Body, given that zeroing is not permitted under the W-T comparison methodology pursuant to the second sentence of Article 2.4.2 in original anti-dumping investigations, it also cannot be permitted in respect of administrative reviews.

In light of the above, the Appellate Body upheld the Panel's finding that the United States' use of zeroing when applying the W-T comparison methodology in administrative reviews is inconsistent "as such" with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

4.5.1.7.4 Separate opinion of one Appellate Body member regarding zeroing under the W-T comparison methodology

One member of the Division disagreed with the ruling of the majority of the Appellate Body that zeroing is not permitted under the W-T comparison methodology provided for in the second sentence of Article 2.4.2 of the Anti-Dumping Agreement and expressed a separate opinion.

The Appellate Body member began by recalling that the text of the second sentence of Article 2.4.2 has no qualifier, and it does not specify how the investigating authority is to conduct the comparison between a weighted average normal value and prices of individual export transactions, once it finds the requisite pattern and provides the requisite explanation. Noting that the second sentence of Article 2.4.2 is an exception and has the function of unmasking targeted dumping and addressing it, he was of the view that the question that needed to be answered was, what are the limits, if any, that the Anti-Dumping Agreement places on what an investigating authority may do to unmask and deal with targeted dumping.

According to this Appellate Body member, the majority's interpretation would permit investigating authorities to deal with targeted dumping only partially, and possibly ineffectively, since within the pattern, prices above normal value will cancel out – or re-mask – partly or completely, the targeted dumping that results from prices below normal value. In his opinion, such an incomplete approach is not required by the text of the second sentence read in the context of the entire Article 2.4.2 and in light of the object and purpose of the Anti-Dumping Agreement. In addition, it unduly restricts the regulatory leeway that should be accorded to investigating authorities to deal with targeted dumping. Having found that, when applying the second sentence of Article 2.4.2, investigating authorities are to focus only on pattern transactions, he was of the opinion that investigating authorities are permitted to zero those pattern transactions that are priced above normal value, and to calculate dumping only on the basis of pattern transactions priced below

normal value. Such an approach, according to this Appellate Body member, would deal fully with targeted dumping by dividing the full amount of such dumping – instead of an amount diminished by non-dumped prices – by the full value of an exporter's sales.

This member of the Appellate Body was of the view that previous Appellate Body jurisprudence supported in-pattern zeroing under the second sentence of Article 2.4.2. He recalled that in *US – Softwood Lumber V (Article 21.5 – Canada)*, the Appellate Body, in finding that a prohibition on the use of zeroing under the T-T comparison methodology would not render the second sentence of Article 2.4.2 meaningless, stated that, "on the contrary, … the use of zeroing under the two comparison methodologies set out in the first sentence of Article 2.4.2 would enable investigating authorities to capture pricing patterns constituting 'targeted dumping', thus rendering the third methodology *inutile*." According to him, the Appellate Body's prior findings regarding the exceptional nature of the W-T comparison read in light of the aforesaid statement in *US – Softwood Lumber V (Article 21.5 – Canada)* imply that zeroing is permissible under the W-T comparison methodology in order to identify and address targeted dumping.

Moreover, this Appellate Body member also recalled that in the aforesaid dispute, the Appellate Body, in the context of the T-T comparison methodology, had stated that the reference to export prices in the plural, without further qualification, suggested that all of the results of the transaction-specific comparisons should be included in the aggregation for purposes of calculating the margins of dumping. In contrast, he reasoned that, the fact that the second sentence of Article 2.4.2, unlike the first sentence, uses the phrase "prices of individual export transactions" (the word "individual" being the qualifier) indicates that not all the transaction-specific comparisons arising from the export prices that form part of the pattern need to be aggregated in order to calculate dumping.

Accordingly, he took the view that, allowing an investigating authority to zero within the pattern under the second sentence of Article 2.4.2 is not only a permissible interpretation within the meaning of the second sentence of Article 17.6(ii), but that it is a more defensible interpretation within the meaning of the first sentence of Article 17.6(ii) of the Anti-Dumping Agreement.

In light of the above, this Appellate Body member disagreed with the finding of the majority that zeroing within the "pattern" under the W-T comparison methodology of the second sentence of Article 2.4.2 of the Anti-Dumping Agreement is not permissible. Consequently, he also disagreed with the findings of the majority on zeroing under Articles 2.4 and 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

4.5.2 Claims under the SCM Agreement and related claims under the GATT 1994

4.5.2.1 The Panel's upholding of the USDOC's determination that the RSTA Article 26 tax credit programme was regionally specific

Korea claimed that the Panel erred in its interpretation and application of Article 2.2 of the SCM Agreement by upholding the USDOC's determination that the RSTA Article 26 tax credit programme was regionally specific. Korea's appeal focused on the Panel's interpretation and application of certain terms contained in Article 2.2, namely: (i) "certain enterprises"; (ii) "designated"; and (iii) "geographical region".

Korea argued, first, that the term "certain enterprises" only refers to entities with legal personality, such as companies, whereas manufacturing facilities, which do not have legal personality, do not fall within the scope of the term. The Appellate Body noted that the definition of the word "enterprise" does not indicate that such term signifies only an entity with legal personality. To the contrary, the text of Article 2.2 does not exclude that a sub-unit or a constituent part of a company – including, but not limited to, its branch offices or the facilities where it conducts manufacturing operations – may fall within the scope of the term "certain enterprises" despite not necessarily having distinct legal personality. The Appellate Body also noted

the immediate context provided by the word "located" and stated that not every activity conducted by an enterprise in a given region would suffice for that enterprise to be located there. However, an enterprise may be located in a certain region if it effectively establishes its commercial presence in that region, including by setting up a sub-unit such as a branch office or a facility for manufacturing operations. When a measure limits eligibility for a subsidy based on the geographical location of any of these sub-units or constituent parts of an enterprise, that measure will be regionally specific.

Second, Korea maintained that the "designation" of a region must be done affirmatively, not by implication or suggestion. In its view, the RSTA Article 26 tax credit programme could not be said to affirmatively designate a geographical region, as it merely disqualified investments made in the Seoul overcrowding area from eligibility for subsidies that would otherwise be available. Based on the relevant definition of the verb "designate", the Appellate Body considered that the identification of a region for purposes of Article 2.2 may be explicit or implicit, provided that the relevant region is clearly discernible from the text, design, structure, and operation of the subsidy measure at issue. For the Appellate Body, it is irrelevant that the coverage of the RSTA Article 26 tax credit programme was couched in negative terms – i.e. it excluded investments made in the Seoul overcrowding area from eligibility for subsidies otherwise available. In essence, the programme had the effect of discouraging certain investments in one portion of the Korean territory and, at the same time, encouraging those investments in another portion of the Korean territory.

Third, Korea submitted that, since the Seoul overcrowding area accounts for only 2% of the national territory, the area covered by the RSTA Article 26 tax credit programme – i.e. the remainder of the country – was too large, too unbounded, and insufficiently demarcated to be considered as a "designated geographical region". Korea also stressed that the programme was based on neutral and objective eligibility criteria, consistently with Article 2.1(b) of the SCM Agreement, and constituted an effective policy tool to address overcrowding and urban sprawl. The Appellate Body rejected Korea's arguments. It observed that the term "geographical region" in the text of Article 2.2 is not qualified in any way; therefore, any identified tract of land within the jurisdiction of a granting authority may, irrespective of its size, constitute a geographical region. As the boundaries of the area falling within the scope of the RSTA Article 26 tax credit programme were clearly delineated in the relevant regulations, the Appellate Body saw no reason why such identified tract of land would not qualify as a designated geographical region. The Appellate Body also explained that a subsidy that sets forth neutral and objective eligibility criteria with respect to a given region, consistently with Article 2.1(b), may nonetheless be regionally specific under Article 2.2. Finally, the Appellate Body observed that Members are, in principle, free to pursue legitimate objectives, such as addressing overcrowding and urban sprawl, through measures other than subsidy programmes, including zoning regulations or prohibitions to build in certain areas. However, when they choose to do so through the bestowal of regionally specific subsidies, the disciplines of the SCM Agreement will apply.

In sum, the Appellate Body agreed with the Panel that the RSTA Article 26 tax credit programme effectively designated the region where the relevant eligible investments were to be made in order to qualify for the subsidy at issue, thereby being "limited to certain enterprises located within a designated geographical region" within Korea's jurisdiction. The Appellate Body therefore upheld the Panel's finding that the USDOC's determination of regional specificity with respect to the RSTA Article 26 tax programme was not inconsistent with Article 2.2 of the SCM Agreement.

Korea further claimed that, in articulating its findings on regional specificity, the Panel did not adequately review the USDOC's determination, thereby failing to conduct an objective assessment of the matter before it and acting inconsistently with its duties under Article 11 of the DSU. The Appellate Body observed that Korea's claims under Article 2.2 were not directed at the USDOC's assessment of the evidence before it, nor did they require the Panel to closely examine the specifics of the USDOC's determination or the facts on the record of the investigation. Rather, the thrust of Korea's argumentation touched on the interpretation of

Articles 2.1(b) and 2.2 of the SCM Agreement. As the Panel had addressed all such interpretative arguments, the Appellate Body found that the Panel did not act inconsistently with its duties under Article 11 of the DSU in articulating its findings on regional specificity.

4.5.2.2 The Panel's upholding of the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA are not tied to any particular products

Korea claimed that, by upholding the USDOC's determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA were not tied to particular products, the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. First, Korea argued that, by focusing on Samsung's intended use of the proceeds of the tax credits, both the USDOC and the Panel applied an incorrect tying test. Second, Korea submitted that the Panel erred by affirming the USDOC's dismissal of certain evidence submitted by Samsung that would have enabled the USDOC to single out the qualifying expenditures and the related tax credits accruing to Samsung's digital appliance business unit.

The Appellate Body noted that both the USDOC's determination and the Panel's reasoning involved a two-step analysis. First, both applied a test whereby a subsidy is tied to a product only if the intended use of that subsidy is known to the granting authority, and so acknowledged prior to or concurrent with its bestowal. Second, in light of this test, both the USDOC and the Panel did not consider it necessary to take into account some evidence submitted by Samsung, which purportedly showed the amount of eligible expenditures made by the digital appliance business unit, as well as the tax credits that those expenses generated under Articles 10(1)(3) and 26 of the RSTA. The Appellate Body thus found it useful to examine each of these two analytical steps in turn.

With regard to the test applied by the USDOC and endorsed by the Panel, the Appellate Body stated that a subsidy is tied to a particular product if the bestowal of that subsidy is connected to, or conditioned upon, the production or sale of the product concerned. An assessment of whether this connection or conditional relationship exists will inevitably depend on the specific circumstances of each case. In conducting such an assessment, an investigating authority must examine the design, structure, and operation of the measure granting the subsidy at issue and take into account all the relevant facts surrounding the granting of that subsidy. Against this backdrop, the Appellate Body considered that the test applied by the USDOC and endorsed by the Panel meant that a subsidy cannot be tied to a product if: (i) the financial contribution is conferred on the recipient after the eligible activities have occurred; and (ii) the recipient is not required to spend the proceeds of the subsidy on the same type of activities that gave rise to eligibility.

The Appellate Body considered that the fact that the recipient obtains the proceeds of a subsidy before, at the same time as, or after conducting the eligible activities is not, in and of itself, dispositive of whether that subsidy is tied to a particular product. In all those situations, the bestowal of a subsidy may be connected to, or conditioned on, the production or sale of a particular product. Indeed, even when that subsidy operates in a manner whereby the recipient will obtain the proceeds after the eligible activity has occurred, the expectation to obtain those proceeds may induce the recipient to engage in the production or sale of the product giving rise to eligibility. The Appellate Body observed that the proceeds deriving from certain types of financial contribution, such as grants or loans, are usually paid before the recipient undertakes a certain activity; conversely, the proceeds of other types of financial contribution, such as cash saved as a result of tax credits and other forms of revenue forgone, are normally obtained after the recipient has become entitled to receive them or has carried out the eligible activity. Excluding the existence of a product-specific tie whenever the recipient obtains the proceeds of a subsidy after it has carried out the eligible activities could result in an unwarranted distinction between those different types of financial contribution.

Similarly, the Appellate Body was not persuaded by the USDOC's and the Panel's focus on the recipient's intended use of the proceeds of a subsidy. According to the Appellate Body, the fact that a financial contribution, once collected by the recipient, may be spent on activities different from those for which it was bestowed is not, in and of itself, sufficient to exclude the existence of a product-specific tie. Unless a subsidy programme expressly determines the way in which the recipient has to spend the proceeds of the subsidy, the recipient will always be free, in principle, to finance product-specific activities with resources other than those provided by the granting authority. Accordingly, under the USDOC's and the Panel's test, hardly any subsidy would ever be considered tied to a particular product, for the recipient would be able to escape such tie by spending the proceeds on different activities. For the Appellate Body, an appropriate inquiry into the existence of a product-specific tie requires a scrutiny of the design, structure, and operation of the subsidy at issue. Based on this assessment, a subsidy that does not restrict the recipient's use of the proceeds of the financial contribution may, nonetheless, be found to be tied to a particular product if, for instance, it induces the recipient to engage in activities connected to that product.

The Appellate Body turned next to the Panel's affirmation of the USDOC's dismissal of certain evidence submitted by Samsung. The Appellate Body recalled that the USDOC was required to evaluate all evidence relevant to its inquiry into the existence of a product-specific tie, and to provide reasoned and adequate explanations for its determination. The Appellate Body considered that, in order to fulfil such duties, the USDOC should have reviewed the evidence submitted by Samsung, which would have allegedly enabled it to single out the qualifying expenditures and the related tax credits accruing to the digital appliance business unit. The fact that such evidence was created ad hoc for the purposes of the *Washers* countervailing duty investigation, and was not expressly required under the Korean legislation at issue – i.e. Articles 10(1)(3) and 26 of the RSTA – did not suffice to relieve the USDOC of its duty to review it. Thus, the Appellate Body found that, by too readily dismissing the relevance of that evidence, the USDOC failed to evaluate all of the relevant evidence, and that, by upholding the USDOC's dismissal of that evidence, the Panel erroneously concluded that the explanations provided by the USDOC were reasoned and adequate.

In sum, the Appellate Body concluded that the Panel: (i) improperly endorsed the flawed tying test applied by the USDOC in the *Washers* countervailing duty investigation; and (ii) improperly upheld the USDOC's dismissal of certain evidence submitted by Samsung that was potentially relevant to the inquiry into the existence of a product-specific tie. Therefore, the Appellate Body reversed the Panel's finding that the USDOC determination that the tax credits received by Samsung under Articles 10(1)(3) and 26 of the RSTA are not tied to any particular products is not inconsistent with Articles 19.4 of the SCM Agreement and VI:3 of the GATT 1994; and found, instead, that the USDOC's determination is inconsistent with such provisions.

4.5.2.3 The Panel's upholding of the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production only

Korea claimed on appeal that, by upholding the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA to Samsung's domestic production only, the Panel erred in its interpretation and application of Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. In particular, Korea submitted that the Panel improperly upheld the USDOC's presumptive allocation of subsidies to domestic production, and stressed that, during the course of the *Washers* countervailing duty investigation, Samsung submitted arguments and evidence which effectively rebutted this presumption.

The Appellate Body noted that the subsidized products relevant for calculating per unit subsidization are those manufactured, produced, or exported by the recipient. However, according to the Appellate Body, nothing in the SCM Agreement indicates that such products should be further limited to those produced by the recipient within the jurisdiction of the subsidizing Member. Rather, a subsidy may be bestowed on the recipient's production outside the jurisdiction of the subsidizing Member. For instance, if the recipient is a multinational corporation with facilities located in multiple countries, the subsidized products may, depending on the circumstances of the case, include that corporation's production in those multiple countries. In order

to appropriately identify the subsidized products, investigating authorities should examine the arguments and evidence submitted by interested parties, as well as the specific facts surrounding the bestowal of the subsidy at issue.

Against this backdrop, the Appellate Body was not persuaded by the Panel's statement that any positive effect that Samsung's Korea-based R&D activities might have on Samsung's overseas production does not constitute a benefit within the meaning of Article 1.1(b) of the SCM Agreement. For the Appellate Body, the identification of the recipient of the "benefit" is distinct from, and should not prejudge, the calculation of the amount of subsidy that has been bestowed upon the products produced by the recipient, so as to determine properly the amount of countervailing duty to be imposed on such products in accordance with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994. Thus, the fact that Samsung is the recipient of the benefit deriving from the bestowal of subsidies under Article 10(1)(3) of the RSTA does not, in and of itself, preclude a finding that those subsidies may be allocated also to the production of Samsung's overseas subsidiaries. Accordingly, the Appellate Body considered that the Panel unduly conflated the concept of "recipient of the subsidy" under Article 1 of the SCM Agreement with the concept of "subsidized product" for purposes of calculating per unit subsidization under Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994.

Similarly, the Appellate Body was not convinced by the Panel's affirmation of the USDOC's presumptive allocation of subsidies to Samsung's domestic production. While that presumption could, in principle, be rebutted, the only way to do so was for Samsung to show that the Government of Korea explicitly stated, in the application and/or approval documents, that the subsidy was being provided for more than domestic production. The Appellate Body considered that the expressed intent of a subsidizing authority, as evinced by the face of the measure granting the subsidy, cannot be the sole factor relevant to the allocation of that subsidy to the products manufactured by the recipient in the context of calculating per unit subsidization. Instead, the USDOC should have evaluated Samsung's arguments and evidence that, allegedly, would have enabled it to allocate the tax credits Samsung received under Article 10(1)(3) of the RSTA across its worldwide production. Thus, the Appellate Body concluded that, by focusing solely on the face of the measure, the USDOC failed to evaluate all of the relevant evidence, and that, by upholding the USDOC's determination, the Panel erroneously concluded that the explanations provided by the USDOC were reasoned and adequate.

In sum, the Appellate Body concluded that the Panel: (i) erroneously conflated the concept of "recipient of the benefit" with the concept of "subsidized product"; and (ii) improperly condoned the USDOC's failure to assess all the arguments and evidence submitted by interested parties and other relevant facts surrounding the bestowal of tax credits under Article 10(1)(3) of the RSTA. Therefore, the Appellate Body reversed the Panel's finding that the USDOC's attribution of the tax credits received by Samsung under Article 10(1)(3) of the RSTA exclusively to Samsung's domestic production is not inconsistent with Article 19.4 of the SCM Agreement and Article VI:3 of the GATT 1994; and found, instead, that the USDOC's determination is inconsistent with such provisions.

4.6 Appellate Body Report, *European Union – Anti-Dumping Measures on Biodiesel from Argentina*, WT/DS473/AB/R

This dispute concerned a challenge by Argentina against two sets of measures of the European Union: (i) the anti-dumping measure on imports of biodiesel from Argentina; and (ii) the second subparagraph of Article 2(5) of the Council Regulation (EC) No. 1225/2009 of 30 November 2009 on protection against dumped imports from countries not members of the European Community (Basic Regulation).

The anti-dumping measure imposed by the European Union on imports of biodiesel from Argentina was adopted at the conclusion of an anti-dumping investigation on imports of biodiesel originating in Argentina and Indonesia. The investigation was initiated by the European Commission, following a complaint by the

European Biodiesel Board (EBB). The EU authorities found that, because the biodiesel market in Argentina was heavily regulated by the State, domestic sales of biodiesel were not made in the ordinary course of trade. For this reason, the EU authorities constructed the normal value of the biodiesel from Argentina on the basis of costs of production of biodiesel plus a reasonable amount for selling, general and administrative expenses. The EU authorities also found that soybeans are the main raw material purchased and used in the production of biodiesel in Argentina. It was undisputed that the cost of raw materials is the largest cost component in producing biodiesel.

In constructing the normal value in the Provisional Regulation, the EU authorities noted the EBB's allegation that, under Argentina's Differential Export Tax (DET) system, Argentina imposes differential taxes on exports of soybeans, soybean oil, and biodiesel, and, specifically, that the taxes imposed on exports of the raw materials are higher than those imposed on exports of the finished product. The EBB alleged that the DET system depresses the domestic price of soybeans and soybean oil, and therefore distorts the costs of production of biodiesel producers in Argentina. The EU authorities considered, however, that, due to a lack of information at that time, the question as to whether the Argentine biodiesel producers' records reasonably reflected the costs associated with the production of biodiesel would be further examined at the definitive stage. Thus, despite the EBB's allegation, the EU authorities used the actual costs of soybeans reported in the Argentine producers' records in calculating the constructed normal value for biodiesel.

In the Definitive Regulation, the EU authorities found that the DET system in Argentina depressed the domestic price of soybeans and soybean oil to an artificially low level, affecting the costs of Argentine biodiesel producers. The EU authorities established that the domestic prices of soybeans and soybean oil were essentially equivalent to the international prices minus exporting expenses and the amount of the export tax. The EU authorities thus concluded that the costs of the main raw material were not reasonably reflected in the records kept by the Argentinean producers under investigation. The EU authorities therefore decided to revise the construction of the normal value in the Provisional Regulation and disregard the actual costs of soybeans as reported by the Argentine producers in their records. Instead, such actual costs were replaced by a surrogate price for soybeans in Argentina, namely, the average of the reference prices of soybeans published by the Argentine Ministry of Agriculture for export FOB Argentina, minus fobbing costs, during the investigation period.

Furthermore, the Definitive Regulation confirmed the provisional findings of dumping, injury, and causation, although certain aspects of the findings were modified. In particular, the figures relating to two of the macroeconomic indicators examined by the EU authorities – the production capacity and capacity utilization rate of the EU industry – were modified in light of the revised data submitted by the EBB subsequent to the Provisional Regulation. The EBB claimed that the data previously submitted regarding the total EU production capacity included idle capacity and therefore had to be reduced. The EU authorities accepted the revised data on production capacity submitted by the EBB, which led to a downward adjustment to the production capacity figures, and an upward adjustment to the capacity utilization rates, in the Definitive Regulation.

The Basic Regulation is the basic EU legal instrument on the protection against dumped imports from countries that are not member States of the European Union. It contains language identical or similar to that used in the Anti-Dumping Agreement, together with additional provisions and details that have no direct counterpart in the Anti-Dumping Agreement. Article 2(5) of the Basic Regulation contains four subparagraphs. The second subparagraph of Article 2(5) provides that, "[i]f costs associated with the production and sale of the product under investigation are not reasonably reflected in the records of the party concerned, they shall be adjusted or established on the basis of the costs of other producers or exporters in the same country or, where such information is not available or cannot be used, on any other reasonable basis, including information from other representative markets."

Before the Panel, Argentina claimed that the anti-dumping measure on biodiesel is inconsistent with several provisions of the Anti-Dumping Agreement and the GATT 1994. Specifically, Argentina alleged that the European Union acted inconsistently with: (i) Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of records kept by the Argentine producers, and by including costs not associated with the production and sale of biodiesel in the calculation of the cost of production; (ii) Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by failing to construct the normal value of the exports of biodiesel on the basis of the cost of production in the country of origin; (iii) Articles 2.2 and 2.2.2(iii) of the Anti-Dumping Agreement by failing to base the profit-margin component of the constructed normal value on a reasonable method within the meaning of Article 2.2.2(iii); (iv) Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for differences affecting price comparability and thus precluding a fair comparison between the normal value and the export price; (v) Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement; (vi) Articles 3.1 and 3.4 of the Anti-Dumping Agreement with regard to the EU authorities' injury determination; and (vii) Articles 3.1 and 3.5 of the Anti-Dumping Agreement with regard to the EU authorities' non-attribution analysis and finding that the injury suffered by the EU domestic industry did not result from factors other than dumped imports.

Furthermore, Argentina claimed that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with: (i) Article 2.2.1.1 and, as a consequence, Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by providing that the authorities shall reject or adjust the cost data in the records of producers or exporters under investigation when those costs reflect prices that are "abnormally or artificially low" as a result of an alleged market distortion; (ii) Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by providing that the costs shall be adjusted or established in certain cases on any other reasonable basis, including information from other representative markets; and, as a consequence, (iii) Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

With respect to the claims against the anti-dumping measure on biodiesel, the Panel found that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. The Panel also found that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by using in the construction of the normal value a "cost" that was not the cost prevailing in Argentina. Further, the Panel found that Argentina had not established that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make a fair comparison between the normal value and the export price. In addition, the Panel found that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margin of dumping that should have been established under Article 2 of the Anti-Dumping Agreement. Finally, the Panel found that Argentina had not established that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

As regards the claims concerning the second subparagraph of Article 2(5) of the Basic Regulation, the Panel found that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement. The Panel also found that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. Finally, the Panel found that the second subparagraph of Article 2(5) of the Basic Regulation is not inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

4.6.1 Claims regarding the anti-dumping measure on imports of biodiesel from Argentina

4.6.1.1 Determination of dumping

4.6.1.1.1 Article 2.2.1.1 of the Anti-Dumping Agreement

The European Union appealed the Panel's finding that the European Union acted inconsistently with Article 2.2.1.1 of the Anti-Dumping Agreement by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers. The Appellate Body first interpreted the second condition in the first sentence of Article 2.2.1.1, before addressing various claims of errors by the European Union concerning the Panel's interpretation and application of this provision.

4.6.1.1.1.1 The second condition in the first sentence of Article 2.2.1.1

The Appellate Body noted that the EU authorities relied explicitly on the second condition – namely, that the records "reasonably reflect the costs associated with the production and sale of the product under consideration" – to discard the records kept by the Argentine producers under investigation insofar as they pertained to the cost of soybeans. Thus, the Appellate Body stated, for purposes of resolving this dispute, it was the meaning of this condition that had to be ascertained, and not whether there were other circumstances in which the obligation in the first sentence of Article 2.2.1.1 would not apply.

The Appellate Body considered that the phrase "costs associated with the production and sale of the product under consideration", read together with the reference to "records kept by the exporter or producer under investigation", makes it clear that the second condition refers to those costs incurred by the investigated exporter or producer that have a relationship with the production and sale of the product under consideration. Moreover, the Appellate Body noted that it is the records of the individual exporters or producers under investigation that are subject to the condition to reasonably reflect the costs. Turning to the relevant context, the Appellate Body contrasted the two conditions in the first sentence of Article 2.2.1.1, noting that the first condition concerns the general accounting and reporting practices of the exporter or producer, whereas the second condition concerns the records' reasonable reflection of the costs associated with the production and sale of the product under consideration in a specific anti-dumping proceeding.

The Appellate Body considered that its understanding of the second condition in the first sentence of Article 2.2.1.1 is confirmed by the second and third sentences of Article 2.2.1.1 and footnote 6 of the Anti-Dumping Agreement, which set out rules for the allocation and adjustment of costs. In the Appellate Body's view, the cost allocations and adjustments contemplated in these provisions allow an investigating authority to obtain a more precise calculation of the costs associated with the product under consideration for the specific exporter or producer by ensuring or verifying that there is a genuine relationship between the costs reflected in the exporter's or producer's records and the costs associated with the production and sale of the specific product under consideration. To the Appellate Body, this context supports the understanding that the second condition in the first sentence of Article 2.2.1.1 relates to whether the records of the exporter or producer suitably and sufficiently correspond to or reproduce the costs that have a genuine relationship with the production and sale of the specific product under consideration. The Appellate Body found that Article 2.2 of the Anti-Dumping Agreement also provides contextual support for its understanding. In particular, Article 2.2 concerns the establishment of the normal value through an appropriate proxy for the price of the like product in the ordinary course of trade in the domestic market of the exporting country. To the Appellate Body, this supports the view that the condition at issue concerns the costs that have a genuine relationship with the production and sale of the product under consideration, because these are the costs that would form the basis for the price of the like product if it were sold in the ordinary course of trade in the domestic market.

The Appellate Body considered that the object and purpose of the Anti-Dumping Agreement is to recognize the right of Members to take anti-dumping measures to counteract injurious dumping while, at the same time, imposing substantive conditions and detailed procedural rules on anti-dumping investigations and on the imposition of anti-dumping measures. The Appellate Body concluded that its understanding of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement is consistent with such object and purpose.

In sum, the Appellate Body understood the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement as referring to whether the records kept by the exporter or producer suitably and sufficiently correspond to or reproduce those costs incurred by the investigated exporter or producer that have a genuine relationship with the production and sale of the specific product under consideration.

4.6.1.1.1.2 Whether the Panel erred in its interpretation and application of Article 2.2.1.1

The European Union claimed that the Panel erred in finding that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement refers to the actual costs incurred by the investigated exporter or producer. The Appellate Body considered that, although Article 2.2.1.1 does not explicitly refer to "actual" costs, the Panel stated that the condition at issue relates to whether the costs in a producer's or exporter's records correspond – within acceptable limits – in an accurate and reliable manner to all the actual costs incurred by the particular producer or exporter for the product under consideration. Reading the Panel's use of the word "actual" in light of the broader reasoning of the Panel findings, the Appellate Body understood the Panel to have considered that the second condition concerns the costs incurred by the investigated exporter or producer that are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation. Thus, the Appellate Body did not consider that the Panel's use of the word "actual" was in error.

The European Union also claimed that the Panel erred in finding that the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement does not include a general standard of reasonableness. The Appellate Body failed to see any textual support in Article 2.2.1.1 for this argument. The Appellate Body observed that the adverb "reasonably" in Article 2.2.1.1 modifies the verb "reflect" in a phrase where the subject of the sentence is the records. To the extent that costs are genuinely related to the production and sale of the product under consideration in a particular anti-dumping investigation, the Appellate Body did not consider that there is an additional or abstract standard of reasonableness that governs the meaning of "costs" in the second condition in the first sentence of Article 2.2.1.1.

The Appellate Body also addressed the multiple discrete instances where the European Union alleged that the Panel erred in interpreting the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. The Appellate Body disagreed with the European Union and did not consider that the Panel erred in those instances.

The Appellate Body then turned to the European Union's claim that the Panel erred in its application of the provision at issue to the anti-dumping measure on biodiesel. Noting that the European Union did not advance any argument that was separate and different from its arguments concerning the alleged errors in the Panel's interpretation of this provision, the Appellate Body agreed with the Panel's finding that the European Union acted inconsistently with Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.

The Appellate Body therefore found that the Panel did not err in its interpretation or application of the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement. Consequently, the Appellate Body upheld the Panel's finding that the European Union acted inconsistently with Article 2.2.1.1 by failing to calculate the cost of production of the product under investigation on the basis of the records kept by the producers.

4.6.1.1.2 Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

4.6.1.1.2.1 Whether the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

Argentina claimed that the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 when stating that these provisions do not limit the sources of information that may be used in establishing the costs of production. To Argentina, given that "cost of production" refers to expenses incurred in the production of the product concerned in the country of origin, the information and evidence used to calculate those costs are necessarily those from the country of origin.

The Appellate Body considered that the phrase "cost of production […] in the country of origin" in Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 may be understood as a reference to the price paid or to be paid to produce something within the country of origin. These provisions do not contain additional qualifying language limiting the sources of information or evidence to only those sources inside the country of origin. The reference to "in the country of origin", however, indicates that, whatever information or evidence is used to determine the "cost of production", it must be apt to or capable of yielding a cost of production in the country of origin. This, in turn, suggests that information or evidence from outside the country of origin may need to be adapted in order to ensure that it is suitable to determine a cost of production in the country of origin.

Turning to the relevant context, the Appellate Body considered that the first sentence of Article 2.2.1.1 does not preclude information or evidence from other sources from being used in certain circumstances. In some circumstances, the information in the records kept by the exporter or producer under investigation may need to be analysed or verified using documents, information, or evidence from other sources, including from sources outside the country of origin. These considerations support the understanding that the determination of the "cost of production in the country of origin" in Article 2.2 may take account of evidence from outside the country of origin. The Appellate Body further observed that the scope of the obligation to calculate the costs on the basis of the records in the first sentence in Article 2.2.1.1 is narrower than the scope of the obligation to determine the cost of production in the country of origin in Article 2.2. In circumstances where the obligation in the first sentence of Article 2.2.1.1 does not apply, or where relevant information from the exporter or producer under investigation is not available, an investigating authority is not prohibited from relying on information other than that contained in the records kept by the exporter or producer, including in-country and out-of-country evidence. This, however, does not mean that an investigating authority may simply substitute the costs from outside the country of origin for the cost of production in the country of origin. Whatever the information that it uses, an investigating authority has to ensure that such information is used to arrive at the cost of production in the country of origin. Compliance with this obligation may require the investigating authority to adapt the information that it collects.

In its appeal, the European Union claimed that the Panel erred in its interpretation of Article 2.2 of the Anti-Dumping Agreement. The Appellate Body understood the European Union's claim of error under Article 2.2 to be dependent on its claim of error under Article 2.2.1.1 of the Anti-Dumping Agreement. As the Appellate Body had found that the Panel did not err in its interpretation of Article 2.2.1.1, the Appellate Body rejected the European Union's claim.

On the basis of the above, the Appellate Body considered that the Panel did not err in its interpretation of Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

4.6.1.1.2.2 Whether the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement to the anti-dumping measure at issue

The European Union claimed that the Panel erred in finding that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement by not using the cost of production in Argentina when constructing the normal value of biodiesel. The European Union argued that the Panel failed to recognize that: (i) a price derived from a price at the border can be characterized as both an international and a domestic price; and (ii) the subtraction of the fobbing costs from the published reference price renders the surrogate price for soybeans used by the EU authorities a reasonable proxy for the price of soybeans in Argentina *that would have existed* in the absence of the distortion caused by the Argentine DET system.

The Appellate Body considered that domestic prices may reflect world prices and, in such circumstances, a price at the border could be simultaneously characterized as both an international and a domestic price. The Appellate Body did not consider, however, that the Panel failed to take such considerations into account. Rather, the Panel's analysis focused on the EU authorities' understanding of the surrogate price for soybeans. Other than pointing to the deduction of fobbing costs, the European Union had not asserted that the EU authorities adapted, or even considered adapting, the information used in their calculation in order to ensure that it represented the cost of production in Argentina. On the contrary, the EU authorities specifically selected the surrogate price for soybeans to remove the perceived distortion in the cost of soybeans in Argentina. As the Panel stated, the EU authorities selected and used this particular information precisely because it did not represent the cost of soybeans in Argentina. Thus, the Appellate Body agreed with the Panel that the surrogate price for soybeans used by the EU authorities did not represent the cost of soybeans in Argentina for producers or exporters of biodiesel. Accordingly, the Appellate Body did not consider that the European Union had established that the Panel erred in its application of Article 2.2 of the Anti-Dumping Agreement in finding that the European Union acted inconsistently with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994 by not using the cost of production in Argentina when constructing the normal value of biodiesel. Consequently, the Appellate Body upheld these findings of the Panel.

4.6.1.1.3 Article 2.4 of the Anti-Dumping Agreement

Argentina appealed the Panel's finding that Argentina did not establish that the European Union acted inconsistently with Article 2.4 of the Anti-Dumping Agreement by failing to make due allowance for differences which affect price comparability within the meaning of this provision. Argentina alleged that the Panel erred in its interpretation of Article 2.4, because the Panel articulated a general proposition that is not supported by the text of Article 2.4 or relevant Appellate Body findings in past disputes. Argentina contended that the Panel also erred in its application of Article 2.4.

The Appellate Body observed that the Panel read the Appellate Body's findings in *EC – Fasteners (China) (Article 21.5 – China)* as being consistent with the general proposition that differences arising from the methodology applied for establishing the normal value cannot, in principle, be challenged under Article 2.4 as "differences affecting price comparability". The Appellate Body stated that it did not share the Panel's understanding that the Appellate Body report in that dispute contained any such general proposition. Rather, the reasoning in that report was tailored to the circumstances of that dispute, in which Article 2.4 of the Anti-Dumping Agreement had to be read in the context of the second Ad Note to Article VI:1 of the GATT 1994 and Section 15(a) of China's Accession Protocol. The Appellate Body emphasized that neither of those provisions was relevant for purposes of this dispute. Moreover, the Appellate Body stated that it would have serious reservations regarding what the Panel referred to as the "general proposition", given that the text of Article 2.4 itself makes clear that due allowance shall be made in each case, on its merits.

Recalling that it had upheld the Panel's findings that the EU authorities acted inconsistently with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement in constructing the normal value, and notwithstanding its

reservations about certain aspects of the Panel's analysis under Article 2.4 of the Anti-Dumping Agreement, the Appellate Body did not consider it fruitful, in the particular circumstances of this dispute, to further examine whether the EU authorities also failed to conduct a fair comparison in comparing the constructed normal value to the export price. The Appellate Body therefore found it unnecessary to rule on Argentina's claim at issue.

4.6.1.2 Imposition of anti-dumping duties – Article 9.3 of the Anti-Dumping Agreement

The European Union appealed the Panel finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 by imposing anti-dumping duties in excess of the margins of dumping that should have been established under Article 2 of the Anti-Dumping Agreement and Article VI:1 of the GATT 1994, respectively. The European Union argued that the Panel erred in its interpretation and application of Article 9.3 by: (i) considering that this provision calls for a comparison between the amount of duties and the dumping margins that should have been calculated consistently with Article 2 of the Anti-Dumping Agreement, and that a violation of Article 2 automatically results in a violation of Article 9.3; and (ii) relying on the margins of dumping calculated in the Provisional Regulation in applying Article 9.3 to the facts of this dispute.

The Appellate Body shared the Panel's understanding that the margin of dumping referred to in Article 9.3 relates to a margin that is established consistently with Article 2. Noting that Article 9.3 provides the benchmark against which the WTO–consistency of the amount of the anti-dumping duty must be examined, the Appellate Body considered that it would frustrate the function of Article 9.3 if the margin of dumping were itself inconsistent with the Anti-Dumping Agreement. The Appellate Body found support for the above understanding in the context provided by Article 9.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994, as well as in relevant past Appellate Body reports. Furthermore, in the Appellate Body's view, the Panel properly found that an inconsistency with Article 2 does not necessarily mean that the anti-dumping duty actually applied will exceed the correct margin of dumping, for example, due to the application of the lesser duty rule. Thus, in order to succeed with a claim under Article 9.3, a complainant must show that anti-dumping duties are imposed at a rate that is higher than the dumping margin that would have been established had the authority acted consistently with Article 2. The Appellate Body noted that such a showing will depend on the specific circumstances of each dispute.

The Appellate Body considered that the Panel's reliance on the margin of dumping calculated in the Provisional Regulation in reaching its findings was appropriate in light of the specific circumstances of this case, including the fact that: (i) the change in the basis for constructing the normal value that the EU authorities made between the Provisional and Definitive Regulations led to the finding of inconsistency with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement; (ii) this change significantly increased the margin of dumping and duty rates, in comparison to the provisional stage; and (iii) the consistency with Article 2 of the margin of dumping calculated in the Provisional Regulation had not been questioned. Thus, the Appellate Body found that the Panel did not err in finding that Argentina had made a *prima facie* case that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement, which the European Union had failed to rebut. The Appellate Body also agreed with the Panel that the above considerations applied *mutatis mutandis* to Argentina's claim under Article VI:2 of the GATT 1994.

For these reasons, the Appellate Body upheld the Panel's finding that the European Union acted inconsistently with Article 9.3 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994.

4.6.1.3 Non-attribution in causation determination – Articles 3.1 and 3.5 of the Anti-Dumping Agreement

Argentina appealed the Panel's finding that Argentina failed to establish that the EU authorities' treatment of overcapacity as an "other factor" causing injury to the EU domestic industry was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

Noting that the Panel stated that the revised data did not have a significant role in the EU authorities' conclusion in the Definitive Regulation on overcapacity as an "other factor" causing injury, Argentina alleged that the Panel erred in its interpretation of Articles 3.1 and 3.5 in considering it relevant to examine the role of the revised data in the EU authorities' conclusion on overcapacity. In the Appellate Body's view, however, the totality of the Panel's analysis made it clear that the Panel found that the EU authorities' non-attribution analysis was not based on or affected by the revised data. Thus, contrary to Argentina's argument, the Appellate Body did not consider the Panel to have articulated a standard whereby it was relevant to examine whether the revised data played a significant role in the EU authorities' non-attribution analysis. The Appellate Body therefore found that the Panel did not err in interpreting Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

The Appellate Body went on to address Argentina's claim that the Panel erred in its application of Articles 3.1 and 3.5 of the Anti-Dumping Agreement. First, the Appellate Body considered that Argentina failed to establish that the Panel erred in finding that the EU authorities' non-attribution analysis concerning overcapacity in the Definitive Regulation was not based on or affected by the revised data. Second, the Appellate Body considered that the Panel's statement that "overcapacity" and "capacity utilization" are logically related was consistent with the way in which these concepts were used in the investigation. In the Appellate Body's view, while "overcapacity" described, in absolute terms, the production capacity that the EU domestic industry had not used, "capacity utilization" described, in relative terms, the production capacity that the EU domestic industry had used. Thus, the Appellate Body considered that the Panel did not err in finding that the EU authorities were not required to give priority to the evolution of the domestic industry's overcapacity in absolute terms as opposed to its evolution in relative terms. Finally, the Appellate Body considered that, contrary to Argentina's argument, the EU authorities' assessment that capacity utilization remained low was consistent with the evidence before them. For these reasons, the Appellate Body upheld the Panel's finding that Argentina failed to establish that the European Union's non-attribution analysis was inconsistent with Articles 3.1 and 3.5 of the Anti-Dumping Agreement.

4.6.2 Claims regarding the second subparagraph of Article 2(5) of the Basic Regulation

Before addressing Argentina's claims of error, the Appellate Body noted that, when a Member's municipal law is challenged "as such", a panel must ascertain the meaning of that law for the purpose of determining whether that Member has complied with its WTO obligations. In this regard, a panel must conduct an independent assessment of the meaning of the municipal law at issue, and should not simply defer to the meaning attributed to that law by a party to the dispute. In conducting its assessment, a panel must undertake a holistic assessment of all the relevant elements before it. The Appellate Body stressed that a panel's assessment of municipal law for the purpose of determining its consistency with WTO obligations is subject to appellate review under Article 17.6 of the DSU. Just as it is necessary for the panel to seek a detailed understanding of the municipal law at issue, so too is it necessary for the Appellate Body to review the panel's examination of that municipal law.

4.6.2.1 Article 2.2.1.1 of the Anti-Dumping Agreement

Argentina claimed that the Panel erred in finding that the second subparagraph of Article 2(5) of the Basic Regulation does not require the European Union to determine that a producer's records does

not meet the second condition in the first sentence of Article 2.2.1.1 of the Anti-Dumping Agreement when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. Argentina further claimed that the Panel acted inconsistently with Article 11 of the DSU by failing to undertake a holistic assessment of all the different elements put forward by Argentina beyond the text of the measure, in order to ascertain the meaning of the second subparagraph of Article 2(5) of the Basic Regulation.

According to Argentina, Article 2.2.1.1 of the Anti-Dumping Agreement does not allow an investigating authority to reject or adjust costs simply because such costs are considered to be abnormally or artificially low due to a distortion. Argentina argued, therefore, that by providing that the EU authorities shall reject or adjust the records of the party under investigation when those records reflect costs which are abnormally or artificially low due to an alleged market distortion, the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Article 2.2.1.1 of the Anti-Dumping Agreement.

The Appellate Body reviewed the Panel's evaluation of all the elements submitted by Argentina, consisting of: (i) the relevant text of the Basic Regulation; (ii) the legislative history that led to the introduction of the measure at issue into the Basic Regulation, including academic articles; the alleged consistent practice of the EU authorities; and (iii) certain judgments of the General Court of the European Union. Following its review, the Appellate Body found that Argentina had not established that the Panel erred in its assessment of the second subparagraph of Article 2(5) of the Basic Regulation. Like the Panel, the Appellate Body found no support in the text of the Basic Regulation, or in the other elements relied on by Argentina, for the view that the second subparagraph of Article 2(5) concerns the determination that the records of the party under investigation do not reasonably reflect the costs associated with the production and sale of the product under consideration when those records reflect prices that are considered to be artificially or abnormally low as a result of a distortion. Instead, the Appellate Body shared the Panel's view that the second subparagraph of Article 2(5) comes into play only after a determination has been made under the first subparagraph that the records do not reasonably reflect the costs associated with the production and sale of the product under consideration.

As regards Argentina's claim under Article 11 of the DSU, the Appellate Body considered that the Panel had conducted a proper examination and undertaken a holistic assessment of the various elements before it. Therefore, the Appellate Body rejected Argentina's claim that the Panel had acted inconsistently with Article 11 of the DSU.

For these reasons, the Appellate Body upheld the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2.1.1 of the Anti-Dumping Agreement.

4.6.2.2 Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994

Argentina requested the Appellate Body to reverse the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. Argentina advanced three grounds in support of its appeal. First, Argentina argued that the Panel erred in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation by finding that, even when "information from other representative markets" is used, the second subparagraph of Article 2(5) does not require the EU authorities to establish the costs of production so as to reflect costs prevailing in other countries. Second, Argentina maintained that, in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation, the Panel acted inconsistently with Article 11 of the DSU by failing to undertake a holistic assessment of all of the different elements put forward by Argentina. Third, Argentina alleged that the Panel erred in finding that, in order for Argentina to prevail on its claim, Argentina had to demonstrate that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner.

The Appellate Body first observed that there is no basis, either in the practice of the GATT and the WTO generally or in the provisions of the Anti-Dumping Agreement, for finding that only certain types of measures can be challenged "as such". Allowing measures to be the subject of dispute settlement proceedings, whether or not they are of a mandatory character, is consistent with the comprehensive nature of the right of Members, enshrined in Article 3.2 of the DSU, to resort to dispute settlement to preserve their rights and obligations under the covered agreements. Furthermore, the Appellate Body stated that measures involving discretionary aspects may be found to violate certain WTO obligations "as such". The Appellate Body found that a measure may be found to be inconsistent "as such", if it restricts, in a material way, the discretion of the domestic authorities to act in a WTO-consistent manner. The Appellate Body emphasized that precisely what is required to establish that a measure is inconsistent "as such" will vary, depending on the particular circumstances of each case, including the nature of the measure and the WTO obligations at issue.

As with the claim of error under Article 2.2.1.1 of the Anti-Dumping Agreement, the Appellate Body reviewed the Panel's evaluation of all the elements submitted by Argentina. These elements consisted of the relevant text of the Basic Regulation, the legislative history that led to the introduction of the measure at issue into the Basic Regulation, the alleged consistent practice of the EU authorities, and certain judgments of the General Court of the European Union.

Turning to Argentina's first ground of appeal, the Appellate Body understood the second subparagraph of Article 2(5) of the Basic Regulation as allowing for a wide range of possible actions by the EU authorities. The Appellate Body considered that none of the elements relied on by Argentina demonstrated that the second subparagraph of Article 2(5) precludes the possibility that the EU authorities could use information from other representative markets but adapt that information to ensure that it reflects the cost of production in the country of origin. Accordingly, the Appellate Body found that Argentina had not established that the Panel erred in rejecting Argentina's assertion that the second subparagraph of Article 2(5) of the Basic Regulation means that, when the costs of other domestic producers or exporters in the same country cannot be used, the EU authorities are required to use information from other representative markets that does not reflect the costs of production in the country of origin.

As regards Argentina's claim under Article 11 of the DSU, the Appellate Body considered that, in ascertaining the meaning of the second subparagraph of Article 2(5) of the Basic Regulation, the Panel had conducted a proper examination and undertaken a holistic assessment of the various elements before it. Therefore, the Appellate Body rejected Argentina's claim that the Panel had acted inconsistently with Article 11 of the DSU.

With respect to Argentina's third ground of appeal, the Appellate Body agreed with the Panel that the second subparagraph of Article 2(5) of the Basic Regulation is capable of being applied in a WTO-inconsistent manner. However, to the extent that the Panel may have been expressing a legal standard for an "as such" challenge when it stated that Argentina had not demonstrated that the second subparagraph of Article 2(5) cannot be applied in a WTO-consistent manner, the Appellate Body considered this to be a misreading of a statement by the Appellate Body in *US – Carbon Steel (India).* The Appellate Body clarified that the finding in that dispute related to the nature of the WTO obligation at issue, and the burden of proof with regard to India's assertion as to the meaning of the municipal law at issue in that dispute.

That said, the Appellate Body considered that the mere fact that the application of the second subparagraph of Article 2(5) could, in some circumstances, lead to WTO-inconsistency was not sufficient to discharge Argentina's burden to make a *prima facie* case that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. For the Appellate Body, nothing in the second subparagraph of Article 2(5) of the Basic Regulation precludes the possibility that, when the EU authorities rely on "information from other representative markets", they could adapt that information to reflect the costs of production in the country of origin, in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. Therefore, the Appellate Body found that Argentina had not satisfied its burden of

proving that the second subparagraph of Article 2(5) of the Basic Regulation restricts, in a material way, the discretion of the EU authorities to calculate the costs of production in a manner consistent with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

For these reasons, the Appellate Body upheld the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Article 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994.

4.6.2.3 Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement

Argentina submitted that, because the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent "as such" with Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994, it necessarily followed that the second subparagraph of Article 2(5) of the Basic Regulation is also inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

Argentina advanced no arguments in support of its consequential claims under Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement that were separate from its arguments in support of its claims under Articles 2.2.1.1 and 2.2 of the Anti-Dumping Agreement and Article VI:1(b)(ii) of the GATT 1994. Having upheld the Panel's findings under those provisions, the Appellate Body upheld the Panel's finding that Argentina had not established that the second subparagraph of Article 2(5) of the Basic Regulation is inconsistent with Article XVI:4 of the WTO Agreement and Article 18.4 of the Anti-Dumping Agreement.

5. PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS

A total of 29 WTO Members participated at least once as appellant, other appellant, appellee, or third participant in appeals for which an Appellate Body report was circulated in 2016. 8 Members participated at least once as the main participants, and 27 Members participated, at least once, as third participants.

As of the end of 2016, 74 of the 164 WTO Members had participated in appeals in which Appellate Body reports were circulated between 1996 and 2016. Further information on the participation of WTO Members in appeals is provided in Annex 11.

6. PROCEDURAL ISSUES ARISING IN APPEALS

This section highlights the procedural issues that were addressed in the Appellate Body reports circulated in 2016.

6.1 Treatment of confidential information

In *US – Washing Machines*, Korea and the United States jointly requested that the Appellate Body Division hearing the appeal to adopt, pursuant to Rule 16(1) of the Working Procedures, additional procedures for the protection of business confidential information (BCI) on the basis of the BCI procedures adopted by the Panel. The European Union, a third party in the dispute, submitted that BCI procedures at the appellate stage should not be based on the Panel's BCI procedures, which in the European Union's view, had, in certain respects, been superseded by recent rulings by the Appellate Body.

The Division adopted a Procedural Ruling granting additional protection to the information, which had been designated as BCI in the submissions to the Appellate Body and in the panel record. The Division recalled that, in *EC and certain member States – Large Civil Aircraft*, the Appellate Body considered that the DSU and the Rules of Conduct already provide for confidentiality, and that any additional protection must be justified. Moreover, the Division observed that, while participants requesting particularized arrangements have the burden of justifying that such arrangements are necessary in a given case adequately to protect certain information, it is the task of the WTO adjudicator and not of the parties to determine whether additional protection in the form of BCI procedures is called for. The Division further recalled that, in *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body stated that in determining the scope and content of such procedures, the panel must consider the effect that these procedures may have on the exercise by the panel of its adjudicative duties under the DSU and other covered agreements, the parties' rights to due process, the rights of the third parties, and the rights and systemic interests of other WTO Members. The Division agreed with the United States and Korea that the information for which additional protection was sought related to sensitive commercial data of the companies concerned. The Division therefore provided additional protection to BCI and specified the terms of such protection.

6.2 Extension of time-period for Appellate Body member to complete an appeal

In *Colombia – Textiles and EU – Biodiesel*, the Appellate Body informed the participants and third participants that, in accordance with Rule 15 of the Working Procedures for Appellate Review, the Appellate Body had notified the Chair of the DSB of its decision to authorize Appellate Body member Mrs Yuejiao Zhang to complete the disposition of these appeals, even though her second term expired before the completion of the appellate proceedings. Likewise, in *India – Solar Cells*, the Appellate Body authorized Appellate Body member Mr Seung Wha Chang to complete the disposition of that appeal, even though his term expired before the completion of the appellate proceedings.

6.3 Time limits for the filing of written submissions

In *India – Solar Cells*, the United States requested the Appellate Body Division hearing the appeal to extend the deadline for the filing of its appellee's submission by one day. The United States noted that its appellee's submission in another pending appellate proceeding, namely, *US – Washing Machines* (DS464), was also due on the same day as the deadline for filing its appellee's submission in *India – Solar Cells*. The Division issued a Procedural Ruling, extending the deadline for the United States to file its appellee's submission by one day. Moreover, in order to provide the third participants sufficient time to incorporate reactions to the appellee's submission into their third participants' submissions, the Division decided, pursuant to Rule 16(2) of the Working Procedures, to also extend the deadline for the filing of the third participants' submissions and third participants' notifications by one day.

In *Argentina – Financial Services*, on the day set out in the Working Schedule for Appeal for filing third participants' submissions and executive summaries, just prior to the 5 p.m. deadline, Australia sent an e-mail communication to the Appellate Body and the participants and third participants indicating that it had omitted to include the executive summary of its third participant's written submission, and that it would endeavour to send the executive summary the following morning. The following day, Australia filed an executive summary of its third participant's submission. On the same day, the Appellate Body Division hearing this appeal sent a letter to Australia, informing it that the executive summary had not been filed in accordance with the official Working Schedule and inviting Australia to file a written request explaining why the executive summary should nonetheless be accepted.

Australia filed a request that the executive summary of its third participant's submission be accepted should the Division consider that there was no unfairness to any of the participants in this appeal, and taking account of the short length and limited scope of its written submission, and that the absence of an executive summary had been rectified as quickly as possible. The Appellate Body observed that compliance with established time periods by all participants regarding the filing of submissions is an important element of due process of law and a matter of fairness and orderly procedure, which are referred to in Rule 16(1) of the Working Procedures. The Appellate Body considered that these considerations are also valid with respect to executive summaries of written submissions. In the particular circumstances of the case, the Appellate Body accepted the executive summary of Australia's third participant's written submission.

6.4 Requests regarding the conduct of the oral hearing

In *US – Washing Machines*, the Appellate Body Division hearing the appeal asked the United States and Korea to keep their opening statements at the oral hearing to 30 minutes each and the third participants to keep their opening statements to a maximum of five minutes each. China requested the Division to allocate a further five minutes for its opening statement in light of China's direct and immediate interest in the issues raised in this appeal. China explained that several issues of interpretation raised in this appeal were directly relevant to the then parallel panel proceedings in *US – Anti-Dumping Methodologies (China)* (DS471). The Division informed China that, in light of the many issues raised in this appeal and in order to be able to complete the hearing within a reasonable time-frame, the Division did not consider that it would be appropriate to extend the time allocated for opening statements.

In *EU – Biodiesel*, the European Union requested a period of 50 minutes to deliver its oral statement at the hearing. The European Union expressed the view that there was an unusual volume of third participant submissions in this appeal, and that those submissions referred to a number of points that had not been raised by Argentina. The European Union asserted that it needed to have a full opportunity to address these additional points on its own motion and in an appropriately structured way. The European Union also requested that additional procedures be adopted for: (i) public observation of the oral hearing; and (ii) viewing of a recording of the oral hearing by third participants. The Appellate Body Division hearing the appeal informed the participants and third participants that they would be accorded, respectively, 35 minutes each and seven minutes each for their oral statements at the hearing. The Division also issued a Procedural Ruling in which it declined the European Union's request to adopt additional procedures: (i) to allow public observation of the oral hearing, and (ii) to enable the third participants to view a video recording of the oral hearing.

6.5 Reasons for the extension of the time-period for the circulation of Appellate Body reports

The 90-day time-period stipulated in Article 17.5 of the DSU for the circulation of reports was exceeded in all the appellate proceedings in respect of which Appellate Body reports were circulated in 2016. For each appellate proceeding, the Appellate Body communicated to the DSB Chairman the reasons why it was not possible to circulate the Appellate Body report within the 90-day period.

These reasons included the substantial workload of the Appellate Body, scheduling difficulties arising from overlap in the composition of the Divisions hearing appeals concurrently pending before the Appellate Body, the length of the submissions filed, the number and complexity of the issues raised, the shortage of staff in the Appellate Body Secretariat, and the demands that concurrent appellate proceedings had placed on the WTO Secretariat's translation services. In *Argentina – Financial Services and Colombia – Textiles*, there were additional constraints owing to the need for Spanish-speaking staff of which the Appellate Body Secretariat only had a limited number, and the need to translate documents from Spanish into English for non-Spanish-speaking Appellate Body members and staff.

6.6 Correction of clerical errors

In *US – Washing Machines*, Korea requested authorization, pursuant to Rule 18(5) of the Working Procedures, to correct certain clerical errors in its Notice of Other Appeal, other appellant's submission, and appellee's submission. The Appellate Body Division hearing the appeal provided the United States, the third participants, and third parties with an opportunity to comment in writing on the request. Having received no objections to Korea's request, the Division authorized Korea to correct the clerical errors in its Notice of Other Appeal, other appellant's submission, and appellee's submission.

7. ARBITRATION UNDER ARTICLE 21.3(C) OF THE DSU

The DSU does not specify who shall serve as an arbitrator 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 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.[34] In carrying out arbitrations under Article 21.3(c), Appellate Body members act in an individual capacity.

7.1 *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear*, WT/DS461/13

On 22 June 2016, the Dispute Settlement Body (DSB) adopted the Panel and Appellate Body Reports in *Colombia – Measures Relating to the Importation of Textiles, Apparel and Footwear.* This dispute concerned the imposition by Colombia of a compound tariff on the importation of certain textiles, apparel, and footwear.

The Appellate Body upheld the Panel's finding that, for imports of products classified in Chapters 61, 62, 63, and 64 (except for heading 64.06 but including tariff line 6406.10.00.00) of Colombia's Customs Tariff, in the instances identified in the Panel Report, the compound tariff exceeds the bound tariff rates in Colombia's Schedule of Concessions, and is therefore inconsistent with Article II:1(a) and (b) of the GATT 1994. With respect to Article XX(a) of the GATT 1994, the Appellate Body found that the measure at issue is designed to protect public morals in Colombia within the meaning of Article XX(a). However, the Appellate Body found that Colombia had not demonstrated that the compound tariff is a measure "necessary to protect public morals" within the meaning of Article XX(a). With respect to Article XX(d) of the GATT 1994, the Appellate Body found that that the measure at issue is designed to secure compliance with laws or regulations which are not inconsistent with the GATT 1994, namely, Article 323 of Colombia's Criminal Code, within the meaning of Article XX(d). However, the Appellate Body found that Colombia had not demonstrated that the compound tariff is a measure "necessary to secure compliance with laws or regulations which are not inconsistent" with the GATT 1994, within the meaning of Article XX(d). The Appellate Body therefore recommended that Colombia bring its measure, found in its report, and in the panel report as modified by the Appellate Body report, to be inconsistent with the GATT 1994, into conformity with its obligations under that Agreement.

At the meeting of the DSB held on 22 June 2016, Colombia informed the DSB of its intention to implement the DSB's recommendations and rulings in this dispute, and stated that it would need a reasonable period of time in which to do so. Consultations between the parties failed to result in an agreement on the reasonable period of time for implementation. Panama therefore requested that this period be determined through binding arbitration pursuant to Article 21.3(c) of the DSU. Colombia and Panama were unable to agree on an arbitrator. The Director-General appointed Mr Giorgio Sacerdoti as the Arbitrator on 30 August 2016. Mr Sacerdoti accepted this appointment on 5 September 2016.

Colombia requested a reasonable period of time for implementation of 12 months, taking into account: (i) the procedural steps set out in Colombia's domestic regulatory framework; (ii) the fact that the compound tariff is designed to be a measure to combat money laundering falling within the scope of subparagraphs (a) and (d) of Article XX of the GATT 1994; (iii) the complexity of designing the implementation measure in light of the Panel and Appellate Body Reports; and (iv) Colombia's status as a developing country. Colombia indicated that it sought to issue two "mutually-supportive decrees" – i.e. a tariff decree and a customs decree – as part of the implementation process.

[34] Mr Simon Farbenbloom served 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.

Panama responded that the reasonable period of time for implementing the DSB's recommendations and rulings in this dispute should be 66 days. Panama argued that Colombia's implementation obligation was limited to ensuring that its tariffs on the products at issue did not exceed the bound levels set out in its Schedule of Concessions and that any action unrelated to, or going beyond, the removal of the inconsistency with Article II:1(a) and (b) could not be included in the reasonable period of time.

The Arbitrator examined, as a preliminary matter, the findings of the Panel and the Appellate Body in the underlying dispute to ascertain whether the two decrees proposed by Colombia fell within the range of measures that would be capable of achieving prompt compliance with the DSB's recommendations and rulings. The Arbitrator noted that the Appellate Body recognized that there was a relationship between the compound tariff and the objective of combating money laundering in Colombia. The Arbitrator considered that, in determining the reasonable period of time, it was relevant to take into account that the DSB's recommendations and rulings imply that Colombia may decide to adopt measures pursuing the policy objective of combating money laundering, as long as they are apt in form, nature, and content to bring Colombia into compliance with its obligations under the GATT 1994. Consequently, the Arbitrator considered that the time needed to enact these decrees should be included in the calculation of the reasonable period of time for implementation.

With respect to Colombia's contention that, in the first stage of implementation, it needed six months to analyse the Panel and Appellate Body Reports and to evaluate how to implement the recommendations and rulings of the DSB, the Arbitrator agreed that the determination of the reasonable period of time should include time to conduct the preparatory process. However, the Arbitrator was of the view that some of the preparatory steps envisaged by Colombia could be pursued in parallel and within shorter time frames. Hence, the Arbitrator considered that the first stage described by Colombia could be completed in less than four months.

Colombia identified seven steps that it would take in the second stage of implementation: (i) the issuance of a recommendation by the Committee on Customs, Tariffs and International Trade Affairs (Triple A Committee); (ii) the preparation of the draft tariff decree and of the draft customs decree and its accompanying resolutions; (iii) public consultations; (iv) the issuance of an opinion by the Superintendent of Industry and Commerce on the potential impact of the proposed decrees on the conditions of competition; (v) the review and signature of the decrees by the Minister of Trade and the Minister of Finance; (vi) the review of the decrees by the Secretariat of the Office of the President of the Republic and the President's signature; and (vii) the publication and entry into force of the decrees.

In examining these steps, the Arbitrator noted that some of the component steps of the second stage were administratively mandated. The Arbitrator also noted that the tariff decree and the customs decree must be prepared by the Ministry of Trade, Industry and Tourism, and the *Dirección de Impuestos y Aduanas Nacionales (DIAN)*, respectively. Moreover, the Arbitrator observed that enactment of the decrees at issue required the signature by the President of Colombia and subsequent publication in the Official Gazette and entry into force.

With regard to public consultations, the Arbitrator referred to several examples provided by Panama showing that, in several instances, the Colombian authorities had held public consultations prior to issuing a decree related to the imposition of tariffs. In the Arbitrator's view, these examples demonstrated that the relevant Colombian authorities had conducted public consultations in the process of enacting decrees. The Arbitrator added that conducting public consultations during the rule-making process is commonly associated with good governance practices in contemporary polities, and should, in the present case, be taken into account when determining the reasonable period of time for implementation. With regard to obtaining an opinion from the Superintendent of Industry and Commerce, the Arbitrator disagreed with Panama's position that this step was unnecessary in the present case. The Arbitrator added that, while he did not object to either of these two steps, he had some reservations about the time frame proposed by Colombia.

The Arbitrator further observed that some of the legal instruments serving as a basis for various steps of the second stage did not appear to prescribe any minimum mandatory time frames, and, for those that did,

such time frames were shorter than the time requested by Colombia. Therefore, the Arbitrator considered that Colombia's legal process for enacting the tariff decree and the customs decree was characterized by a considerable degree of flexibility. Thus, the Arbitrator considered that there appeared to be a certain amount of flexibility within the normal administrative process that Colombia may be expected to utilize in good faith in order to ensure prompt compliance with the recommendations and rulings of the DSB.

Moreover, the Arbitrator observed that some of the steps outlined by Colombia could be carried out in parallel, and that there seemed to be a degree of overlap in the composition of some of the Colombian authorities that take part in the various steps of the decision-making process. Therefore, in view of the extensive preparatory work during the first stage and the decision-making process related to the recommendation of the Triple A Committee, the Arbitrator considered that the time frames for some of the latter steps outlined by Colombia could be shortened without compromising the ability of the relevant authorities to carry out the relevant tasks.

In addition, Colombia estimated that the preparation of the customs decree and its accompanying resolutions would take two months, and that the preparation of the draft tariff decree would take one month. While the Arbitrator acknowledged Colombia's efforts in preparing the customs decree and its accompanying resolutions in tandem, he also expected Colombia to make use of all possible synergies and flexibilities in the decision-making process so that it could promptly bring itself into compliance with its WTO obligations. Therefore, the Arbitrator concluded that Colombia could be expected to prepare the tariff decree, on the one hand, and the customs decree and its accompanying resolutions, on the other hand, in parallel and within a shorter time frame than the one proposed by Colombia.

With respect to the final part of the second stage, the Arbitrator acknowledged that draft decrees subject to the President's signature had to comply with certain legal formalities before being signed by the President of Colombia. Given the need to guarantee that the process of preparing the decrees adheres to the required legal formalities, the Arbitrator stated that the two-week period for the review of the decrees by the Secretariat of the Office of the President and the President's signature did not seem excessive. At the same time, the Arbitrator noted that Colombia requested one month for the publication of the decrees in the Official Gazette and their entry into force. In the Arbitrator's view, this time frame was not fully warranted in light of the requirements under Colombian law for the publication and entry into force of decrees.

Having examined all the arguments and evidence regarding the various steps under the second stage, the Arbitrator concluded that, while the steps outlined by Colombia were warranted in order to enact the tariff decree and the customs decree, Colombia would be able to complete all of these steps in less than the time it requested. Therefore, the Arbitrator considered that the second stage described by Colombia could be completed in less than four months.

Finally, both Colombia and Panama submitted that Article 21.2 of the DSU requires taking into account their respective status as developing countries as a particular circumstance in determining the reasonable period of time for implementation in the present case. The Arbitrator noted that, in a situation where both the implementing and the complaining Member are developing countries, the requirement provided in Article 21.2 is of little relevance, except if one party succeeds in demonstrating that it is more severely affected by problems related to its developing country status than the other party with respect to measures that have been subject to dispute settlement. The Arbitrator stated that, while he recognized that the means of implementation chosen by Colombia may comprise measures seeking to combat money laundering, he did not consider that, beyond this recognition, the developing country status of both parties had altered his conclusion as to the reasonable period of time for implementation.

In light of the foregoing considerations, the Arbitrator determined that the reasonable period of time for Colombia to implement the recommendations and rulings of the DSB in this dispute was seven months from 22 June 2016, expiring on 22 January 2017.

8. OTHER ACTIVITIES

8.1 WTO 20th Anniversary Conferences

In 2016, the Appellate Body continued its 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: (i) 15 May 2015 in Italy; (ii) 2-6 July 2015 in China; (iii) 28 August 2015 in Korea; and (iv) 2-4 December 2015 in Mexico.

The fifth conference was held in Cambridge (Massachusetts), United States of America, from 28 to 29 April 2016. It was organized by Harvard University. Mr Thomas R. Graham, Appellate Body member, was on the conference steering committee. The conference addressed a wide range of topics concerning WTO dispute settlement, including the future of trade remedies, the impact of free trade agreements, digital trade, services, and institutional resource constraints.

The sixth and final conference will take place in Delhi, India in February 2017. It will be organized by the National Law University, Delhi. Mr Ujal Singh Bhatia, Appellate Body member, is on the conference steering committee.

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 2016, the Appellate Body Secretariat welcomed interns from China, Finland, France, Greece, the Netherlands, Sri Lanka, and Ukraine. A total of 137 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. 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.

In 2016, the Appellate Body participated in the final development and testing of the DDSR application as well as in the drafting of a comprehensive User Guide, which will be provided to Members. The DDSR entered a pilot phase in July 2015. During this phase, parties and panelists may volunteer to use the DDSR in parallel with the existing paper filing procedures. By 2016, the e-filing tool of the DDSR had been tested at the panel stage in a few disputes, and was also tested in the appellate proceedings in *India – Solar Cells*. The testing of the DDSR in the pilot phase may continue for one or two more years before the DDSR is fully launched.

8.4 Technical assistance, moot court competitions, and other outreach activities

In 2016, Appellate Body Secretariat staff participated in the WTO Biennial Technical Assistance and Training Plan for 2016-2017.[35] This was particularly in relation to training government officials in dispute settlement procedures and practices in specialized courses, national seminars, regional trade policy courses, and advanced trade policy courses. Appellate Body Secretariat staff also provided training to visiting university students from different parts of the world.

Furthermore, in 2016, Appellate Body Secretariat staff along with colleagues from the WTO Secretariat participated as panelists in various moot court competitions. The WTO is committed to supporting the development of international trade law and WTO-related studies. One proven tool of such development is a simulation of WTO panel proceedings, in fora commonly referred to as WTO Moot Court Competitions. In such a Moot Court Competition, each participating student team represents both the complainant and the respondent in the fictional case and prepares both written and oral submissions. Oral pleadings are made before panels consisting of WTO law experts and a winning team is selected. Importantly, since 2003, the WTO has supported the annual Moot Court Competition on WTO Law organized by the European Law Students' Association (ELSA). The ELSA Moot Court Competition involves teams from universities in Africa, Asia-Pacific, Europe, Latin America, and North America.

While the WTO is firm in its commitment to support moot court competitions on international trade issues, in general, ELSA is of special interest in that it offers a global moot court competition. This competition therefore provides teams with the opportunity to interact and compete on a global stage with the best teams from the other regions, an opportunity that would not arise in a regional competition. Moreover, several WTO staff members participate as judges and in other capacities, thereby giving students the opportunity to interact with those working directly on WTO issues. Additionally, the ELSA Moot Court competition has created an avenue for interaction between WTO Member government officials, local university professors, and the participants of the competing teams. This has increased information exchange at the national level, and discourse on international trade law and other WTO-related issues.

In 2016, staff from the WTO and Appellate Body Secretariats provided support to the global ELSA moot court competition through technical advice on the subject matter, sending WTO staff to participate as panelists in the various regional rounds, and hosting the Final Oral Round in Geneva, Switzerland.

[35] WT/COMTD/W/211.

ANNEX 1

EXECUTIVE SUMMARIES OF WRITTEN SUBMISSIONS IN APPELLATE PROCEEDINGS

The Working Procedures for Appellate Review[1] (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. On 11 March 2015, the Appellate Body circulated a Communication to all WTO Members[2] titled "Executive Summaries of Written Submissions in Appellate Proceedings". In this communication, the Appellate Body informed the WTO Membership about its proposed new guidelines regarding executive summaries.

In particular, the Appellate Body introduced two new aspects to the practice of asking participants in appeals to submit executive summaries of their written submissions. First, the Appellate Body requested 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, instead of using the executive summaries to assist in drafting its own description of the arguments of the participants, the Appellate Body started annexing, to each of its reports, the executive summaries submitted by the participants and third participants in the relevant 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. It was hoped that the new approach would 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.

In 2015, the Appellate Body implemented this new approach on a trial basis for the first time in the appeals in *Peru – Agricultural Products* (WT/DS457) and *China – HP-SSST (Japan) / China – HP-SSST (EU)* (WT/DS454 / WT/DS460). In 2016, the participants and third participants submitted executive summaries of their written submissions in all the disputes before the Appellate Body. Appellate Body reports circulated in 2016 that reflect the new approach are: *EC – Fasteners (Article 21.5 – China)*; *Argentina – Financial Services*; *Colombia – Textiles*, *India – Solar Cells*; *EU – Biodiesel*; and *US – Washing Machines*.

The Appellate Body is considering whether it would be useful to incorporate some or all aspects of these guidelines into the Working Procedures now that both the Appellate Body and Members have had 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.[3]

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

2 WT/AB/23, 11 March 2015.

3 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

The Appellate Body observed a significant increase in the length of the appellants' and appellees' written submissions, as measured by the word count of those submissions between January 2009 and October 2015. While in the first five cases in the period considered the average number of words per submission was 26,965, the average number of words per submission in the last five cases of the period considered was 34,982, which represents an increase of almost 30% in the length of the appellants' and appellees' submissions. Accordingly, on 23 October 2015, the Appellate Body circulated a communication to all WTO Members, regarding possible introduction of limits on the length of written submissions[1] with a view to managing its increasing workload.

The Appellate Body identified a number of questions and considerations in order to initiate reflection and discussion among and with WTO Members. In particular, the Appellate Body proposed that WTO Members consider: (i) what the effects would be of setting limits on the length of written submissions in WTO appellate proceedings; (ii) whether the same limits on length should apply to all written submissions in all appeals and, if not, what objective criteria should be used to determine the applicable limits; and (iii) whether the rules setting limits on the length of written submissions should provide for the possibility to request, in exceptional circumstances, an extension of such limits.

The Appellate Body received comments from Australia[2], Colombia[3], the European Union[4], Japan[5], Mexico[6], Norway[7], and the United States.[8]

In principle, Australia and Norway supported uniform page limits for written submissions in all appeals. Australia noted that any guidelines that the Appellate Body may wish to adopt in this regard could include, for example, suggested page or word limits for simple, complex and highly complex appeals. In Australia's view, while limits on appellants' and appellees' written submissions should normally match each other, it may be necessary to allow a respondent greater length in disputes involving multiple complainants. Both Australia and Norway considered that any extension from such limits should be granted only in exceptional circumstances, to be decided on a case-by-case basis.

Colombia, the European Union, Japan, Mexico, and the United States did not support the introduction of limits on the length of written submissions. Colombia the European Union, Japan, and Mexico viewed page limits as an infringement of WTO Members' due process rights. For Japan, such page limits would also be contrary to Articles 16.4 and 17 of the DSU which provide that only parties to a dispute can define and delineate the scope of an appeal, and thus determine which issue or issues are to be reviewed by the Appellate Body.

Additionally, the European Union, Japan, and the United States pointed out that page limits would be impracticable for a variety of reasons. The European Union submitted that the length of written submissions

1 JOB/AB/2, 23 October 2015.
2 Communication from Australia, dated 22 January 2016.
3 Communication from Colombia, dated 13 November 2015.
4 Communication from the European Union, dated 14 December 2015.
5 Communication from Japan, dated 31 March 2016.
6 Communication from Mexico, dated 31 March 2016.
7 Communication from Norway, dated 31 March 2016.
8 Communication from the United States, 31 March 2016.

is determined largely by factors that are beyond the participants' control, including the quality of the underlying panel report, the number of claims raised, and the factual complexity of the dispute. Japan argued that adopting a uniform page limit applicable to all appeals could lead to parties filing additional submissions later in a proceeding to address issues that they had not fully addressed in their "initial" written submissions, and would therefore not alleviate the workload of the Appellate Body. The United States added that setting page limits could increase burdens on the Appellate Body and participants, and risk diverting resources away from the merits of the claims raised in a particular appeal. The United States underscored that page limits may mean that the Appellate Body receives less complete and informative submissions, thus increasing the workload of the Appellate Body. Page limits could also result in a participant having to reduce the number of issues appealed or arguments presented, without regard to the merit of those issues or arguments. Recalling that the average length of written submissions varies from case-to-case, and that the length of appellees' submissions has in fact declined in recent appeals, the United States submitted that it would not be appropriate or effective to apply the same page limit to all appeals. Furthermore, factors such as the complexity of the issues raised on appeal, or number of issues raised, could not be taken into account prior to the filing of the appeal.

As alternatives to page limits, Colombia suggested: (i) optimization of processes relating to document management (including translation); (ii) establishment of a working group within the Appellate Body comprising a suitable number of persons involved in all aspects of the disputes; and (iii) introduction of staff with specific legal and economic expertise in all areas. The European Union suggested guidelines by the Appellate Body urging the participants to keep their written submissions concise or guidance on how to structure submissions so as to avoid unnecessary reproduction of findings by the panel, case law, and arguments presented to the panel. Mexico suggested that the Appellate Body may wish instead to consider establishing on a trial basis a non-binding scheme or guidelines regarding the maximum length of written submissions.

Having considered the reactions of WTO Members, the Appellate Body decided not to pursue the introduction of limits on the length of written submissions.

ANNEX 3

COMMUNICATIONS FROM APPELLATE BODY MEMBERS AND FORMER APPELLATE BODY MEMBERS CONCERNING OPPOSITION TO THE REAPPOINTMENT OF AN APPELLATE BODY MEMBER

COMMUNICATION TO THE DISPUTE SETTLEMENT BODY FROM CURRENT APPELLATE BODY MEMBERS DATED 18 MAY 2016

Dear Ambassador Carim,

We have followed the recent statement of opposition to the reappointment of Mr Seung Wha Chang and the reasons for that opposition, which were provided to members of the press. We are concerned about the accuracy of some of those reasons and, in particular, about the risks they may carry for the trust that WTO Members place in the independence and impartiality of Appellate Body members, on which the dispute settlement system depends.

With regard to accuracy, no case is the result of a decision by one Appellate Body member, nor should interpretations or outcomes be attributed to a single member. Appeals are heard and decided by three members who are chosen randomly to constitute the Division for each particular case. During a Division's consideration of a case, there is always a formal, intensive exchange of views, in person in Geneva, between the three Division members and the Appellate Body members who are not on the Division. Our reports are reports of the Appellate Body.

Our mandate states in Articles 3.2, 17, and 19.2 of the Dispute Settlement Understanding that we are to adjudicate appeals and clarify existing provisions of the covered agreements without adding to or diminishing the rights and obligations provided in those agreements. We strive to adhere to that mandate when deciding complex issues that arise in a variety of circumstances, frequently on matters of first impression. Whether we have always succeeded is a subject we leave to the WTO Membership to discuss. We welcome the right of WTO Members to comment on our reports, as is foreseen in Article 17.14 of the Dispute Settlement Understanding, and we are open to other informed and constructive comments.

With regard to risks for the trust that WTO Members place in the independence and impartiality of Appellate Body members, we are concerned about the tying of an Appellate Body member's reappointment to interpretations in specific cases, and even doing so publicly. The dispute settlement system depends upon WTO Members trusting the independence and impartiality of Appellate Body members. Linking the reappointment of a member to specific cases could affect that trust.

Finally, we wish to say that we have the highest respect for Mr Seung Wha Chang as a person and colleague of integrity, independence, and impartiality. He has worked hard together with us to maintain the quality of our reports and to foster constructive improvement of our operations.

We recognize that there is no right of reappointment. We understand that we do not have a role in decisions for reappointment. But we felt compelled to make our views known for the reasons we have given.

Yours sincerely,

Thomas R. GRAHAM
Chair
Appellate Body

Ujal Singh BHATIA
Appellate Body member

Ricardo RAMÍREZ HERNÁNDEZ
Appellate Body member

Shree Baboo Chekitan SERVANSING
Appellate Body member

Peter VAN DEN BOSSCHE
Appellate Body member

Yuejiao ZHANG
Appellate Body member

COMMUNICATION TO THE DISPUTE SETTLEMENT BODY FROM FORMER APPELLATE BODY MEMBERS DATED 31 MAY 2016

Dear Mr. Chairman:

We write in the hope that we can be of some assistance to the Members of the World Trade Organization. As the thirteen living former members of the WTO Appellate Body, we have followed closely and with some concern the recent deliberations of the Members of the WTO on the pending candidacy for reappointment of one of our successors on the Appellate Body. We recognize that this is a political decision that is reserved exclusively for the Members of the WTO in their role as the WTO Dispute Settlement Body. We recognize, too, that, because it includes the possibility of the reappointment of a member of the Appellate Body to a second four-year term, the WTO Dispute Settlement Understanding contemplates also the possibility that a member may not be reappointed.

This acknowledged, we think it urgent nonetheless to voice our consensus that this political decision by the Members of the WTO must never be made in such a way that could threaten to politicize WTO dispute settlement and imperil the impartial independence of every member of the Appellate Body that is required by the WTO Rules of Conduct. The continued impartial independence of the WTO Appellate Body is essential to upholding the rule of law in international trade; moreover, we see it as a prerequisite to providing security and predictability for the rule-based multilateral trading system for the benefit of all of the Members of the WTO.

We emphasize that the concerns raised for us by the current reappointment process are wholly institutional. One member of the Appellate Body has been singled out for criticism by one Member of the WTO by reference to rulings in certain appeals in which he was a member of the Division concerned. The criticisms that have been directed toward that one Appellate Body member in the current process could just as easily have been directed toward any of the six other Appellate Body members. As the six other members of the Appellate Body have explained in a recent letter to the Members of the WTO, the rulings and the recommendations of the Appellate Body cannot be attributed solely to any one Appellate Body member, because "our reports are reports of the Appellate Body."

Throughout the first twenty years of the WTO and the Appellate Body, this has always been so. In always ruling, recommending, and reporting as one, the members of the Appellate Body have maintained and mutually reinforced the strength of their individual commitments to impartiality and independence. But if, now, the fact that a member of the Appellate Body joined in the consensus on the outcome on a particular legal issue or on a particular dispute becomes for the first time a factor in a decision on that member's reappointment, all of the accomplishments of the past generation in establishing the credibility of the WTO dispute settlement system can be put in jeopardy. This raises the possibility of inappropriate pressures by participants in the WTO trading system. There must be no opening whatsoever to the prospect of political interference in what must remain impartial legal judgments in the WTO's rule-based system of adjudication.

As our revered late colleague Julio Lacarte once said of any action that might call into question the impartiality and the independence of the Appellate Body, "This is a Rubicon that must not be crossed." The unquestioned impartiality and independence of the members of the Appellate Body has been central to the success of the WTO dispute settlement system, which has in turn been central to the overall success of the WTO. Undermining the impartial independence of the Appellate Body now would not only call into question for the first time the integrity of the Appellate Body; it would also put the very future of the entire WTO trading system at risk.

From time to time, one or more of the Members of the WTO may differ with a decision reached by the Appellate Body, but this does not necessarily mean that the Appellate Body has acted outside its mandate in reaching that decision. Such differences are unavoidable in a rule-based system that seeks to resolve

international disputes between disputing parties that maintain conflicting views of the meaning of the rules. Indeed, such differences are intrinsic to the very process of legal interpretation – the core competency of the Appellate Body.

A decision on the reappointment of a member of the Appellate Body should not be made on the basis of the decisions in which that Member has participated as a part of the divisions in particular appeals, lest the impartiality, the independence, and the integrity of that one Member, and, by implication, of the entire Appellate Body, be called into question. Nor should either appointment or reappointment to the Appellate Body be determined on the basis of doctrinal preference, lest the Appellate Body become a creature of political favour, and be reduced to a mere political instrument. Rather, as provided in Article 17.3 of the WTO Dispute Settlement Understanding, the standard for both appointment and reappointment should be whether the person in question is "of recognized authority, with demonstrated expertise in law, international trade and the subject matter of the covered agreements generally."

Should WTO Members ever conclude that the Appellate Body has erred when clarifying a WTO obligation in WTO dispute settlement, the Marrakesh Agreement establishing the World Trade Organization spells out the appropriate remedial act. Article IX:2 of the Marrakesh Agreement, on "Decision-Making," provides, "The Ministerial Conference and the General Council shall have the exclusive authority to adopt interpretations of this Agreement and of the Multilateral Trade Agreements" by a "three-fourths majority of the Members." Any such legal interpretation would, of course, be binding in WTO dispute settlement. We observe that, to date, the Members of the WTO have not seen the need to take any such action.

Furthermore, and importantly, should WTO Members conclude now that they would like to do still more to help ensure the impartial independence of the Appellate Body, we suggest that the current system of reappointment be abolished. Instead of one four-year term, with the possibility of a second four-year term, we recommend a single, longer term for all members of the Appellate Body.

Mr. Chairman, we respectfully request that you circulate this letter to all the Members of the WTO. We ask also that you assure them that we remain, as always, eager to serve them in any way we can.

We thank you very much.

Sincerely,

Georges Abi-Saab	James Bacchus	Luiz Olavo Baptista
Lilia R. Bautista	Claus-Dieter Ehlermann	AV Ganesan
Jennifer Hillman	Merit E. Janow	Mitsuo Matsushita
Shotaro Oshima	Giorgio Sacerdoti	Yasuhei Taniguchi
	David Unterhalter	

ANNEX 4

FAREWELL SPEECHES OF TWO APPELLATE BODY MEMBERS

SPEECH ON 26 SEPTEMBER 2016 BY SEUNG WHA CHANG

I would like to start by thanking all of the WTO Members, first for agreeing, four years ago, to appoint me to serve this wonderful institution with the honour of being a member of the Appellate Body and for enabling me to speak here today as I leave. For the last four years, I have constantly felt that I was a junior Appellate Body member. But now, as I am leaving earlier than my more senior colleagues, I feel like I am suddenly becoming senior to them. This is a good feeling. What a day!

I would like to address three aspects of WTO dispute settlement, and to follow that with a somewhat more personal reflection regarding the past four years at the Appellate Body. The first of these three aspects is what I see as one of the current challenges facing WTO dispute settlement in general. The other two relate more specifically to the Appellate Body's mandate, as well as its independence and impartiality.

Over the last twenty years, the WTO disputes have not only increased in number; they also have become more legalistic, more complex, and more sophisticated. This reflects the success of the WTO: national economies are more intertwined. It also reflects the increasing role of lawyers/litigators in WTO dispute settlement. The problem is, however, that this evolution appears not to have been contemplated in the DSU. For example: the 90-day time limit for appellate proceedings and the part-time status of Appellate Body members appear to be incompatible with the increased size and complexity of appeals brought to the Appellate Body.

Some may take the view that WTO panels and the Appellate Body were not designed to, and thus should not, operate in the same way as traditional judicial bodies. But if the users of the WTO dispute settlement system present their cases and request various procedural rulings with sophisticated advocacy skills and strategies as do litigants before such judicial bodies, the WTO panels and the Appellate Body will have no other way than to respond accordingly to accommodate the ways in which the dispute settlement system is currently being used by WTO Members. I believe the Appellate Body has done its best to accomplish this mission, while streamlining its case management practices accordingly. However, the Appellate Body has done it under the structural constraints that flow from the over-twenty year-old framework provided by the DSU.

So now the time has come for WTO Members to take action with regard to the legal framework of the dispute settlement system, whether through a revision to the DSU, or an adoption of supplementary rules or decisions by the DSB.

Now I turn to more specific issues. First, the Appellate Body mandate.

Of course, the scope of the Appellate Body's mandate should be defined in accordance with the DSU. Under the DSU, the Appellate Body is required to "address" each of the issues raised by the parties to a dispute during an appellate proceeding, and such issues are limited to "issues of law covered in the panel report and legal interpretations developed by the panel". Accordingly, once duly raised by the parties on appeal, the Appellate Body is under its 'legal duty' to address each of those issues.

WTO Members may diverge on how the Appellate Body should "address" each of the issues raised by the parties. In my view, this depends largely on how the parties presented their claims. But in the end it will

be the Appellate Body who will decide, on a case-by-case basis, how to address each issue appealed, in light of the guiding principles, for example, the aim of the dispute settlement system, which is the prompt resolution of disputes, and, equally importantly, due process concerns.

Article 3.2 of the DSU provides that "[t]he dispute settlement system of the WTO serves to clarify the existing provisions of [the covered] agreements in accordance with customary rules of interpretation of public international law." As the Appellate Body has said, this mandate to "clarify" is not an invitation for "the Appellate Body to 'make law' by clarifying existing provisions of the WTO Agreement outside the context of resolving a particular dispute." Thus, the Appellate Body should be careful not to provide general interpretations of the provisions of the covered agreements in an abstract or overly comprehensive manner disconnected from the scope of the issues appealed in a particular dispute, and thereby take the risk of foreclosing the interpretative window for future cases, in which a more pertinent dispute may arise.

At the same time, remember, the whole of the covered agreements of the WTO constitute a "single package" multilateral trading system, and each component cannot be interpreted or applied in isolation from other components. In interpreting certain provisions, panels and the Appellate Body face the delicate task of striking a balance between maintaining coherence among different but systemically connected WTO provisions, on the one hand, and respecting contextual peculiarities of each of them, on the other hand. This is why the Appellate Body should carefully consider systemic implications of the legal interpretations of any particular WTO provisions that may have an impact on other contextually relevant parts of the covered agreements.

This is a more difficult task than merely making an isolated and myopic decision of which party's argumentation regarding a specific WTO provision prevails. It is not an academic exercise, but rather a proper and required adjudicatory function of the Appellate Body. At the same time, it is the very core responsibility of the Appellate Body in clarifying the existing WTO provisions and thereby "providing security and predictability of the multilateral trading system," in which the whole WTO Members, including the third parties to a dispute, have a systemic interest.

Now I move on to the issue of independence and impartiality of the Appellate Body.

Undoubtedly, the independence and impartiality of adjudicators under the dispute settlement mechanism is the most fundamental pillar for the adjudicatory institution. Appellate Body members of course have the duty to maintain their independence and impartiality. Similarly, WTO Members who created this system also are obligated not to undermine the independence and impartiality of Appellate Body members.

It is true that there is no right of automatic reappointment for Appellate Body members. But, it is equally true that WTO Members as a whole have a very strong interest in preserving the independence and impartiality of the Appellate Body, and therefore they should be discouraged from using their sovereign right in ways that undermine basic confidence in the Appellate Body. Therefore, I recommend that the WTO Members through the DSB lay out some principles and procedural requirements that Members would be expected to observe regarding reappointments.

Each Appellate Body member's reappointment should be secured unless there are legitimate reasons for WTO Members to oppose it. Further, the scope of these legitimate reasons should be very limited. For example, "incapacity," including illness, and material breaches of duties as required under the DSU and other relevant rules, such as the Code of Conduct, would, in my view, constitute legitimate reasons to oppose reappointment. Such violations of duties may include failure to maintain independence or impartiality, for example affiliation with any government; *ex parte* communications of the type prohibited by the current rules; breach of confidentiality; and failure to avoid conflicts of interests.

Nevertheless, these reasons should become legitimate only when sufficient evidence has been properly presented in a timely manner by a WTO Member who intends to oppose reappointment, and when the level of such breach is "material." If a WTO Member seriously considers opposing reappointment of an Appellate Body member, it should make best efforts to raise this issue at the earliest practicable time, and sufficient due process opportunities for an Appellate Body member to be heard should be guaranteed before her term expires. Without such principles, not only may confidence in the independence and impartiality of Appellate Body members be eroded, but also unexpected vacancies in the composition of the Appellate Body may occur, which would be detrimental to the proper operation of the Appellate Body system.

Most importantly, the outcome of cases must never be an acceptable reason for opposing reappointment. And similarly, an Appellate Body member's adjudicatory performance relating to case-management, including her "judicial style," should not be recognized as a legitimate reason for opposing reappointment. In particular, I believe that there should be only one occasion for vetting "judicial style" – the lead-up to the initial appointment. The term "judicial style" may capture various aspects of an adjudicator's performance, which are normally kept confidential and invisible to outsiders. If a WTO Member attempts to define an Appellate Body member's 'judicial style' on the basis of its mere observation of that member's adjudicatory performance during the oral hearing, it would be something like drawing an elephant after touching only its nose without looking at the whole body.

Throughout my professional career of more than twenty-five years as an adjudicator, whether as a national judge, an international arbitrator, a WTO panelist, or an Appellate Body member, I have consistently applied one of my adjudicatory principles, that is, "if you cannot evenly please both parties with your questions in the hearing room, try to displease them both with your questions, but always evenly." In my recollection, for the last four years, in the Appellate Body hearings, my questioning has failed to evenly please both parties, but at every single one of them, I have tried my best to displease them in an even-handed manner, whether they are claimants or respondents, or whether they are large advanced countries or small less developed countries. Yes, this is my "judicial style".

Please imagine what would be the consequences to the proper functioning of the Appellate Body if individual Appellate Body member's questioning and judicial styles observed in the oral hearing room were to be assessed unilaterally by WTO Members (in particular, the parties to disputes) for their decision on whether to oppose her reappointment in the future? Should that continue to happen, I would rather suggest to my Appellate Body colleagues that the Appellate Body seriously consider eliminating oral hearings or replacing them with written questionnaires. Otherwise, no single Appellate Body member during her first term will be free from the risk of non-reappointment unless she is a magician to evenly please all parties all the time. Under such circumstances, can you expect an Appellate Body member to carry out her adjudicative functions in an independent and impartial manner, and how many Appellate Body members actually would like to consider seeking reappointment?

For all these reasons, I am glad that the DSB has launched the Dedicated Sessions on the issue of reappointment, including whether an amendment to the rules governing reappointment is necessary. I would strongly support a proposal to change the newly appointed Appellate Body member's term to a non-renewable six- or seven-year extended term. If this goal is too ambitious to achieve in the foreseeable future, then perhaps the DSB might use the Dedicated Sessions as a valuable forum to rationalize the reappointment process in order to preserve the independence and impartiality of the Appellate Body. I am truly (and truly) hopeful that WTO Members will convert my unfortunate event of non-reappointment into a valuable and positive opportunity to foster, rather than undermine, the independence and impartiality of the Appellate Body in the long run.

Let me lastly turn to my personal reflection on the last four years in this institution. First of all, it has been an enormous honour and privilege to work with so wise and dedicated six other colleagues. Recently, we have all marvelled, together, that, for the last few years, while listening carefully to the system users' voices

and wishes, the Appellate Body has made meaningful progress to improve its case-handling practices so as to make them more efficient and fair, and at the same time enhance our level of responsibility for the work products of the Appellate Body. I am proud of what I have done together with my colleagues so far, and I hope and believe that such efforts will continue after I leave.

The Appellate Body Secretariat lawyers, headed by the most dedicated Director, Werner, are one of the best and talented intellectual groups I have worked with in my entire professional life. Without them, under the short time limit and the part-time status of the Appellate Body members, the appellate review system of the WTO would not be sustainable. Therefore, it is essential that they should be provided with sufficient human resources and the working environment so that they can thrive and be retained under sustainable working conditions.

Eight years may be too a long period for one person to keep affection for another person with the same high level of passion. Likewise, my love for the WTO might have withered or faded away eventually, had I served two terms of four years. But, as I am leaving the WTO now after one term when my love for it is still at the highest gear, I will continue to be in love with WTO, in particular the Appellate Body, for the rest of my life.

And on a very final note, I recall, four years ago, I took an oath before all of you and my family including the twin children, while reading out this sentence: "I do solemnly swear that I shall perform my duties as a member of the Appellate Body of the World Trade Organization honourably, independently, impartially, conscientiously, and in accordance with the law of the World Trade Organization. I shall, at all times, avoid direct or indirect conflicts of interest in the exercise of my functions and responsibilities, and shall respect the confidentiality of proceedings of the Appellate Body." Now, I can proudly confirm that I have strictly kept my promise for the last four years.

Thank you all and goodbye.

SPEECH ON 26 OCTOBER 2016 BY YUEJIAO ZHANG

Time flies very fast. I have completed eight years of service as a member of the world-renowned Appellate Body which is the highest adjudicative body of the WTO. These past eight years have been the most rewarding of my fifty years of professional life. Serving on the Appellate Body has been a deep honour. I would like to thank all those who made it possible for me to be part of this unique institution.

It has also been a privilege and true pleasure to have spent these eight years in the company of such intelligent, wise and collegial members of the Appellate Body, both present and past, as well as the very dedicated staff of the AB Secretariat. While I say farewell, I express my gratitude to each of you.

When I was appointed Appellate Body member, I considered it to be a glorious mission and heavy responsibility on my shoulders. I took an oath before all of you on 23 May 2008 and I committed myself to serve the rules-based multilateral trading system and to settle trade disputes according to WTO law independently, impartially, conscientiously, and to avoid any conflicts of interest in the exercise of my functions and responsibilities. Independence and impartiality are of upmost importance for adjudicators. That we are unaffiliated with any Government and engage in no ex parte communication is a mandatory requirement for all panelists and AB members. This protects not only the authority and dignity of the AB, but also the integrity and credibility of adjudicators. Like my AB colleagues, I pledged my dedication and priority in carrying out the work of the AB and ensuring the security and predictability of the multilateral trading system. This was not mere lip-service, but a fulfilled promise on my part. I never forewent an AB assignment for a personal matter. In October 2008, my father was hospitalized just before I was due to travel to Geneva for an appeal and I was reluctant to leave him. My father told me, "You should go to Geneva. Settling a world dispute of such dimension is more important than my health. I will recover." At his

insistence, I came to Geneva as scheduled. After the oral hearing, the Exchange of Views among seven AB members and the Division's deliberation in the appeal process, I returned straight to the Beijing Hospital, but my father had passed away. My husband told me that my father had said that he was proud of me. These were his last words.

I have been inspired not only by my father, but also by the founding fathers of the Appellate Body. I count among these Ambassador Julio Lacarte, Judge Florentino Feliciano, as well as Professor John Jackson all of whom passed away in the last year. I was very fortunate to have had meetings with them in Geneva, in Beijing and other cities, where they shared with me their vast experience of WTO law and practice. Their vision, professionalism and dedication left a lasting impression on me.

I sincerely thank six AB colleagues for their dedication, profound knowledge on WTO law, collegiality, wisdom and long term experience on multilateral trade negotiations and dispute settlement, and for always making our deliberations warm, sharp, smooth and fruitful.

As AB members, we work hard. Despite extensive long distance traveling, many of us start to informally comment on issues through email at about 4 o'clock in the morning followed by intense meetings through the entire working day and into the evening and weekends. Since it is difficult to be recovered totally from the jetlag, almost all AB members have changed their regular sleeping time and become early birds!

In my view, the part time status of the AB members and 90 days' time pressure for completion of AB report is not sustainable, particularly in times of heavy work load, and given the complexity of legal issues raised in appeals. Due to delays in the appointment process, the AB had only six members for 9.5 months in 2013. At present it has only five members. The current two vacant ABM positions should be filled as soon as possible.

I would also thank the AB Secretariat very capable lawyers and dedicated staff. They also work hard, including in the evening and on weekends, and often at the expense of personal and family commitments.

The shortage of capable lawyers is a big challenge for the WTO dispute settlement mechanism. Stable and well trained and capable lawyers are very important for the smooth appeal process and retaining institutional memory. Unfortunately I have seen seven lawyers leave the ABS during the last eight years, roughly 40 % of them to law firms. There is an urgent need for the WTO to recruit very qualified lawyers and to retain them.

My colleagues of the AB and ABS have treated me as family. During the last eight years, I spent four Chinese Spring Festivals at AB work in Geneva. Surprising me, my ABM colleagues and the AB Secretariat staff organized parties to celebrate my birthday. I was deeply moved to tears by the songs that they composed and the dancing for my farewell. I will never forget the warm hospitality and close friendship that they offered me.

I am also grateful to the Chinese Government who nominated me to the AB after I had retired from the Asian Development Bank. The Chinese Government has never intervened in my work in the AB, even when I, together with other members of the Division, ruled that their measures failed to comply with some of the covered agreements. I am very impressed by their implementation of the WTO rulings.

My gratitude also goes to other Members of the WTO. They have respected the AB's findings even when such rulings found fault with their measures. The mandatory nature and good enforcement of DSB-adopted rulings is key to the success of the WTO dispute settlement system. At the same time, the trust and confidence that WTO Members place on the adjudicators encourage the AB to make every effort to ensure prompt and positive solution of trade disputes.

It is usually imprudent for adjudicators to speak on the issues they are asked to decide. Therefore, I was almost faceless and voiceless during my eight-year tenure at the WTO Appellate Body.

There are, however, a few occasions where AB members have been able to be more open, and frank, in expressing personal views. Following AB tradition, I would like to take this Farewell as an opportunity to offer a few modest personal observations about the WTO Dispute Settlement System and the Appellate Body.

The WTO Dispute Settlement System is highly regarded, and often referred to as "the jewel in the crown" of the WTO. Its establishment, including the creation of a permanent Appellate Body, was a significant achievement. The fact that some regional or bilateral trade and investment agreements will introduce a similar permanent court shows what a model the WTO Appellate Body has become for trade and investment dispute settlement.

WTO law is part of public international law. Trade is the engine of world economic development. More than 98% world trade is subject to WTO law, which provides security and predictability to the multilateral trading system. Consequently the harmonized and binding WTO law has contributed to the harmonization of public international law and to reducing its fragmentation. I believe that WTO law has also contributed to global economic governance, enhancing such important principles as the rule of law, accountability, transparency and inclusiveness.

During the last eight years I saw how much WTO law and dispute settlement contributes to the prevention of trade friction and reduction of trade protectionism under the world financial crisis and economic downturn. At the same time, I saw that 13 new Members joined WTO, committing themselves to rules-based multilateralism. The WTO has really become a "world" organization.

Meanwhile, I saw the extreme difficulty that WTO Members have in reaching consensus on important issues through multilateral trade negotiations. The slow process of the decision making in the WTO needs reform.

Overall, I believe that with its solid legal foundation, successful dispute settlement system as well as its sound negotiation and trade policy review mechanism and effective technical cooperation, the WTO plainly has the vigour not only to survive during difficult times, but to contribute to the peace and development of the world. The WTO will never die!

In recent years, the WTO Dispute Settlement System has faced many challenges. For instance, the demand for dispute settlement among Members is high, the number of cases being brought to the WTO is increasing, more issues and more complex issues are being raised, and submissions and reports are getting longer. All of this has created a heavier workload and engendered a shortage of experienced professional staff, but the budget is tight. How is the WTO to deal with these challenges?

I would like to offer some very preliminary and personal thoughts and proposals:

First, the WTO should explore the possibility of more use of the informal resolution of governmental trade disputes, for example, through consultation, mediation, and conciliation (also called alternative dispute resolution ADR). This would be an ideal choice. As ADR proceedings are faster than formal adjudication proceedings, the cost is lower to the parties; the proceedings are less formalistic, less legalistic, and less burdensome to the parties. Furthermore, ADR can reduce confrontation between parties and maintain long-term trading relationships among WTO Members. Parties' autonomy is the underlying principle. If the parties are willing to settle their trade disputes voluntarily and peacefully without prejudice to the interests and rights of a third party, they should be encouraged to do so. The DSU should provide incentives to let Members settle their disputes through ADR. Some Members may be concerned about the enforceability of the outcome of ADR. Just as the DSB adopts panel and AB reports having legal effect, it too could adopt any ADR agreement among parties.

Second, if consultations fail, the next step in WTO dispute settlement proceedings is the panel stage, which is very important. Fact-finding and legal reasoning, as well as the quality of panel reports, are vital parts of this stage of the process. Panelists act on an ad hoc basis. Selection and training of panelists is extremely important. To ensure a fair representation and participation of WTO membership in this process, selection and training of panelists from developing country Members should be a top priority in the legal aid agenda of the WTO.

Third, measures are needed to address the current shortage of qualified lawyers to support panel and appeal work. Internal mobility of qualified lawyers should be encouraged, and ongoing training in fact-finding and legal reasoning should be encouraged and made more available to Secretariat staff in the dispute settlement Divisions. Drafting consonant with WTO law, coherent, convincing, concise and reader-friendly reports should be a key objective of in house quality control.

Fourth, the competent authorities and Committees of the WTO should clarify and interpret the WTO covered agreements in a timely manner. Through subsequent agreements, a set of secondary rules can be adopted quickly.

As the highest decision making body of WTO, the Ministerial Conference decisions should be given more weight. All Members should implement adopted Ministerial decisions in good faith.

Fifth, on the subject of remand, I would think the introduction of such a new system may not be effective, because once the parties know the outcome of the AB's decision, they may be reluctant to provide additional factual information that would confirm their violation of the covered agreements. In addition, organizing new panels is very time consuming, and may prolong the proceedings and impose more burdens on the parties. If a panel undertakes a thorough fact-finding exercise and parties cooperate in providing all uncontested evidence and sign an agreed statement of facts, there should be little need for panels to exercise judicial economy. Then, at the appellate review stage, if the AB reverses some of the panels' interpretations and conclusions, the AB can complete the legal analysis based on the uncontested facts and other factual information and findings in the panel report. By completing the legal analysis, it can avoid mooting some of the panel decisions and not leave issues open.

Sixth, many panel meetings and oral hearings are now open to public viewing. Some Members are reluctant to open the oral hearing to the public because they have few representatives in Geneva who can benefit from the hearing. Providing access through internet streaming would allow more Members and more people to benefit from such open proceedings. Making the WTO DS proceedings more transparent is beneficial to the dissemination of WTO law and training of people. Article 17 of the DSU should be amended accordingly.

Seventh, a further improvement to WTO dispute settlement proceedings would be the issuance of more concise and convincing reports. Written submissions by the parties should be shorter with set page limits. The determinations of a reasonable period of time awarded through arbitration should be no more than 15 months, and there is no need for reports setting out such determinations to be lengthy. Article 21.5 compliance proceedings should focus on the measures taken to comply, and should not reopen the case.

Eighth, the DSU stipulates that the AB shall provide its report within a maximum of 90 days. But the 90 days include weekends, holiday periods, and time needed to translate the report into the official WTO languages. So the actual working days are really only two months. This tight time requirement should be more flexible, based on the complexity and novelty of the legal issues in question. Quality and outcome should be the first consideration of dispute settlement proceedings. In my view, AB reports could be shorter and more concise if the AB was afforded the time necessary for deliberation and drafting of its reports.

Ninth, to achieve the UN millennium goal on poverty reduction and enhancing the standard of living of people in the world, trade policies play a very important role. Several WTO covered agreements also ensure governments' rights to regulate according to law. Among those policies to protect public goods, I see environmental protection and appropriate subsidies.

For instance, should Article 8 of SCM agreement on Non Actionable Subsidies be reactivated? I believe that assistance to research activities, assistance to disadvantaged regions; assistance to promote adaptation of existing facilities to new environmental requirements imposed by law should be non-actionable.

Tenth, while the multilateral trade negotiation is slow, the regional free trade agreement negotiations develop rapidly. There are more than 400 Regional Free Trade Agreements. Should the WTO do more than merely receive the reports and information of the FTAs? Perhaps it could coordinate or provide best practices or samples to its Members to enhance the weaker Members' bargaining position and help to avoid conflicts between FTAs and the covered agreements. There are new modalities to conduct cross border trade, such as import and export over the internet. Should the WTO take the lead in the preparation of relevant rules to govern new ways of trading?

For all the above tasks, we need highly qualified people, trade specialists, economists and WTO lawyers. Human resources development is the key, particularly the training of developing countries' experts on WTO.

In concluding my personal reflexions, I am very confident that WTO dispute settlement is sound and widely supported by 164 Members. More importantly, WTO dispute settlement is handled by very capable, highly professional and very knowledgeable AB members, panelists, Secretariat staff and WTO Members. I thank you again from the bottom of my heart for your very hard work and effective contribution to the success of the WTO dispute settlement system. I am proud to have been a part of it. I wish you all the very best!

ANNEX 5

SPEECH BY THOMAS GRAHAM ON 22 NOVEMBER 2016

SPEAKING UP: THE STATE OF THE APPELLATE BODY

Yogi Berra, a great American baseball player of the 1950's, remains famous today in part for what are called his "Yogisms" – a unique mangling of the English language in ways that often, perhaps unwittingly, showed clever insight:

> "It ain't over 'til it's over;"
>
> "It's déjà vu all over again;"
>
> "Half the game is 90% mental."

Yogi once told an audience: "Thank you for making this occasion necessary."

I want to thank the World Trade Institute, the University of Geneva, the Graduate Institute, the WTO, and my colleagues on the Appellate Body and AB staff, for helping to make this occasion possible. And I want to give special thanks to the WTI for helping to make possible the reception this evening.

And channelling Yogi Berra, I want to cite developments throughout this challenging year for making this occasion necessary.

It has been a difficult year. One Appellate Body colleague completed her second term and rotated off, and another AB colleague was not reappointed to a second term, giving rise to a discussion in the Dispute Settlement Body dedicated to the subject of the independence and impartiality of the Appellate Body in relation to the reappointment process, a discussion that we have followed and appreciate.

As a consequence of the vacancies, we have been five instead of seven Appellate Body members for half the year. We have managed to do all right with that, with some of us overlapping on cases and all of us working a little harder. So far this year we have issued six reports, and the business of the AB has continued to be done. We expect to welcome soon two new members. We are grateful for that and look forward to their joining us.

But Yogi Berra also said: "The future ain't what it used to be."

Looking ahead, things are not going to get easier. For one thing, many things are unforeseeable. And for another, the large increase in cases that has long been predicted is now upon us.

We have three appeals in process currently, including the enormous Airbus compliance appeal, and China's appeal in US Antidumping and Countervailing Duty Methodologies. We have been told by the Directors of the Legal and Rules Divisions to expect about 26 panel reports to be issued during 2017 – twenty-six – including another enormous appeal, the Boeing Section 21.5 compliance case, and an appeal of the large

and complex Australia Plain Packaging panel decision. Since historically more than two-thirds of all panel reports are appealed, we can expect 17 or 18 new appeals next year, along with the carry-over of Airbus, Methodologies, and Russia Pigs – the three appeals that are currently pending.

In other words, we are expecting next year almost three times the number of appeals that we had in the busy year that we are now completing, and those 20-plus appeals next year will, almost certainly, include cases that are unusually large and complex. This will cause a backlog that will build up and continue beyond 2017.

Moreover, during 2017 we will lose two more veteran Appellate Body members whose second terms will expire, so there will be two more vacancies to be filled. By the end of next year, four of the seven Appellate Body members will not have served more than one year. Currently we have only 16 lawyers to help us, a number that is flatly inadequate for the caseload we are facing. By comparison, more than 45 lawyers are working at the panel stage.

So we have chosen to speak up, to break out of the "splendid isolation" that has enveloped the Appellate Body during most of its first 20 years. We've begun doing that already: starting with the workload paper that we issued in 2013, and continuing with our participating in several receptions, including one kindly hosted by the Canadian Ambassador. We continued our communication with Members through "listening sessions" that my predecessor as Chair, Peter van den Bossche, held with individual delegations and representatives of groups of delegations last year. We co-hosted and participated in conferences celebrating the 20th Anniversary of the WTO, which were held over the past 17 months in Florence, Beijing, Seoul, Cancun, and Cambridge, Massachusetts (and still another is to be held in Delhi). Currently I am holding a second round of "listening sessions" with delegations and their representatives.

We have learned a lot from listening to WTO Members. We have concluded that the benefits of communicating far outweigh any downsides. And, more than ever, we need to keep talking. I will return to that in a moment.

The Appellate Body has always struggled with – and succeeded despite – the fact that from the beginning we have been continuously adapting and making do with an organizational structure that was obsolete almost from the first day, because it was based on expectations that were very different from what in fact occurred.

The Appellate Body was an afterthought, created at the end of the Uruguay Round negotiations 20 years ago. It was an amazing achievement – the Uruguay Round – the culmination of changes that had begun to stir many years earlier, when an earlier generation of negotiators – the generation of the grandfathers and grandmothers of some of you – began to tackle a category of subjects that were then called "non-tariff barriers" to trade.

From those seeds the Uruguay Round negotiators, between 1986 and 1995 – produced 22 agreements setting forth new rules aimed at fostering open and fair trade competition over a wide range of subjects, many of which had not been the specific subject of trade rules before. And along with these new rules, the Uruguay Round negotiators created a new and larger international institution – the WTO – to house, promote, and reconsider the WTO rules, and to settle disputes arising under them.

As most of you know, one of the bold innovations of the Uruguay Round was adoption of the "reverse consensus rule": that a final dispute-settlement finding becomes a decision of the WTO Dispute Settlement Body, and therefore becomes subject to mandatory compliance backed by the possibility of trade retaliation, unless the decision is opposed by consensus of the DSB members. This created one of the most credibly enforceable dispute settlement system in the history of international law.

The virtually automatic adoption of panel reports, backed by the possibility of authorized trade retaliation, made some of the negotiators nervous. What if a dispute settlement panel got it wrong? And so, late in the Uruguay Round, the negotiators added a few lines to the new Dispute Settlement Understanding and thereby created a second level for the review of initial panel reports. They called it the Appellate Body.

As created, the Appellate Body was a sort of a court, but not exactly a court, since its decisions were subject to DSB approval albeit under the reverse consensus rule. Appellate Body members were sort of judges, deciding cases and subject to strict Code of Conduct and ethical rules. But the AB members were unlike most other judges, since they were to be part-time, were not expected to live in Geneva, and were not prohibited from holding other jobs.

Few expected the Appellate Body to be very busy or to play a central role in WTO dispute settlement. One prominent scholar said many delegations saw the newly created Appellate Body "as a kind of Super-Panel to give a losing party another bite at the cherry, given that the losing party could no longer block adoption of the Panel". Another called the Appellate Body a safety measure against "bad" panel reports. The Chairman of the WTO dispute settlement negotiations, the late, great Julio Lacarte, who also was the first Chairman of the Appellate Body, said later that many governments believed panels would continue to be the "backbone" of WTO dispute settlement, and that "the newly created Appellate Body would be called upon infrequently."

At the time, on average there were about six cases a year, at the panel level. A small portion of these six were expected to be appealed. And so, for the Appellate Body's beginning in 1995, the WTO Dispute Settlement Body decided that, "a reasonable level of support in the initial stages of operation of the Appellate Body would be one registrar, three professional assistants with legal training, and sufficient clerical staff."

Perhaps they had not seen an American film of about the same period, called Field of Dreams, which gave rise to a pithy aphorism that is still widely used: "If you build it, they will come." As Lacarte later put it, "[i]t was WTO Members themselves who resorted to appealing almost every panel report from the very beginning." In the early years, the appeal rate was nearly 100%.

The appeal rate eventually settled down to about 70% of all panel reports. But the number of appeals, the number of issues appealed, and the number of arguments and pages, have all grown enormously, especially in recent years.

In the Appellate Body's first three years appeals averaged three per year. In the most recent three years there have been 24 appeals in total, an average of eight per year. And next year, as I said earlier, the Appellate Body expects to be dealing with 20 or more appeals, between two and three times the annual average.

And the cases have grown much larger. The length of WTO panel reports that have been appealed has more than doubled since the early years of WTO dispute settlement to an average of more than 350 pages. The average number of exhibits submitted by the parties to panels, and, thus, frequently on appeal to the Appellate Body, has increased from around 60 per case in the early years, to over 500 currently. The factual and legal complexity of disputes has also grown over time, and the growing body of WTO jurisprudence further contributes to the length and complexity of submissions on appeal. This trend has intensified as we predicted in workload paper that we circulated in 2013.

Mega-cases, such as the Airbus and Boeing cases, have stretched our capacity and made delays and queues necessary, and will do so again.

Outside lawyers now represent parties in most disputes, and while their presence sharpens issues and makes additional expertise available, and is welcomed by us, it also may contribute to increasing the number of issues raised and arguments made. In fact, the average number of issues raised on appeal has more than

doubled since the early cases. The number of claims brought under Article 11 of the DSU, requiring us to examine a panel's assessment of the facts, has also increased, and so has the number of procedural requests made during an appeal.

Remember that we were an afterthought, that the Appellate Body was designed to review a few cases a year and that the rules that define our structure have not changed in the 20 years since our founding.

Appellate Body membership is still officially a part-time job; many Appellate Body members have had other professional commitments, an expectation that is reflected in the rules.

Appellate Body members are not expected to live in Geneva, and the incentive system, while improved, reflects the expectation that we will live in our home countries, but be available at all times and on short notice for travel to Geneva. We spend a lot of time in jet lag.

The original rules still call for us to complete the consideration of appeals and to release our final reports within 90 days of the date an appeal is filed, a deadline that simply is not realistic in view of the size and complexity of appeals today, and especially considering that the first 21 days following the filing of an appeal are taken up with the filing of submissions, and that we must give the translators our final report two or three weeks before the report is to be issued, to allow adequate time for translation.

We have to note, also, that whether we exceed 90 days or not, the appeal stage, during which we hear a case, accounts for only a small portion of the overall duration of WTO dispute settlement proceedings, which may take up one and a half or two years, or longer in exceptionally big cases. By way of comparison, the average duration of the proceedings before the International Court of Justice is four years, and before the General Court and the Court of Justice of the European Union, more than three years. And the ICJ has 15 judges and 60 professional staff.

From the beginning, the Appellate Body has had to adapt to workloads and demands that were not expected, with an institutional structure that was not designed for such workloads and demands. So far, the Appellate Body has been able to adapt well enough.

Quantitatively, the Appellate Body has issued 142 reports, including reports regarding parties' compliance under Article 21.5 of the DSU. During the same period (1995- 2016), the International Court of Justice rendered 65 judgments and five advisory opinions – less than half the Appellate Body's number -- and the International Tribunal for the Law of the Sea rendered 12 judgments and two advisory opinions.

Whether there has been a "resolution of a dispute" is not always a precise concept, but we can say for certain that compliance with our rulings has not continued to be an issue, under WTO auspices, at least, in all but a small handful of the disputes that have come before us.

Qualitatively, like judges everywhere, we work with less than perfect rules, rules that were the subject of negotiators' compromises, rules that are sometimes ambiguous, imprecise, incomplete, or contradictory, rules that sometimes are not fully up to date with rapidly changing globalized trade. We can't read the minds of the negotiators who concluded the agreements, nor is it our job to do so. We work with the words on paper.

But that is rarely as simple as it might sound. The Dispute Settlement Understanding states, in the most relevant part of Article 3.2, that the WTO 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". It further states that findings of the dispute settlement system "cannot add to or diminish the rights and obligations provided in the covered agreements".

But, in almost every appeal that comes before the Appellate Body, the very heart of the question at issue is whether an interpretation advocated by one of the participants would correctly reflect the balance struck in the treaty provisions, or would add to or detract from the rights and obligations of a WTO Member. Whether we have struck the balance correctly is often in the eye of the beholder.

Maintaining the balance struck by the negotiators and written into the rules is, in fact, a nearly-constant theme in our deliberations. For example, a lot of our cases touch upon national laws and policies regarding subjects as sensitive as health and safety, protection of natural resources, and even protection of "public morals." We are keenly aware of the balance that is struck between the rules on fair and open competitive trade opportunities, on one hand, and proper space for domestic regulation, on the other hand, as reflected, for example, in the exceptions such as those expressed in GATT Article XX; in the preambles of several of the Uruguay Round agreements; and in many of the rules themselves.

We try hard to discern and give meaning to that balance as reflected in the treaty text and to get our interpretations right. We can't expect all Members always to agree with us. We don't always agree even among ourselves. But we do bring to these discussions respect for one another and our honest best efforts, by our own lights. We read the statements that parties to our appeals make in the DSB, and we are always open to constructive criticism.

We also have tried to be more efficient in the way we handle cases, and more user-friendly in the way we write our reports. Last year we began, on a trial basis, annexing to our reports the participants' and third participants' executive summaries of their arguments, instead of summarizing those arguments ourselves in the opening pages of our reports. We also have begun restating the reasoning behind our conclusions in the final pages of our reports, in the section listing the findings and conclusions. This is an effort to make it easier for those who turn quickly to the "Findings and Conclusions" section to understand the decisions and the reasoning. We are always looking for ways to improve the interaction between ABMs and participants in oral hearings, and we have heard the suggestions that have been made in this respect.

We are well aware that developing-country Members face considerable burdens for participation in the WTO dispute-settlement system, and that, so far, the system has been used only once by a least-developed-country Member. But we are happy that through the Advisory Centre on WTO Law – an institution unlike any other that we are aware of in any other international court system – developing country Members are provided excellent legal services and training at low costs. Notably, LDC-Members of the WTO, or countries in the process of acceding, are entitled to the services of the Advisory Centre without having to become its members or to contribute to its fund.

A speech on the state of the Appellate Body would be incomplete without some mention of independence and impartiality. My colleagues and I welcome the discussion in the "Dedicated Session" that is taking place in the DSB. Needless to say, the independence and impartiality of adjudicators are vital to any adjudicative system, including the WTO dispute settlement system, and we need to safeguard it.

We consider that independence can be challenged in various ways. Pressures regarding reappointment may be one way. Indirect pressures, for example, to limit resources or staffing may be another way of compromising our independence.

I also would consider our "speaking up" to be incomplete without a brief word about the unique position of the Appellate Body and our Secretariat within the WTO structure. We are the only unit in the WTO framework that has its own senior management – the members of the Appellate Body – and whose staff is directed by that senior management and largely independent from the WTO Secretariat. This, too, is an essential element of our independence. WTO Members recognized this in the very first Decision of the Dispute Settlement Body, of 10 February 1995, which says in part: "The Appellate Body and its support staff

should be independent from the Secretariat…", and that the Appellate Body staff "should be employed by the WTO, on conditions similar to those accorded secretariat staff of similar rank, but should otherwise be administratively separate from it and answerable to the Appellate Body…".

Regarding the sufficiency of the Appellate Body staff, the Dispute Settlement Understanding says in Article 17.7 that the Appellate Body "shall be provided with appropriate administrative and legal support as it requires." The first DSB decision, regarding the Appellate Body, adds that, "the number of support staff needed depends on the anticipated workload of the Appellate Body." The number of the staff allocated to the Appellate Body, and the timing of their appointments, is decided by the senior administration of the WTO, within the parameters set by the Budget Committee.

In conclusion:

The massive volume of appeals next year and beyond, some very large, will tie up a large part of the Appellate Body staff, and will command much of the time and energy of Appellate Body members, for long periods of time. And that, in turn, will reduce our capacity to staff and consider other appeals in parallel.

We will do what we can, with the staff and resources that we have, on a sustainable basis. We will not attempt to drive our staff beyond what is sustainable by them and permissible under the rules. Our staff members are very talented; they work for us by choice, but we can't keep them unless they have reasonable working conditions, and reasonable opportunities for professional advancement.

In striking the balance between quality, speed, sustainability, and capacity, we will give priority to quality within our capacity. This means that almost certainly there will be delays and queues. We will work with the Members and case participants to handle these problems as well as possible.

And that brings me to a request directed to the Members of the WTO:

Our constituents are you, the Members of the WTO who created the Appellate Body, framed our mandate, bring your disputes to us, have the ultimate word on acceptance of our findings, and must comply with our findings after they are authorized by the DSB. Let us see if we can work together to maintain, nurture, and preserve the trust and credibility that has been built up over the years in this dispute settlement system, which is uniquely effective, but fragile, and which cannot be taken for granted.

Can we find a better way for WTO Members and the Appellate Body to discuss long-standing structural problems? As it is, the best efforts on both sides have resulted in our talking past one another to some extent. Our interactions are mainly transactional: We issue decisions; you comment on them in the DSB. Our management of this joint enterprise is mainly unilateral – on both sides: We say from time to time that we are understaffed, very busy and under strain. You make statements in existing WTO bodies or form groups to consider what might be done, but without our input or feedback. Might it be possible to close that gap, and find a way to interact about the structural problems of the dispute settlement system, and in particular of the Appellate Body?

The resolution of disputes, the measures of stability, clarity, and predictability that the Dispute Settlement System has brought about have been achieved by our working together: you provide us with quality pleadings, and we try to respond with quality rulings. But maybe it is time to see if a common effort might put this fragile enterprise, which started as an afterthought, onto a sounder footing, not only in the area of independence and impartiality but also in areas such as matching resources to the growing demands. Maybe we should engage with one another more broadly, and more frequently, than merely meeting across the podium in the hearing room.

In speaking up about the state of the Appellate Body, I have tried to show how we think about this role to which we are all, in our ways, so committed. Maybe in doing so we lose a little of the majesty of "splendid isolation." Maybe in drawing back the figurative robes we expose ourselves to additional criticism.

But we chose to speak up, hoping that by trying to promote more understanding of how we see things we might contribute toward healing some of the scrapes and scratches of this challenging year, and maybe even begin a process that may result in adapting the Appellate Body better to the challenges it faces today and will face more in the intense years of adjudication ahead.

After all, by speaking up this way we are only following the advice of Yogi Berra, who said: "When you come to a fork in the road, take it."

Thank you.

ANNEX 6

MEMBERS OF THE APPELLATE BODY (1 JANUARY TO 31 DECEMBER 2016)

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 served in senior positions in the Government of India as well as in Orissa State in various administrative assignments that involved development administration and policy-making. His legal and adjudicatory experience spans over three decades, and has involved domestic and international legal/jurisprudence issues, as well as negotiation of bilateral, regional, and multilateral trade agreements.

Mr Bhatia has often lectured on international trade issues and has published numerous papers and articles on a 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 an LLB and an LLM from Seoul National University School of Law, and an LLM as well as an 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, Slate, Meagher & Flom. 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. Earlier 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. 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. 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 has been a Guest Scholar at the Brookings Institution and 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 JD 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.

Hyun Chong Kim (Korea) (2016-2020)

Mr Kim received his Degrees of Bachelor, Masters and Juris Doctor from Columbia University in New York. He served as Trade Minister for Korea from 2004 to 2007, during which time Korea negotiated free trade agreements with more than 40 countries, including Korea's biggest trading partners. As minister, Mr Kim was appointed Facilitator for the services negotiations at the WTO's December 2005 Hong Kong Ministerial Conference and helped Korea host the November 2005 Asia-Pacific Economic Cooperation (APEC) Leaders' Summit in Busan. He served as Korea's Ambassador to the United Nations from 2007 to 2008 and was elected Vice President of the UN Economic and Social Council in 2008, where he worked towards achievement of the Millennium Development Goals.

Between 1999 and 2003, Mr Kim was a senior lawyer in the WTO's Appellate Body Secretariat and Legal Affairs Division, where he worked on cases related to IPR, services, TRIMs, safeguards, and subsidies/countervailing measures, among others. More recently, Mr Kim oversaw patent and anti-trust litigation with a major Korean corporation and is currently a professor at Hankuk University of Foreign Studies in Seoul, where he focuses on trade law and trade policies.

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 MA from the University of Sussex, a Postgraduate Diploma in Foreign Affairs and International Trade from Australian National University, and a BA (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.

Hong Zhao (China) (2016-2020)

Ms Zhao received her Degrees of Bachelor, Masters and Ph. D in Law from the Law School of Peking University in China. She currently serves as Vice President of the Chinese Academy of International Trade and Economic Cooperation. Ms Zhao is also a guest Professor at several universities including the Universities of Peking, Fudan, and International Business and Economics. Previously she served as Minister Counsellor in charge of legal affairs at China's mission to the WTO, during which time she served as Chair of the WTO's Committee on Trade-Related Investment Measures (TRIMs). Ms Zhao then served as Commissioner for Trade Negotiations at the Chinese Ministry of Commerce's Department for WTO Affairs, where she participated in a number of important negotiations on international trade, including the Trade Facilitation Agreement negotiations, and negotiations on expansion of the Information Technology Agreement.

Domestically, Ms Zhao helped formulate many important Chinese legislative acts on economic and trade areas adopted since the 1990s and has experience in China's judiciary system, serving as Juror at the Economic Tribunal of the Second Intermediate Court of Beijing between 1999 and 2004. She has also taught and supervised law students on international economic Law, WTO law and intellectual property rights (IPR) at various universities in 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 PhD 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 7

FORMER APPELLATE BODY MEMBERS AND CHAIRPERSONS

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
Yuejiao Zhang	China	2008-2012 2012-2016
Seung Wha Chang	Korea, Republic of	2012-2016

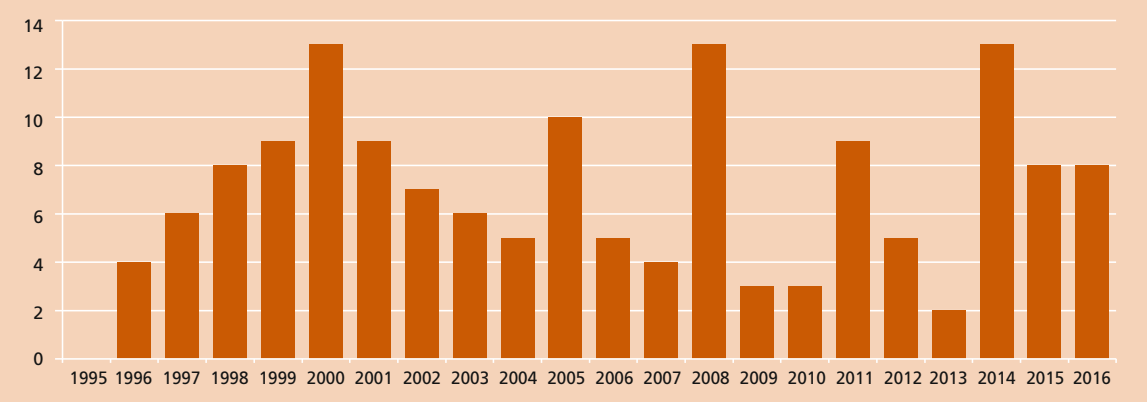
II. FORMER CHAIRPERSONS OF THE APPELLATE BODY

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
Thomas Graham	United States	1 January 2016 – 31 December 2016

ANNEX 8

APPEALS FILED: 1995-2016[1]

TOTAL NUMBER OF APPEALS: 1995-2016



APPEALS FILED: 1995-2016

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	9	9	0
2012	5	5	0

[1] No appeals were filed and no Appellate Body reports were circulated in 1995, the year the Appellate Body was established.

Year	Notices of Appeal filed	Notices of Appeal in original proceedings	Notices of Appeal in Article 21.5 proceedings
2013	2	2	0
2014	13	11	2
2015	8[h]	6	2
2016	8	7	1
Total	**151**	**127**	**24**

[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 9

PERCENTAGE OF PANEL REPORTS APPEALED BY YEAR OF ADOPTION[a]: 1996-2016[b]

	All panel reports			Panel reports other than Article 21.5 reports[c]			Article 21.5 panel reports		
Year of adoption	Panel reports adopted[d]	Panel reports appealed[e]	Percentage appealed[f]	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%
2016	8	7	88%	6	6	100%	2	1	50%
Total	**222**	**151**	**68%**	**189**	**127**	**67%**	**33**	**24**	**73%**

[a] The figures in this table correspond to the year in which the panel report was adopted, even in cases when the panel reports were appealed in a different year.

[b] No panel reports were adopted in 1995.

[c] 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.

[d] 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.

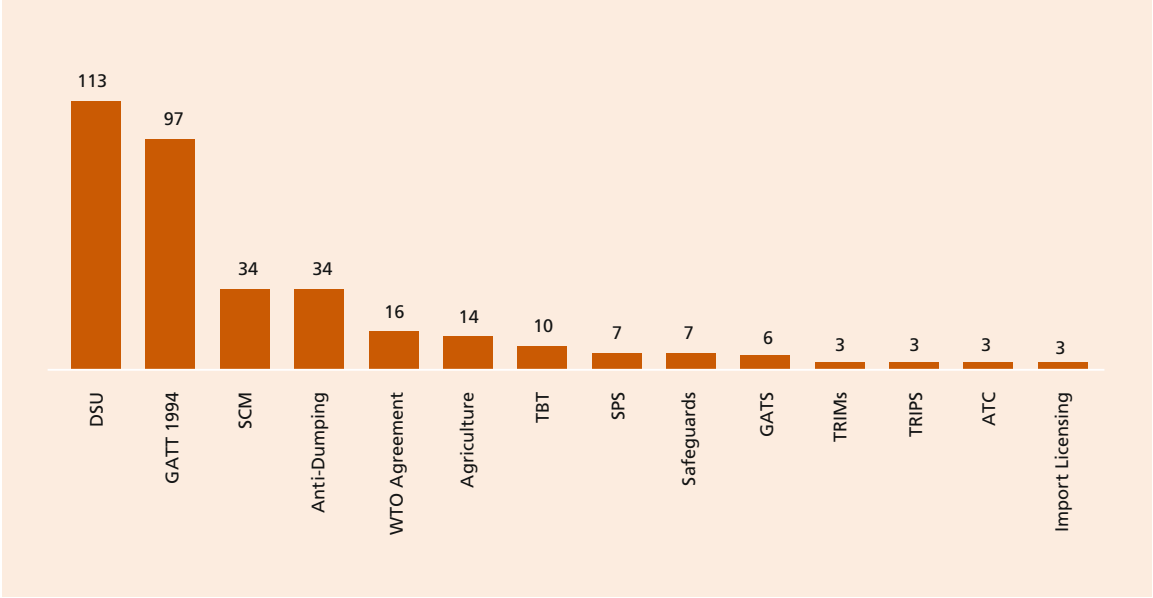
[e] The number of panel reports appealed may differ from the number of Appellate Body reports because some Appellate Body reports address more than one panel report.

[f] Percentages are rounded to the nearest whole number.

ANNEX 10

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: 1996-2016

The chart below shows the number of times specific WTO agreements have been addressed in the 144 Appellate Body reports circulated from 1996 to 2016.



WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: 1996-2016[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
2016	6	1	6	0	0	0	0	1	2	0	1	0	1	0
Total	**113**	**16**	**97**	**14**	**7**	**3**	**10**	**3**	**34**	**3**	**34**	**7**	**6**	**3**

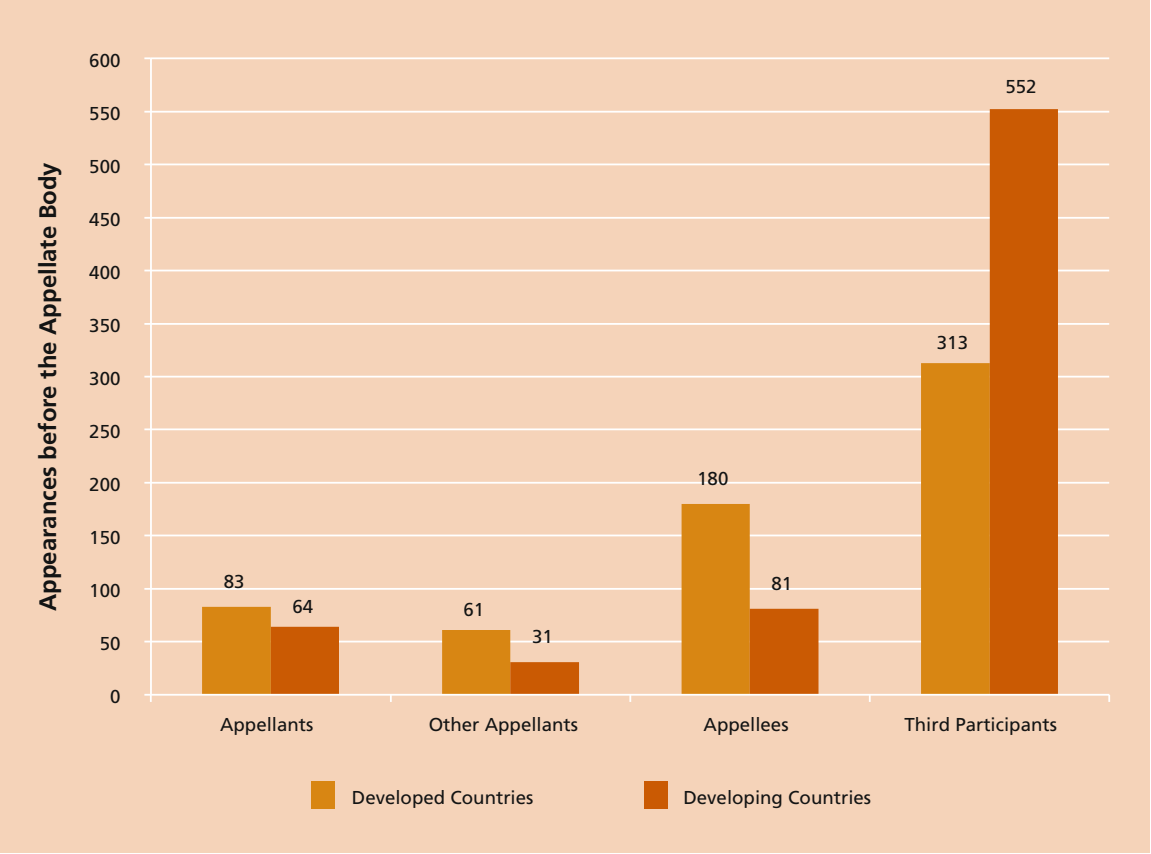
[a] No appeals were filed and no Appellate Body reports were circulated in 1995, the year the Appellate Body was established.

ANNEX 11

PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS: 1996-2016

The chart below 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 to 2016.[1]

WTO MEMBER PARTICIPATION IN APPEALS 1996-2016



[1] No appeals were filed and no Appellate Body reports were circulated in 1995, the year the Appellate Body was established.

I. STATISTICAL SUMMARY

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Antigua & Barbuda	0	1	1	0	2
Argentina	3	5	8	20	36
Australia	2	2	6	45	55
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
Bolivia, Plurinational State of	0	0	0	1	1
Brazil	5	7	12	37	61
Cameroon	0	0	0	3	3
Canada	14	10	23	32	79
Chad	0	0	0	2	2
Chile	3	0	2	12	17
China	15	5	11	50	81
Colombia	1	0	0	23	24
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	19	23
Egypt	0	0	0	2	2
El Salvador	0	0	0	6	6
European Union	22	20	48	72	162
Fiji	0	0	0	1	1
Ghana	0	0	0	2	2
Grenada	0	0	0	1	1
Guatemala	1	2	2	13	18
Guyana	0	0	0	1	1
Honduras	0	2	2	6	10
Hong Kong, China	0	0	0	8	8
Iceland	0	0	0	2	2
India	9	2	8	45	64
Indonesia	0	1	1	5	7
Israel	0	0	0	2	2
Jamaica	0	0	0	5	5
Japan	7	6	15	66	94

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Kenya	0	0	0	1	1
Korea	3	5	7	35	50
Kuwait, the State of	0	0	0	1	1
Madagascar	0	0	0	1	1
Malaysia	1	0	1	1	3
Malawi	0	0	0	1	1
Mauritius	0	0	0	2	2
Mexico	5	6	9	36	56
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	31	37
Oman	0	0	0	4	4
Pakistan	0	0	2	3	5
Panama	1	0	2	3	6
Paraguay	0	0	0	5	5
Peru	1	1	1	7	10
Philippines	3	0	3	2	8
Poland	0	0	1	0	1
Russian Federation	0	0	0	10	10
Saint Lucia	0	0	0	4	4
Saudi Arabia, Kingdom of	0	0	0	17	17
Senegal	0	0	0	1	1
Singapore	0	0	0	1	1
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	40	40
Tanzania	0	0	0	1	1
Thailand	3	2	5	23	33
Trinidad & Tobago	0	0	0	1	1
Turkey	1	0	0	19	20
United States	37	24	82	42	185
Venezuela, Bolivarian Republic of	0	0	1	6	7
Viet Nam	1	0	0	8	9
Total	**142**	**108**	**266**	**842**	**1358**

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 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

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
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

2008 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
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
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

2008 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
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
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

2011 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
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
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

2012 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
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
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 – Renewable Energy 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 – 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)
EC – Seal Products (Canada) WT/DS400/AB/R	Canada	European Union	Canada European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Russia United States
EC – Seal Products (Norway) WT/DS401/AB/R	Norway	European Union	Norway European Union	Argentina China Colombia Ecuador Iceland Japan Mexico Namibia Russia United States
US – Countervailing and Anti-Dumping Measures (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 – Rare Earths (US) 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 – Rare Earths (EU) 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 – Rare Earths (Japan) WT/DS433/AB/R	China	---	Japan	Argentina Australia Brazil Canada Chinese Taipei Colombia India Indonesia European Union Korea Norway Oman Peru Russia United States
US – Carbon Steel (India) WT/DS436/AB/R	India	United States	India United States	Australia Canada China European Union Saudi Arabia Turkey
US – Countervailing Measures (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 – Import Measures (EU) WT/DS438/AB/R	Argentina	European Union	Argentina European Union	Australia Canada China Ecuador Guatemala India Israel Japan Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland United States
Argentina – Import Measures (US) WT/DS444/AB/R	Argentina	---	United States	Australia Canada China Ecuador European Union Guatemala India Israel Japan Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland
Argentina – Import Measures (Japan) WT/DS445/AB/R	Argentina	Japan	Argentina Japan	Australia Canada China Ecuador European Union Guatemala India Israel Korea Norway Saudi Arabia Chinese Taipei Thailand Turkey Switzerland United States

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – COOL (Article 21.5 – Canada) WT/DS384/AB/RW	United States	Canada	Canada United States	Australia Brazil China Colombia European Union Guatemala India Japan Korea Mexico New Zealand
US – COOL (Article 21.5 – Mexico) WT/DS386/AB/RW	United States	Mexico	Mexico United States	Australia Brazil Canada China Colombia European Union Guatemala India Japan Korea New Zealand
US – Shrimp (Viet Nam) WT/DS429/AB/R	Viet Nam	---	United States	China Ecuador European Union Japan Norway Thailand
India – Agricultural Products WT/DS430/AB/R	India	---	United States	Argentina Brazil China Colombia Ecuador European Union Guatemala Japan
Peru – Agricultural Products WT/DS457/AB/R	Peru	Guatemala	Guatemala Peru	Argentina Brazil China Colombia Ecuador El Salvador European Union Honduras India Korea United States

2015 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – HP-SSST (Japan) WT/DS454/AB/R and Add. 1	Japan	China	China Japan	European Union India Korea Russia Saudi Arabia Turkey United States
China – HP-SSST (EU) WT/DS460/AB/R and Add. 1	China	European Union	China European Union	India Japan Korea Russia Saudi Arabia Turkey United States
US – Tuna II (Mexico) (Article 21.5 – Mexico) WT/DS381/AB/RW	United States	Mexico	Mexico United States	Australia Canada China European Union Guatemala Japan Korea New Zealand Norway Thailand

2016

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Fasteners (China) WT/DS397/AB/RW	European Union	China	China European Union	Japan United States
Argentina – Financial Services WT/DS453/AB/R	Panama	Argentina	Argentina Panama	Australia Brazil China Ecuador European Union Guatemala Honduras India Oman Saudi Arabia Singapore United States
Colombia –Textiles WT/DS461/AB/R	Colombia	---	Panama	China Ecuador El Salvador European Union Guatemala Honduras Philippines United States
US – Washing Machines WT/DS464/AB/R	United States	Korea	Korea United States	Brazil Canada China European Union India Japan Norway Saudi Arabia Thailand Turkey Viet Nam

2016 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
India – Solar Cells WT/DS456/AB/R	India	---	United States	Brazil Canada China Ecuador European Union Japan Korea Malaysia Norway Russia Saudi Arabia Chinese Taipei Turkey
EU – Biodiesel (Argentina) WT/DS473/AB/R	European Union	Argentina	Argentina European Union	Australia China Colombia Indonesia Mexico Norway Russia Saudi Arabia Turkey United States

WORLD TRADE ORGANIZATION

2016