WORLD TRADE ORGANIZATION

ANNUAL REPORT FOR 2018

APPELLATE BODY

March 2019

ANNUAL REPORT

The Appellate Body welcomes comments and inquiries regarding this Annual Report at the following address:

Appellate Body Secretariat
World Trade Orgainzation
Rue de Lausanne 154
CH – 1211 Geneva 2, Switzerland
E-mail: appellatebody.registry@wto.org
www.wto.org/appellatebody

Photo credits:
WTO New building – © WTO/Brigida González
Brazil room – © WTO/Jessica Genoud

ANNUAL REPORT FOR 2018

APPELLATE BODY

March 2019

2018 ANNUAL REPORT

APPELLATE BODY MEMBERS: 2018

From left to right: Mr Shree Baboo Chekitan Servansing, Ms Hong Zhao, Mr Ujal Singh Bhatia, Mr Thomas Graham.

CONTENTS

WTO ABBREVIATIONS USED IN THIS ANNUAL REPORT

Abbreviation	Description
ACP	African Caribbean Pacific
AIDCP	Agreement on the International Dolphin Conservation Program
BCI	business confidential information
CFR	Code of Federal Regulations
COFINS	Contribution to Social Security Financing
DDSR	Digital Dispute Settlement Registry
Digital Inclusion programme	programme for Digital Inclusion
DIMD	Department for Internal Market Defence of the EEC
DPCIA	Dolphin Protection Consumer Information Act
DSB	Dispute Settlement Body
DSU	Understanding on Rules and Procedures Governing the Settlement of Disputes
EADS	European Aeronautic Defence and Space Company N.V.
ECAs	economic complementation agreements
EEC	Eurasian Economic Commission
ELSA	European Law Students' Association
Enabling Clause	Decision on Differential and More Favourable Treatment, Reciprocity, and Fuller Participation of Developing Countries, Decision of 28 November 1979
ETP	Eastern Tropical Pacific
GATT 1994	General Agreement on Tariffs and Trade 1994
GSM	Global System for Mobile Communications
Hogarth ruling	United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth,* 494 F.3d 757 (9th Cir. 2007); United States Court of Appeals for the Ninth Circuit, *Earth Island Institute v. Hogarth,* 494 F.3d 1123 (9th Cir. 2007)
HSBI	highly sensitive business information
ICT	information and communication technology
ICT programmes	Informatics, PADIS, PATVD, and Digital Inclusion programmes
INMETRO	National Institute of Metrology, Quality and Technology
INOVAR-AUTO programme	programme of Incentive to the Technological Innovation and Densification of the Automotive Supply Chain
IPI tax	Tax on Industrialised Products

Abbreviation	Description
IPR	intellectual property rights
IUU	illegal, unreported, and unregulated
LA/MSF	"Launch Aid" or "Member State Financing"
LCA	large civil aircraft
LCVs	light commercial vehicles
LTF-EOP	Long Term Financing of Export-Oriented Projects
MBS	Manufacturing Bond Scheme
NEPAD	New Partnership for Africa's Development
NMFS	National Marine Fisheries Service
PADIS programme	programme of Incentives for the Semiconductors Sector
PATVD programme	programme of Support for the Technological Development of the Industry of Digital TV Equipment
PBR	Potential Biological Removal
PEC	Predominantly Exporting Companies
PEC programme	regime for Predominantly Exporting Companies
PET	polyethylene terephthalate
PPBs	Basic Productive Processes
R&D	research and development
RECAP programme	Special Regime for the Purchase of Capital Goods for Exporting Enterprises
Rules of Conduct	Rules of Conduct for the Understanding on Rules and Procedures Governing the Settlement of Disputes
S&D	special and differential
SCM Agreement	Agreement on Subsidies and Countervailing Measures
SRP	Single Rate Presumption
TBT Agreement	Agreement on Technical Barriers to Trade
TRIMs Agreement	Agreement on Trade-Related Investment Measures
TTFs	Tuna Tracking Forms
URAA	Uruguay Round Agreements Act
USDOC	United States Department of Commerce
VLA	very large aircraft
W-T	weighted-average to transaction
Working Procedures	Working Procedures for Appellate Review
WTO	World Trade Organization
WTO Agreement	Marrakesh Agreement Establishing the World Trade Organization

FOREWORD

For the Appellate Body, 2018 was an unusual year, reflecting continuity as well as potentially disruptive challenges. The Appellate Body's docket continued to grow with increasingly complex appeals, while its composition was further reduced from four to three members.

In some respects, 2018 represented business as usual. Throughout the year, the Appellate Body was engaged in appellate proceedings and circulated nine Appellate Body reports concerning six matters[1], including the Appellate Body report in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US).* The matters addressed by these reports included those relating to the Anti-Dumping Agreement, the SCM Agreement, the GATT 1994, the TRIMS Agreement, the TBT Agreement, and the DSU. These disputes dealt with sensitive issues spanning prohibited and actionable subsidies, animal welfare, domestic tax regimes, and unfair trade. The exceptionally large appeal in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*, filed in 2017, continued to occupy a significant portion of the resources of the Appellate Body and its Secretariat in 2018. The Secretariat also assisted an Arbitrator in issuing his award concerning the reasonable period of time for implementation of the panel and Appellate Body reports in *US – Anti-Dumping Methodologies (China) (Article 21.3(c)).* Additionally, 12 panel reports concerning 11 matters were appealed in 2018.[2] In sum, the heavy workload of the Appellate Body shows no signs of abating in the near term.

These figures reflect the rich legacy of the Appellate Body and the value it provides to WTO Members. In resolving disputes, the Appellate Body has endeavoured to do justice to the founding principles of the DSU by clarifying the existing provisions of the covered agreements in accordance with customary rules of interpretation of public international law. Moreover, by emphasizing consistency across its reports, the Appellate Body has contributed to the security and predictability of the multilateral trading system. The Appellate Body's success as an impartial arbiter is not only evidenced by the sheer number of disputes brought before it, but also by the high rate of compliance with the recommendations and rulings of the DSB. While losing parties and sometimes other WTO Members have criticized individual rulings, to date, no WTO Member has explicitly chosen not to implement a ruling in a dispute that it has lost.

These indicators suggest WTO Members' commitment to the appellate system as a key component of a robust and effective dispute settlement mechanism. At the same time, they stand in stark contrast to the institutional crisis we are currently facing. As of 31 December 2018, there were four vacant Appellate Body seats. Despite the numerous DSB meetings held from February 2017 to date, including the discussion of a joint proposal put forward by more than 70 Members, Members remain unable to reach a consensus to initiate the selection processes for the appointment of new Appellate Body members.

Starting in 2017 and continuing through 2018, WTO Members have debated several procedural and substantive issues concerning the functioning of the Appellate Body. For example, WTO Members have discussed the increase in the number of Appellate Body reports that are issued after the 90-day period prescribed in the DSU. In addition, Members have reviewed the operation of Rule 15 of the Working Procedures for Appellate Review, which allows an Appellate Body member whose term has expired to

---

[1] The Appellate Body reports circulated in 2018 were: *Russia – Commercial Vehicles; EC and certain member States – Large Civil Aircraft (Article 21.5 – US); EU – PET (Pakistan); Indonesia – Iron or Steel Products (Viet Nam) / Indonesia Iron and Steel Products (Chinese Taipei); Brazil – Taxation (EU)/Brazil – Taxation (Japan);* and *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II).*

[2] *Korea – Radionuclides; US – Countervailing Measures (China) (Article 21.5 – China); Korea – Pneumatic Valves (Japan); Australia – Tobacco Plain Packaging (Honduras) / Australia – Tobacco Plain Packaging (Dominican Republic); Ukraine – Ammonium Nitrate; Russia – Railway Equipment; US – Supercalendered Paper; EU – Energy Package; Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama); Morocco – Hot-Rolled Steel (Turkey); India – Iron and Steel Products.*

complete the disposition of any appeal to which he or she was assigned while a member. Members have also debated the value that WTO adjudicators should place on previous panel and Appellate Body reports, as well as the role of the Appellate Body in addressing issues relating to municipal law and in reviewing a panel's objectivity in its assessment of the matter before it. These and other issues raised by Members suggest to me that Members remain fully invested in the dispute settlement mechanism and are interested in improving its functioning for it to better serve the multilateral trading system. That said, these issues, weighty as they are, must be debated and resolved as quickly as possible. They should not be instrumentalized in a way that jeopardizes the health and life of the Appellate Body. Left unresolved, this impasse will become a festering sore on the legitimacy of the Appellate Body, and the WTO dispute settlement mechanism, as a whole.

We have already begun to suffer the consequences of the lack of a full complement of Appellate Body members in several ways. The diminished number of Appellate Body members has seriously undermined the collegiality of our deliberations, envisaged in Rule 4 of the Working Procedures for Appellate Review. Second, a smaller membership of the Appellate Body has resulted in dwindling representation of the WTO Membership, which in itself threatens the legitimacy of the Appellate Body. Third, the decrease in serving members is likely to cause further delays in appellate proceedings. Indeed, by the end of my term as Chair in 2018, the Appellate Body could form only one Division of three Appellate Body members.

It must be emphasized that the consequences of the ongoing stalemate extend beyond the Appellate Body. Any paralysis of the Appellate Body will taint panel proceedings. When a panel report is appealed, the current DSU rules provide that adoption of that report is suspended pending the appeal. If the Appellate Body cannot conduct proceedings because a Division cannot be composed, any losing party could prevent the adoption of the panel report by appealing it to a paralyzed Appellate Body. The likely result is therefore not a reversion to the pre-GATT 1994 regime. Instead, an institutional paralysis stretching across panel and appellate proceedings will manifest. This will then impact the rights of Members to procedures under Articles 21 and 22 of the DSU as regards surveillance and implementation. Furthermore, the prospects of securing agreement to new multilateral trade rules diminish if negotiating Members cannot rely on the principled and effective enforcement of those rules. The possible paralysis of the Appellate Body therefore concerns the operation of the multilateral trading system as a whole.

Despite these challenges, we continue our efforts to maintain high standards of quality and coherence in our reports. Engagement and dialogue between Members and the institution are also crucial. As Chair of the Appellate Body, I held consultations with several delegations, particularly those that make frequent use of WTO dispute settlement. Most, while airing some concerns, reaffirmed their desire to preserve the system in its current configuration.

In making these efforts to engage broadly and frequently with WTO Members, I recognize that any lasting solutions to the challenges faced by the dispute settlement mechanism lie firmly with WTO Members. For more than two decades, WTO Members have demonstrated unwavering commitment to independent and impartial dispute settlement. The current impasse is a test of that commitment. If the trust in and credibility of the dispute settlement mechanism are to be preserved, it is essential that WTO Members engage in serious debate on the questions raised regarding the functioning of the appellate system. Given the shared commitment of Members, we remain hopeful that the process of constructive dialogue will lead to lasting solutions that will further enhance the efficiency of dispute resolution in the WTO.

Ujal Singh Bhatia
Chair, Appellate Body

WORLD TRADE ORGANIZATION
APPELLATE BODY

ANNUAL REPORT FOR 2018

1. INTRODUCTION

This Annual Report summarizes the activities of the Appellate Body and its Secretariat for the year 2018.

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."[3] 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[4], trade in services[5], and the protection of intellectual property rights[6], 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[7] 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.[8]

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.[9] 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.[10] Panelists are chosen by agreement of the parties, based on nominations proposed by the Secretariat.[11] However, if the parties cannot agree, either party may request the WTO Director-General to determine the composition of the panel.[12] Panels shall be composed of well-qualified governmental and/or non-governmental individuals with

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

expertise in international trade law or policy.[13] 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."[14] 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 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 Chair to serve a one-year term, which can be extended for an additional one-year period. The Chair 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[15] (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.[16]

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[17] (Working Procedures), drawn up by the Appellate Body in consultation with the Chair 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 it 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.

---

13 Article 8.1 of the DSU.

14 Article 11 of the DSU.

15 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)

16 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).

17 Working Procedures for Appellate Review, WT/AB/WP/6, 16 August 2010.

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.[18] Upon adoption, Appellate Body reports and panel reports (as modified by the Appellate Body) become binding upon the parties.

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's 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.[19]

[18] Articles 16.4 and 17.14 of the DSU.

[19] Article 22.1 of the DSU.

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.[20] 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.[21] Recourse to arbitration, including the procedures to be followed in such arbitration proceedings, is subject to mutual agreement of the parties.[22]

[20] Article 5 of the DSU.

[21] 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 Arbitrator, *US – Section 110(5) Copyright Act (Article 25)*)

[22] 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 normally composed of seven members, each to be appointed by the DSB for a term of four years with the possibility of being reappointed once for another four-year term.

In January 2018, the Appellate Body was composed of four members.[23] The selection processes for the appointment of new Appellate Body members was discussed at DSB meetings throughout the year[24], but Members were not able to reach a consensus to launch and fill the outstanding vacancies.

At all 12 regular DSB meetings in 2018, several revised versions[25] of the proposal regarding the selection processes for Appellate Body members, first introduced at the DSB meeting on 22 November 2017 on behalf of 52 Members[26], were submitted and discussed. All versions of these proposals were substantively the same in that they provided for selection processes to appoint Appellate Body members for the vacancies (the three vacancies that had arisen as a result of the expiry of the second terms of office of Messrs Ricardo Ramírez-Hernández and Peter Van den Bossche, and the resignation of Mr Hyun Chong Kim in 2017). In addition, a fourth vacancy arose upon the expiry of the first term of office of Mr Shree Baboo Chekitan Servansing on 30 September 2018. The proposals were made on behalf of a growing number of proponents, with 52 Members supporting the first proposal at the DSB meeting on 22 November 2017, increasing to 60 Members at the DSB meeting on 22 January 2018[27] and to 71 Members at the DSB meeting on 18 December 2018.[28] The proponents of the proposals stressed "the urgency and importance of filling vacancies in the Appellate Body … so that it can carry out its functions properly".[29] The proponents then proposed to launch selection processes for all the vacancies, establish a Selection Committee, allow Members to submit nominations of candidates, and request the Selection Committee to make a recommendation within a certain period. However, no consensus could be reached to launch the selection processes at DSB meetings throughout 2018. During the year, Members discussed a number of substantive and systemic concerns regarding the functioning of the Appellate Body.[30]

At the DSB meeting held on 28 May 2018, the DSB Chair alerted WTO Members that the first term of office of Mr Servansing would expire on 30 September 2018, and informed WTO Members that she had received a letter from Mr Servansing conveying his interest to the DSB in being considered for reappointment.[31] The Chair sought views on the matter from the delegations and subsequently engaged in informal consultations.[32]

---

[23] The second term of office of Mr Ricardo Ramírez-Hernández expired on 30 June 2017. On the same day, the Chair of the Appellate Body notified by letter the Chair of the DSB that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had authorized Mr Ramírez-Hernández to complete the disposition of the appeals to which he had been assigned before his term expired. Mr Ramírez-Hernández's last appeal under Rule 15 *(EC and certain member States – Large Civil Aircraft (Article 21.5 – US))* ended with the circulation of the Appellate Body report on 15 May 2018.

The second term of office of Mr Peter Van den Bossche expired on 11 December 2017. On 24 November 2017, the Chair of the Appellate Body notified by letter the Chair of the DSB that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had authorized Mr Van den Bossche to complete the disposition of the appeals to which he had been assigned before his term expired. Mr Van den Bossche carried out his duties under Rule 15 throughout 2018.

[24] See, for example, WT/DSB/M/407, WT/DSB/M/409, WT/DSB/M/410, WT/DSB/M/412, WT/DSB/M/413, WT/DSB/M/414, WT/DSB/M/415, and WT/DSB/M/417.

[25] The revised versions of the proposal discussed during the DSB meetings in 2018 are WT/DSB/W/609/Rev.1, WT/DSB/W/609/Rev.2, WT/DSB/W/609/Rev.3, WT/DSB/W/609/Rev.4, WT/DSB/W/609/Rev.5, WT/DSB/W/609/Rev.6, and WT/DSB/W/609/Rev.7.

[26] WT/DSB/M/404 and WT/DSB/W/609.

[27] WT/DSB/M/407.

[28] WT/DSB/W/609/Rev.7.

[29] WT/DSB/W/609/Rev.7.

[30] These concerns are discussed in WT/DSB/M/407, WT/DSB/M/409, WT/DSB/M/410, WT/DSB/M/412, WT/DSB/M/413, WT/DSB/M/414, WT/DSB/M/415, WT/DSB/M/417, WT/GC/W/752/Rev.2, WT/GC/W/753, WT/GC/W/754/Rev.2, JOB/DSB/2, and WT/DSB/M/415.

[31] WT/DSB/M/413.

[32] WT/DSB/M/414 and WT/DSB/M/415.

At the meeting on 27 August 2018, the Chair reported to the DSB that the process of informal consultations on the issue of possible reappointment of Mr Servansing had been concluded, and that based on her consultations, there would be no consensus to reappoint Mr Servansing for a second term.[33]

As a result of the above events, the Appellate Body was composed of four members until the expiry of the first term of office of Mr Servansing on 30 September 2018. Thereafter, it was composed of three members for the remainder of the year as shown in Table 1 below:

TABLE 1: COMPOSITION OF THE APPELLATE BODY IN 2018

Name	Nationality	Term(s) of office
Ujal Singh Bhatia	India	2011-2015 2015-2019
Thomas R. Graham	United States	2011-2015 2015-2019
Shree Baboo Chekitan Servansing*	Mauritius	2014-2018
Hong Zhao	China	2016-2020

* Shree Baboo Chekitan Servansing's term as Appellate Body member ended on 30 September 2018. Pursuant to Rule 15 of the Working Procedures, he has been authorized to complete the disposition of appeals he had been assigned to while being a member of the Appellate Body.[34]

On 31 December 2017, pursuant to Rule 5.1 of the Working Procedures, the members of the Appellate Body elected Mr Ujal Singh Bhatia to serve for a second term as Chair of the Appellate Body, from 1 January to 31 December 2018.[35] On 12 December 2018, the members of the Appellate Body elected Madame Hong Zhao to serve as Chair of the Appellate Body as of 1 January 2019 until 30 June 2019, and Mr Thomas R. Graham as Chair from 1 July 2019 to 31 December 2019.[36]

Biographical information about the members of the Appellate Body is provided in Annex 5. A list of former Appellate Body members and Chairs is provided in Annex 6.

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 2018, the Secretariat comprised a Director, 19 lawyers, 1 administrative assistant, and 5 support staff. Werner Zdouc is the Director of the Appellate Body Secretariat.

[33] WT/DSB/M/417.

[34] On 28 September 2018, the Chair of the Appellate Body notified by letter the Chair of the DSB that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had authorized Mr Servansing to complete the disposition of the appeals to which he had been assigned before the expiry of his term on 30 September 2018. The participants and third participants in the appeals concerned were informed on the same day.

[35] WT/DSB/75.

[36] WT/DSB/77.

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.

Twelve panel reports concerning 11 matters were appealed in 2018, the Appellate Body's work on one appeal filed in 2016 was completed, and its work on one appeal filed in 2017 continued throughout the year. Two of the appeals filed in 2018 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 8 of the 12 new appeals. Table 2 sets out further information regarding the appeals filed in and pending throughout 2018. Further information on the number of appeals filed each year since 1996 is provided in Annex 7.

The percentage of panel reports that have been appealed from 1996 to 2018 is approximately 67%. A breakdown of the percentage of panel reports appealed each year is provided in Annex 8.

TABLE 2: APPEALS FILED IN AND PENDING THROUGHOUT 2018

Panel report appealed	Date of appeal	Appellant[a]	Document symbol	Other appellant[b]	Document symbol
US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)	29 June 2017	European Union	WT/DS353/27	United States	WT/DS353/28
Korea – Radionuclides	9 April 2018	Korea	WT/DS495/8	Japan	WT/DS495/9
US – Countervailing Measures (China) (Article 21.5 – China)	27 April 2018	United States	WT/DS437/24	China	WT/DS437/25
Korea – Pneumatic Valves (Japan)	28 May 2018	Japan	WT/DS504/5	Korea	WT/DS504/6
Australia – Tobacco Plain Packaging (Honduras) / Australia – Tobacco Plain Packaging (Dominican Republic)	19 July 2018	Honduras	WT/DS435/23	---	---
	23 August 2018	Dominican Republic	WT/DS441/23	---	---
Ukraine – Ammonium Nitrate	23 August 2018	Ukraine	WT/DS493/6	---	---
Russia – Railway Equipment	27 August 2018	Ukraine	WT/DS499/6	Russia	WT/DS499/7
US – Supercalendered Paper	27 August 2018	United States	WT/DS505/6	---	---
EU – Energy Package	21 September 2018	European Union	WT/DS476/6	Russia	WT/DS476/7
Colombia – Textiles (Article 21.5 – Colombia) / Colombia – Textiles (Article 21.5 – Panama)	20 November 2018	Panama	WT/DS461/28	Colombia	WT/DS461/29

Panel report appealed	Date of appeal	Appellant [a]	Document symbol	Other appellant [b]	Document symbol
Morocco – Hot-Rolled Steel (Turkey)	20 November 2018	Morocco	WT/DS513/5	Turkey	WT/DS513/6
India – Iron and Steel Products	14 December 2018	India	WT/DS518/8	Japan	WT/DS518/9

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

APPELLATE BODY REPORTS

Nine Appellate Body reports concerning six matters were circulated in 2018, the details of which are summarized in Table 3. As of the end of 2018, the Appellate Body had circulated a total of 159 reports.[37]

TABLE 3: APPELLATE BODY REPORTS CIRCULATED IN 2018

Case	Document symbol	Date circulated	Date adopted by the DSB
Russia – Commercial Vehicles	WT/DS479/AB/R	22 March 2018	9 April 2018
EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	WT/DS316/AB/RW	15 May 2018	28 May 2018
EU – PET (Pakistan)	WT/DS486/AB/R	16 May 2018	28 May 2018
*Indonesia – Iron or Steel Products**	WT/DS490/AB/R WT/DS496/AB/R	15 August 2018	27 August 2018
*Brazil – Taxation**	WT/DS472/AB/R WT/DS497/AB/R	13 December 2018	11 January 2019
*US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)**	WT/DS381/AB/RW/USA WT/DS381/AB/RW/2	14 December 2018	11 January 2019

* In these matters, Appellate Body reports bearing two separate document symbols were issued.

Table 4 below shows which WTO agreements were addressed in the Appellate Body reports circulated in 2018.

TABLE 4: WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED IN 2018

Case	Document symbol	WTO agreements addressed
Russia – Commercial Vehicles	WT/DS479/AB/R	Anti-Dumping Agreement GATT 1994 DSU
EC and certain member States – Large Civil Aircraft (Article 21.5 – US)	WT/DS316/AB/RW	SCM Agreement GATT 1994 DSU
EU – PET (Pakistan)	WT/DS486/AB/R	SCM Agreement GATT 1994 DSU

[37] Further details regarding the circulated Appellate Body reports, by year of circulation, are provided in Annex 10: Table II.

Case	Document symbol	WTO agreements addressed
Indonesia – Iron or Steel Products	WT/DS490/AB/R WT/DS496/AB/R	Agreement on Safeguards GATT 1994 DSU
Brazil – Taxation	WT/DS472/AB/R WT/DS497/AB/R	GATT 1994 Enabling Clause SCM Agreement TRIMs Agreement DSU
US – Tuna II (Mexico) (Article 21.5 – US) / *US – Tuna II (Mexico) (Article 21.5 – Mexico II)*	WT/DS381/AB/RW/USA WT/DS381/AB/RW/2	TBT Agreement GATT 1994 DSU

The findings and conclusions contained in the Appellate Body reports circulated in 2018 are summarized below.

3.1 Appellate Body Report, *Russia – Anti-Dumping Duties on Light Commercial Vehicles from Germany and Italy,* WT/DS479/AB/R

This dispute concerned the levying of anti-dumping duties on certain light commercial vehicles (LCVs) from Germany and Italy by Russia pursuant to Decision No. 113 of 14 May 2013 of the Board of the Eurasian Economic Commission (EEC), including related notices and reports of the Department for Internal Market Defence of the EEC (DIMD). The anti-dumping investigation underlying the measure at issue in this dispute was initiated on 16 November 2011, following an application on 3 October 2011 by Sollers-Elabuga LLC (Sollers), a Russian manufacturer of LCVs. The LCVs investigated were those with a gross vehicle weight varying between 2.8 tonnes to 3.5 tonnes inclusive, van-type bodies, diesel engines with cylinder capacity not exceeding 3.000 cc, designed for the transport of cargo of up to two tonnes (cargo all-metal van version) or for the combined transport of cargo and passengers (combi cargo and passenger van version).

While the European Union challenged anti-dumping duties imposed by Russia, it was the DIMD that had completed the anti-dumping investigation underlying the decision to impose those duties. When the European Union requested consultations with Russia in relation to this dispute on 21 May 2014, Russia was the only WTO Member that was part of the then-called Customs Union between Belarus, Kazakhstan, and Russia (the CU), which is now the Eurasian Economic Union (EAEU). Before the Panel, the European Union claimed that the measure at issue was inconsistent with Articles 1, 3.13.2, 3.43.5, 4.1, 6.5, 6.5.1, 6.9, and 18.4 of the Anti-Dumping Agreement and Article VI of the GATT 1994.

In relation to the definition of domestic industry, the Panel found that the DIMD had acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement by defining the domestic industry as Sollers only after it received the questionnaire responses from both Sollers and Gorkovsky Avtomobilny Zavod (GAZ).

In relation to price suppression, the Panel found that the DIMD had acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis in determining the appropriate rate of return in its price suppression analysis.

In relation to the injury analysis, the Panel found that the DIMD had acted inconsistently with Article 3.4 of the Anti-Dumping Agreement by failing to evaluate the magnitude of the margin of dumping.

In relation to the causation analysis, the Panel found that the DIMD had acted inconsistently with Articles 3.1 and 3.5 of the Anti-Dumping Agreement insofar as it had relied on its WTO-inconsistent price suppression analysis in its causation determination. In addition, the Panel found that the DIMD had acted inconsistently

with Articles 3.1 and 3.5 by failing: (i) to examine whether the alleged overly ambitious business plan of Sollers, in particular in relation to the level of capacity, was causing injury to the domestic industry at the same time as dumped imports; and if so (ii) to separate and distinguish the injurious effects of that factor from the injurious effects of dumped imports.

In relation to the treatment of confidential information, the Panel found that the DIMD had acted inconsistently with Article 6.5 of the Anti-Dumping Agreement by treating certain information as confidential in the absence of any showing of "good cause" for such treatment.

In relation to disclosure of essential facts, the Panel found that the DIMD had acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to inform all interested parties of the information listed in items (d) to (o) of Table 12 of the Panel Report.

Finally, in relation to the European Union's consequential claims, the Panel found that Russia had acted inconsistently with Article 1 of the Anti-Dumping Agreement and Article VI of the GATT 1994, but rejected the claim under Article 18.4 of the Anti-Dumping Agreement.

3.1.1 Definition of domestic industry

Russia appealed the Panel's finding that the DIMD had acted inconsistently with Articles 3.1 and 4.1 of the Anti-Dumping Agreement when defining the domestic industry. Russia argued that an injury determination would be inconsistent with Article 3.1 if an investigating authority were to rely on deficient information provided by domestic producers of the like product. To Russia, producers that provided such deficient information could not be included in the definition of domestic industry under Article 4.1. To the European Union, the Panel correctly found that Article 4.1 implies that an investigating authority cannot define a "domestic industry" on the basis of the allegedly deficient information provided by one producer.

Article 4.1 of the Anti-Dumping Agreement defines the term "domestic industry" as referring to: (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. By using the term "major proportion", the second method of defining the domestic industry focuses on the question of *how much* production must be represented by those producers of the like product. The Appellate Body has read the "major proportion" requirement in Article 4.1 as having both quantitative and qualitative connotations. Regarding the quantitative element, Article 4.1 does not stipulate a specific proportion for evaluating whether a certain percentage constitutes a "major proportion". The qualitative element, in turn, is concerned with ensuring that the domestic producers of the like product that are included in the definition of domestic industry are representative of the totality of domestic producers. The Appellate Body has explained that there is an inverse relationship between, on the one hand, the proportion of total production included in the domestic industry and, on the other hand, the existence of a material risk of distortion in the definition of domestic industry and in the assessment of injury.

Article 4.1 does not refer to the non-inclusion of producers of the like product in the domestic industry definition based on the investigating authority's consideration of alleged deficiencies in the information submitted by domestic producers. The Appellate Body has read the definition of domestic industry in Article 4.1 together with the requirement in Article 3.1 that the determination of injury "be based on positive evidence and involve an objective examination". 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.

If an investigating authority were permitted to leave out, from the definition of domestic industry, domestic producers of the like product that provided *allegedly* deficient information, a material risk of distortion would arise in the injury analysis. The non-inclusion of this category of producers could make the domestic

industry definition no longer representative of the total domestic production, thereby undermining the accuracy of the injury analysis. Rather than leaving a producer of the like product that provided allegedly deficient information out of the domestic industry, the investigating authority should seek to obtain additional information from that domestic producer. Tools exist under the Anti-Dumping Agreement to address the inaccuracy and incompleteness of information. The Appellate Body therefore disagreed with Russia's proposition that, in order to ensure the accuracy of the injury analysis, an investigating authority needs, from the outset, to leave out of the definition of domestic industry the domestic producers of the like product that provide allegedly deficient information.

The Appellate Body has recognized the difficulty of obtaining information regarding domestic producers in certain situations, such as fragmented industries with numerous producers. In such special cases, the term "major proportion" in Article 4.1 allows an investigating authority a certain degree of flexibility in defining the domestic industry. Nevertheless, an investigating authority continues to bear the obligation to ensure that the way in which it defines the domestic industry does not introduce a material risk of distortion into the injury analysis. To the Appellate Body, the situation where an investigating authority is unable to collect any information at all from every domestic producer due to the fragmented nature of the industry is different from the situation where a domestic producer has sought to cooperate in the investigation and submitted information that the investigating authority, however, considered to be deficient.

The Appellate Body considered that the Panel correctly recognized that an investigating authority could define the domestic industry as a "major proportion" of the total domestic production as long as both the quantitative and qualitative elements are satisfied. The Panel also correctly found that Article 4.1 does not allow an investigating authority to leave out of the definition of domestic industry the domestic producers of the like product who have provided allegedly deficient information. Contrary to Russia's claim on appeal, the Appellate Body did not consider that the Panel's interpretation of Article 4.1 of the Anti-Dumping Agreement reduces the term "major proportion" in this provision to inutility. The Appellate Body's interpretation of the "domestic industry" based on a "major proportion of total domestic production" does not take into account the timing of the definition of domestic industry. Rather, it is concerned with ensuring that the domestic producers of the like product selected for inclusion in the domestic industry are sufficiently representative of the total domestic production.

For these reasons, the Appellate Body found that the Panel did not err in its interpretation and application of Articles 3.1 and 4.1 of the Anti-Dumping Agreement in finding that the DIMD had acted inconsistently with these provisions in its definition of "domestic industry".

3.1.2 Price suppression

3.1.2.1 The 2009 rate of return used to construct the target domestic price

Russia challenged the Panel's findings that the DIMD had acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis in determining the rate of return used to construct the target domestic price. To Russia, the focus on one particular factor – such as the financial crisis – would lead to a biased price suppression analysis. This is because the rate of return could be potentially influenced by a number of factors, and Article 3.2 does not require an analysis of "all known factors" causing injury within the meaning of Article 3.5. The European Union disagreed with Russia's contention that an investigating authority is not obliged to consider evidence that questions the rate of return used to construct the domestic target price.

The Appellate Body explained that, pursuant to the second sentence of Article 3.2 of the Anti-Dumping Agreement, an investigating authority shall consider whether the effect of dumped imports is to prevent price increases, which otherwise would have occurred, to a significant degree. By asking the question "whether the effect of" the dumped imports is significant price suppression, the second

sentence specifically instructs an investigating authority to consider whether certain price effects are the consequences of dumped imports. In this respect, the Appellate Body in *China – GOES* stated that an investigating authority is required to consider whether dumped imports have "explanatory force" for the occurrence of significant price suppression. In this regard, an authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression.

The inquiry into whether dumped imports have "explanatory force" for significant suppression of domestic prices under Article 3.2 is distinct from the injury causation and non-attribution analysis under Article 3.5 of the Anti-Dumping Agreement. While the assessments under both provisions are interlinked elements of the single, overall injury analysis, the inquiry under each provision has a distinct focus. The analysis under Article 3.2 focuses on the relationship between dumped imports and *domestic prices*. In contrast, the analysis under Article 3.5 focuses on the causal relationship between dumped imports and *injury* to the domestic industry. Therefore, while an investigating authority is not required under Article 3.2 to conduct an analysis of all known factors that may cause *injury* to the domestic industry, as required by Article 3.5, the authority must consider under Article 3.2 whether dumped imports have "explanatory force" for the occurrence of significant suppression of *domestic prices*.

To the Appellate Body, the fact that several factors or elements could potentially influence the rate of return used to construct the target domestic price does not allow an investigating authority to disregard evidence regarding any particular factor or element that calls into question the explanatory force of dumped imports for significant price suppression. Thus, the Appellate Body disagreed with Russia's argument that the consideration of evidence regarding elements – such as, in this dispute, the financial crisis – that call into question the explanatory force of dumped imports would lead to a biased analysis simply because there could be other factors that could also potentially affect the selected rate of return. In addition, the Appellate Body did not consider that the Panel's interpretation of Article 3.2 suggests that an investigating authority is required to conduct a non-attribution analysis of all known factors that may be causing *injury* to the domestic industry in the context of its price suppression analysis.

For the reasons above, the Appellate Body found that the Panel did not err in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement when finding that the DIMD had acted inconsistently with these provisions by failing to take into account the impact of the financial crisis in its price suppression analysis.

3.1.2.2 Article 11 of the DSU

The European Union challenged certain Panel findings concerning the explanatory force of the dumped imports for price suppression and the degree of such price suppression. The European Union claimed that, in making these findings, the Panel acted inconsistently with Article 11 of the DSU. This is because, to the European Union, the Panel's reasoning at issue was inconsistent and incoherent with its earlier finding that the DIMD had acted inconsistently with Articles 3.1 and 3.2 of the Anti-Dumping Agreement by failing to take into account the impact of the financial crisis when using the 2009 rate of return for constructing the target domestic price. Russia responded that the European Union had not demonstrated that the Panel's assessment was not objective within the meaning of Article 11 of the DSU.

The Appellate Body noted that, when the Panel stated that the "methodology itself" ensures that the failure of actual domestic prices to rise to the level of the target domestic price is an effect of the dumped imports, the Panel was referring to the DIMD's application of its methodology in the anti-dumping investigation at issue. To the Appellate Body, this finding was not coherent and consistent with the Panel's earlier finding that the manner in which the DIMD had used the 2009 rate of return to determine the target domestic price was WTO-inconsistent because the DIMD's application of its methodology had been based on the use of the 2009 rate of return.

The Appellate Body also considered that the Panel's finding that the longterm price trends corroborated the DIMD's counterfactual analysis was not coherent and consistent with its earlier finding concerning the DIMD's construction of the target domestic price on the basis of the 2009 rate of return. This is because the DIMD's counterfactual analysis relied on the target domestic price, and the Panel had found earlier that the manner in which the DIMD had used the 2009 rate of return to determine the target domestic price was WTO-inconsistent.

Finally, the Appellate Body explained that the Panel could not have relied on the target domestic price, in particular on the difference between the actual domestic prices and the target domestic prices, in its assessment of the degree of price suppression, given that it had found earlier that the DIMD's construction of the target domestic price was WTO-inconsistent. To the Appellate Body, the Panel's findings concerning the significant degree of price suppression were also not coherent and consistent with its earlier finding concerning the 2009 rate of return.

For these reasons, the Appellate Body found that the Panel acted inconsistently with Article 11 of the DSU, and reversed the Panel findings at issue.

3.1.2.3 The ability of the market to absorb further price increases

The European Union appealed the Panel's finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases. To the European Union, the Panel erred in its interpretation and application of Articles 3.1 and 3.2 of the Anti-Dumping Agreement because, where there is evidence on the record of significant price and production cost increases, an investigating authority must consider whether the market would absorb further price increases. Russia responded that there is no explicit requirement in Articles 3.1 and 3.2 to consider whether the market would accept price increases and that an investigating authority has to examine this issue only if it is faced with evidence that calls into question the ability of the market to absorb price increases.

The Appellate Body explained that, when an investigating authority's determination rests upon assumptions, these assumptions should be derived as reasonable inferences from a credible basis of facts, and should be sufficiently explained so that their objectivity and credibility can be verified. Moreover, an investigating authority is required, under the second sentence of Article 3.2, to consider whether dumped imports are preventing domestic price increases "which otherwise would have occurred" to a significant degree. Were an investigating authority to rely on a methodology that concerned price increases that would *not* have occurred in the absence of dumped imports, it would not be able to consider objectively, pursuant to Article 3.2, whether the effect of dumped imports was to suppress significantly domestic prices. An investigating authority is also required to consider whether dumped imports have "explanatory force" for the occurrence of significant suppression of domestic prices. In this respect, an investigating authority may not disregard evidence regarding elements that call into question the explanatory force of dumped imports for significant price suppression.

The Appellate Body considered that the question before the Panel was whether the DIMD had properly considered, in light of the circumstances of the underlying anti-dumping investigation, relevant evidence in relation to whether the market could absorb additional price increases. There was evidence on the DIMD's investigation record relating to increases in domestic prices and cost of production as well as alleged quality issues with the domestic product. To the Appellate Body, this evidence was relevant to an assessment of whether the domestic market at issue in the anti-dumping investigation could absorb additional price increases. The DIMD should have explained in its investigation report, at a minimum, why this evidence did not show that the target domestic price relied on by the DIMD was a price that would not have occurred in the absence of dumped imports.

In addition, the Appellate Body recalled that it is not for a panel to conduct a *de novo* review of the facts of the case or substitute its judgement for that of the investigating authority. The Panel in this dispute could not have reached a conclusion about whether the DIMD should have examined certain evidence on the basis of the Panel's own appreciation of this evidence. The conclusion of whether the evidence effectively undermines or confirms the investigating authority's price suppression analysis under Article 3.2 can only be reached on the basis of the authority's review of the evidence within the particular circumstances of each investigation.

For these reasons, the Appellate Body found that the Panel erred in its application of Articles 3.1 and 3.2 in finding that the evidence on the investigation record did not require the DIMD to examine whether the market could absorb further price increases.

Having reversed the Panel's finding at issue, the Appellate Body turned to the European Union's request to complete the analysis. After noting specific pieces of evidence on the DIMD's record, the Appellate Body considered that the DIMD did not examine evidence relevant to whether the market would accept additional domestic price increases. Thus, the Appellate Body found that the DIMD had acted inconsistently with Articles 3.1 and 3.2 by failing to examine evidence relevant to whether the market would accept additional domestic price increases.

3.1.3 Confidential report

3.1.3.1 Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement

The European Union claimed that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by basing its evaluation of the European Union's claims concerning the domestic industry's return on investments, actual and potential effects on cash flow, and the ability to raise capital or investments on the confidential investigation report without assessing whether that document formed part of the DIMD's investigation record. In the European Union's view, instead of requiring Russia to show that certain parts of the confidential investigation report actually formed part of the investigation record, the Panel simply accepted that the entire content of it formed part of the investigation record.

The Appellate Body recalled that the confidential investigation report was submitted by Russia together with Russia's first written submission to the Panel and that the European Union could not have been aware of the contents of the confidential investigation report before receiving it. Having examined the European Union's written submissions to the Panel and answers to the Panel's questions, the Appellate Body disagreed with Russia that, on appeal, the European Union misrepresented the arguments that it had made before the Panel.

The participants agreed that, in principle, a panel could rely on parts of a confidential version of an investigation report in its examination of claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Appellate Body observed that the absence of any indication in the nonconfidential investigation report that the three injury factors at issue were analysed may raise issues of due process. The Appellate Body remarked, however, that the issue of whether an investigating authority can conduct its analysis of the mandatory injury factors in a confidential version of an investigation report, without referring to it in a public version of the investigation report, was not before it in this appeal.

Turning to its analysis under Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement, the Appellate Body noted the difficulty faced by the European Union in obtaining and providing evidence to the Panel in support of its contention that the relevant parts of the confidential investigation report may not have formed part of the investigation record. The nature and scope of the evidence that might be reasonably expected by an adjudicator in order to establish a fact or claim in a particular case will depend on a range of factors, including the type of evidence that is made available by a Member's regulating authority. In a specific case, a panel may have a sufficient basis to reach an affirmative finding regarding a particular fact or claim

on the basis of inferences that can be reasonably drawn from circumstantial rather than direct evidence. A party cannot be reasonably expected to meet its evidentiary burden when information is in the exclusive possession of another party. In light of the circumstances of this case, the Appellate Body did not consider that the European Union had to prove conclusively that the relevant parts of the confidential investigation report did not form part of the investigation record at the time the determination was made. Rather, the Panel should have requested from Russia evidence demonstrating that the confidential investigation report formed part of the investigation record at the time the determination was made.

The Appellate Body observed that, when faced with a claim that a report, or parts of it, on the basis of which an anti-dumping measure was imposed did not form part of the investigation record at the time the determination was made, a panel has to take certain steps to assess objectively and assure itself of the report's validity and whether or not it formed part of the contemporaneous written record of the investigation. In the Appellate Body's view, the manner in which a panel can assure itself of whether an investigation report, or parts of it, formed part of the investigation record will depend on the facts of the particular case and may include, in addition to posing questions to the submitting party, examining additional evidence demonstrating that the contested report, or parts of it, formed part of the investigation record. The Appellate Body highlighted that, in the present dispute, the Panel had not posed pertinent questions to Russia or sought otherwise to assure itself that the relevant parts of the confidential investigation report formed part of the investigation record at the time the determination was made. Thus, the Appellate Body found that the Panel acted inconsistently with Article 11 of the DSU and Article 17.6 of the Anti-Dumping Agreement by relying, in its examination of the European Union's claims, on the confidential investigation report without assuring itself of whether the relevant parts of it formed part of the investigation record at the time the determination to impose the anti-dumping measure was made. Accordingly, the Appellate Body reversed the Panel's finding at issue.

3.1.3.2 Completion of the analysis

Having reversed the Panel findings, the Appellate Body addressed the European Union's request that the Appellate Body complete the analysis. The Appellate Body considered that it would be in the position to address the European Union's request on the basis of the nonconfidential investigation report only if it were first to determine for itself that it could not rely on the confidential investigation report. In light of the absence on the record of this dispute of a discernible attempt by the Panel to assure itself of whether the confidential investigation report formed part of the investigation record and, in particular, the absence of questions being posed to Russia concerning the confidential investigation report, the Appellate Body considered that it could not determine for itself whether it could rely on the analysis contained in the confidential investigation report for purposes of the assessment of the European Union's claims under Articles 3.1 and 3.4 of the Anti-Dumping Agreement. The Appellate Body thus considered that it could not complete the analysis with respect to the European Union's claims under Articles 3.1 and 3.4 concerning the three injury factors at issue and reach a conclusion as to whether the DIMD acted inconsistently with Articles 3.1 and 3.4.

3.1.4 Related dealer

The European Union claimed that the Panel erred in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement by finding that an investigating authority is generally not required to consider the inventories of a dealer related to a domestic producer of the like product, but not itself part of the domestic industry. To the European Union, the Panel's interpretation would wrongly allow a single economic entity to manipulate inventory data by shifting products from the legal entity that produced them to the legal entity that sells those products, and thus prevent an objective assessment based on positive evidence of the state of the domestic industry. Russia responded that the text of Article 3 does not support a proposition that an investigating authority is generally required to analyse the data of entities that are not part of the domestic industry.

Article 3.4 of the Anti-Dumping Agreement provides that the examination under that provision "shall include an evaluation of all relevant economic factors and indices having a bearing on the state of the industry". The clause "having a bearing on the state of the industry" focuses the evaluation on the factors and indices relevant to the state of the domestic industry. In addition, the reference to "all" relevant economic factors and indices does not imply a narrow scope of evaluation. These factors and indices include those expressly listed in Article 3.4, as well as additional ones if they are relevant to the assessment of the state of the domestic industry. Thus, to the Appellate Body, evidence on the record concerning all relevant economic factors and indices that influence the state of the domestic industry falls within the scope of an investigating authority's evaluation under Article 3.4. In this respect, evidence pertaining to inventories of a related dealer that does not produce the like product and is not formally part of the domestic industry may be pertinent, in a particular case, to the evaluation of a relevant economic factor or index having a bearing on the state of the domestic industry.

The Appellate Body did not consider the degree of proximity in the relationship between different entities to be dispositive, without more, of whether evidence relating to the inventory of a related dealer is pertinent to the evaluation of the injury factor "inventories" under Article 3.4. The focus of the evaluation under this provision is not on the nature of the relationship between companies such as producers and dealers; it centres instead on the relevant economic factors and indices having a bearing on the state of the domestic industry. Thus, regardless of whether a domestic producer included in the domestic industry and a dealer are independent from one another, related to each other, or part of the same economic entity, an investigating authority is required to assess whether the evidence on record concerns a relevant economic factor or index having a bearing on the state of the domestic industry. To the extent that this includes evidence relating to a dealer, an investigating authority is required to examine it under Article 3.4. Where it is not plainly discernible that evidence on the record is pertinent to the evaluation of economic factors or indices having a bearing on the state of the domestic industry, interested parties must provide an explanation or reasons as to why they deem the evidence to be pertinent to the assessment of the state of the industry under Article 3.4.

Turning to the European Union's claim that the Panel erred in its application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement, the Appellate Body noted that the European Union's challenge hinges upon its claim of error regarding the Panel's interpretation of these provisions. The thrust of the European Union's argument concerned the nature of the relationship between Sollers and Turin Auto. The European Union had not sought to argue, on the basis of the particular evidence before the DIMD, how the inventory information of Turin Auto was specifically pertinent to the evaluation of "inventories" in relation to the state of Sollers.

For these reasons, the Appellate Body found that the Panel did not err in its interpretation and application of Articles 3.1 and 3.4 of the Anti-Dumping Agreement.

3.1.5 Article 6.9 of the Anti-Dumping Agreement

The participants appealed different aspects of the Panel's interpretation and application of Article 6.9 of the Anti-Dumping Agreement. Russia claimed that, in reaching its conclusions, the Panel erred by interpreting and applying Article 6.9 in a way that suggests that, with respect to essential facts treated as confidential, a finding of inconsistency with Article 6.5 of the Anti-Dumping Agreement will automatically entail an inconsistency with Article 6.9. Russia also raised claims of error under Articles 7 and 15.2 of the DSU with respect to an allegedly new finding concerning information originating from the electronic customs database that the Panel added to its Report at the interim review stage.

The European Union claimed that the Panel erred in its interpretation and application of Article 6.9 by concluding that the source of information cannot be an "essential fact" and finding that the source of information concerning import volumes and values in the DIMD's investigation report does not constitute

"essential facts" under Article 6.9. In the European Union's view, this error stemmed from two earlier interpretative errors made by the Panel in finding that: (i) a methodology is not an essential fact; and (ii) not every essential fact is required to be disclosed, but rather only those essential facts that are additionally shown to be "under consideration".

3.1.5.1 Relationship between Articles 6.5 and 6.9 of the Anti-Dumping Agreement

The Appellate Body first recalled that essential facts are those that "form the basis for the decision whether to apply definitive measures" and those that ensure the ability of interested parties to defend their interests. Thus, the term "essential facts" refers to those facts that are significant in the process of reaching a decision whether to apply definitive measures. Such facts are those that are salient for a decision to apply definitive measures as well as those that are salient for a contrary outcome. Whether a particular fact is essential or "significant in the process of reaching a decision" depends on the nature and scope of the particular substantive obligations, the content of the particular findings needed to satisfy the substantive obligations at issue, as well as the factual circumstances of each case, including the arguments and evidence submitted by the interested parties.

With respect to the relationship between Articles 6.5 and 6.9, the Appellate Body noted that the text of these provisions does not suggest that a finding of inconsistency under Article 6.5 would automatically lead to a finding of inconsistency under Article 6.9. While the notions of essential facts under Article 6.9 and confidential information within the meaning of Article 6.5 may overlap, they are not co-extensive. An assessment under Article 6.5 focuses on whether confidential treatment was conferred to information on the investigation record upon a proper showing of "good cause". By contrast, an assessment under Article 6.9 concerns whether all essential facts have been disclosed in a timely manner so as to ensure the ability of interested parties to defend their interests. Accordingly, an inquiry under Article 6.9 is separate and distinct from an assessment under Article 6.5 of the Anti-Dumping Agreement. Regardless of whether or not the essential facts at issue were properly treated as confidential under Article 6.5, a panel must examine whether any disclosure made – including that made through non-confidential summaries pursuant to Article 6.5.1 – meets the legal standard under Article 6.9. Thus, an inconsistency with Article 6.5 in relation to information that constitutes essential facts may not be presumed to result in an inconsistency with Article 6.9.

Turning to Russia's appeal, the Appellate Body recalled that the Panel had emphasized that the "dual obligation" in Articles 6.5 and 6.9 could be met through the use of non-confidential summaries "where essential facts are properly treated as confidential". The Appellate Body also recalled that the Panel had further stated that "the condition precedent for treatment as confidential of such information by the investigating authority, a showing of good cause, was not met and therefore that information, including the essential facts at issue, was not properly treated as confidential in the investigation." In its subsequent analysis, the Panel referred to its previous finding of inconsistency with Article 6.5 and found that, to the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9. To the Appellate Body, these statements suggest that the Panel considered that the requirements of Article 6.9 could be met by disclosing essential facts through non-confidential summaries only where no inconsistency with Article 6.5 had been established. Disagreeing with the Panel's understanding, the Appellate Body reiterated that, regardless of whether or not the essential facts at issue were treated as confidential consistently with the requirements of Article 6.5, a panel must examine whether any disclosure made meets the requirements of Article 6.9. Having made a finding of inconsistency with Article 6.5, the Panel could not simply conclude, on that basis alone, that the DIMD had failed to comply with the requirements of Article 6.9. Rather, the Panel should have examined whether or not the alleged disclosure made through the nonconfidential summaries met the requirements of Article 6.9.

The Appellate Body thus found that the Panel erred in its interpretation and application of Article 6.9, and reversed the Panel findings at issue.

3.1.5.2 Electronic customs database

With respect to Russia's claim that the Panel acted inconsistently with Articles 7 and 15.2 of the DSU by adding, in its Final Report, paragraph 7.270, which had not appeared in the Panel's Interim Report, the Appellate Body recalled that paragraph 7.270 was added by the Panel in response to Russia's request. At the interim report stage, Russia had requested the Panel to reflect the reason why essential facts, which were determined on the basis of electronic customs database submitted to the DIMD by the national customs authorities of the Member States of the Customs Union on a confidential basis, did not meet the requirements of Article 6.5 of the Anti-Dumping Agreement.

The Appellate Body considered that, in adding the finding in paragraph 7.270 of the Panel Report, the Panel incorporated an element of analysis under Article 6.5 into its assessment under Article 6.9. In the Appellate Body's view, this approach was premised on the Panel's understanding that, in circumstances where information that constitutes essential facts under Article 6.9 was improperly treated as confidential under Article 6.5, the requirements that apply under Article 6.9 to essential facts could not be met by means of the disclosure of non-confidential summaries within the meaning of Article 6.5.1. The Appellate Body thus did not consider that paragraph 7.270 of the Panel Report contained a separate finding of inconsistency with Article 6.5 of the Anti-Dumping Agreement. Rather, the Appellate Body saw it as an error in application that stemmed from the Panel's erroneous interpretation of Article 6.9. The Appellate Body thus disagreed with the Panel's analysis in paragraph 7.270 of the Panel Report.

The Appellate Body found that, as a result of its erroneous interpretation of Article 6.9 of the Anti-Dumping Agreement, the Panel erred in finding, in paragraph 7.270 of the Panel Report, that, to the extent that the DIMD failed to disclose information that was not properly treated as confidential, it acted inconsistently with Article 6.9 of the Anti-Dumping Agreement. The Appellate Body thus reversed the Panel's finding, in paragraph 7.270, and the Panel's relevant conclusions relating to the information originating from the electronic customs database. In light of this reversal, the Appellate Body did not address the remainder of Russia's claims at issue, including its claims of error under Articles 7 and 15.2 of the DSU.

3.1.5.3 Completion of the analysis

Having reversed the relevant Panel findings, the Appellate Body turned to address the European Union's request for completion of the analysis. The European Union requested that the Appellate Body find that the DIMD acted inconsistently with Article 6.9 by failing to disclose the essential facts listed in paragraphs 7.250 and 7.278, Table 12, of the Panel Report.

The Appellate Body recalled the Panel's finding that the draft investigation report constitutes Russia's disclosure under Article 6.9, which was not appealed. Having reviewed the draft investigation report, the Appellate Body concluded that the DIMD did not disclose the relevant essential facts, listed in items (d) and (f) to (o) of Table 12 in paragraph 7.278 of the Panel Report. The Appellate Body also noted that, in response to questioning at the hearing, Russia indicated that the information concerning the weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG was disclosed in the additional disclosure letter. The Appellate Body remarked that the Panel had not referred to the additional disclosure letter in its analysis under Article 6.9. The Appellate Body thus did not consider that there were sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow it to complete the analysis and rule on whether Russia had disclosed the information concerning the weighted average export prices of LCVs produced by Daimler AG and Volkswagen AG.

The Appellate Body thus found that the DIMD had acted inconsistently with Article 6.9 of the Anti-Dumping Agreement by failing to disclose the essential facts contained in items (d) and (f) to (o) of Table 12 in paragraph 7.278 of the Panel Report.

3.1.5.4 Source of information

The European Union took issue with three aspects of the Panel's analysis: (i) the Panel's statement that Article 6.9 does not require the disclosure of methodologies because they do not constitute "facts" or "essential facts"; (ii) the Panel's statement that Article 6.9 does not require the disclosure of "every 'essential fact'", but of those that are "under consideration"; and (iii) the Panel's finding that the source of information in itself and the source of information with respect to import volumes and values used by the DIMD do not constitute essential facts.

The Appellate Body first recalled the Panel's observation that not every "essential fact" is required to be disclosed, and that Article 6.9 requires the disclosure of "essential facts under consideration". In the Appellate Body's view, the Panel appeared to have summarized its understanding of the relevant Appellate Body's statements in *China – GOES*, according to which Article 6.9 does not require the disclosure of *all* the facts that are before an authority but, instead, those that are "essential". The Appellate Body considered that, in rephrasing the Appellate Body's statement in *China – GOES*, the Panel may have cursorily stated that "[n]ot every 'essential fact' is required to be disclosed", instead of saying that *not every fact* is required to be disclosed, but only those that are under consideration and form the basis for the decision whether to apply definitive measures. The Appellate Body had reservations with the Panel statement to the extent that the Panel could be read as having distinguished between two categories of information: (i) essential facts (some of which are not required to be disclosed); and (ii) essential facts under consideration (that are required to be disclosed). Given that the Panel correctly expressed its understanding of this aspect of the legal standard under Article 6.9 elsewhere in its Report, the Appellate Body did not consider that the Panel's rephrasing of the Appellate Body's statement in *China – GOES*, in itself, amounted to a reversible error of law.

Second, the Appellate Body examined the Panel's statement that "Article 6.9 requires the disclosure of facts: the information underlying a decision rather than the reasoning, calculation or methodology that led to a determination." In *China – HP-SSST (Japan) / China – HP-SSST (EU)*, the Appellate Body had found that the calculation methodology used by the investigating authority to determine the margin of dumping constituted an essential fact within the meaning of Article 6.9. The Appellate Body noted that disclosure of the data underlying a dumping determination alone may not enable an interested party to defend its interests, unless that interested party was also informed of the methodology applied by the investigating authority to determine the margin of dumping. At the same time, the Appellate Body observed that not all methodologies used by an investigating authority may constitute essential facts within the meaning of Article 6.9. Rather, only those methodologies the knowledge of which is necessary for the participants to understand the basis of the investigating authority's decision and to defend their interests would be essential facts under Article 6.9. An assessment of whether a particular methodology constitutes an essential fact should therefore be made on a case-by-case basis. Consequently, the Appellate Body disagreed with the Panel's statement to the extent that the Panel considered that a methodology cannot constitute an "essential fact" under Article 6.9 of the Anti-Dumping Agreement.

Finally, the Appellate Body examined the Panel's statements that "[i]n itself, the source of data is not an essential fact under consideration" and that "[k]nowledge of the sources of data might be useful to establish the credibility of information used by investigating authorities, but the sources of data are not themselves essential facts under consideration." The Appellate Body noted that, in certain circumstances, knowledge of the data itself may not be sufficient to enable an interested party to properly defend itself, unless that party is also informed of the source of such data and how it was used by the investigating authority. Thus, knowing the source of data may be pivotal to the ability of an interested party to defend itself. In particular, knowing the source of information may enable the party to comment on the accuracy or reliability of the relevant information and allow it to propose alternative sources for that information. For these reasons, the Appellate Body disagreed with the Panel's general statement that sources of data are not essential facts within the meaning of Article 6.9. The Appellate Body noted that the Panel relied on this interpretation as

the reason for finding that the European Union had failed to demonstrate that the source of information concerning import volumes and values, and volumes of dumped imports used by the DIMD constitutes an essential fact under Article 6.9. Accordingly, the Appellate Body also disagreed with this Panel conclusion.

The Appellate Body thus found that the Panel erred in its interpretation of Article 6.9 as to whether methodologies and sources of information may qualify as essential facts and in its subsequent application of this general understanding to the facts of this case. The Appellate Body thus reversed the Panel's findings at issue.

3.1.5.5 Completion of the analysis

The Appellate Body then turned to address the European Union's request to complete the analysis and find that, by failing to disclose the source of information concerning import volumes and values in the context of its dumping and injury analyses, the DIMD acted inconsistently with Article 6.9 of the Anti-Dumping Agreement.

The Appellate Body recalled that, having considered that sources of information in general do not constitute essential facts, the Panel found that the source of the information concerning the import volumes and values used by the DIMD in its dumping determination was not an essential fact. In the Appellate Body's view, the Panel did not engage further with the European Union's and Russia's arguments and did not examine the contents of the draft investigation report. Consequently, the Panel proceedings were conducted without the Panel sufficiently exploring with the parties the issue of whether the sources of information of import volumes and values used by the DIMD in its dumping determination constituted essential facts and were actually disclosed in this case. The Appellate Body also noted that it was not clear whether the participants agreed on whether the additional letter, which Russia referred to at the oral hearing, was a disclosure document.

In these circumstances, the Appellate Body did not consider that there were sufficient factual findings by the Panel and uncontested evidence on the Panel record that would allow the Appellate Body to complete the analysis and rule on whether the DIMD had to, and in fact did, disclose the source of information concerning import volumes and values that it used in its dumping and injury determinations.

3.2 Appellate Body Report, *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*, WT/DS316/AB/RW

This dispute concerned the implementation by the European Union of the DSB's recommendations and rulings in *European Communities and Certain Member States – Measures Affecting Trade in Large Civil Aircraft*.

3.2.1 The original proceeding

The underlying dispute concerned a challenge brought by the United States against over 300 alleged instances of subsidization, over the course of four decades, by the European Communities and four of its member States – France, Germany, Spain, and the United Kingdom – with respect to large civil aircraft (LCA) developed, produced, and sold by Airbus SAS and its predecessor entities. The measures at issue in the original proceedings included:

"Launch Aid" or "Member State Financing" (LA/MSF) for the development of various Airbus LCA, consisting of the A300, A310, A320, A330/A340 (including the A330-200 and A340-500/600 variants), A350, and A380;

- loans from the European Investment Bank to Airbus entities between 1988 and 2002;
- infrastructure and infrastructure-related grants by the four member State governments;

- corporate restructuring measures undertaken by the French and German Governments; and

- research and technological development funding granted to Airbus entities by the four member State governments.

The United States claimed before the original Panel that each challenged measure was a specific subsidy within the meaning of Articles 1 and 2 of the Agreement on Subsidies and Countervailing Measures (SCM Agreement), and that the European Communities and the four member States, through the use of these subsidies, had caused adverse effects to the United States' interests within the meaning of Articles 5 and 6 of the SCM Agreement. In addition, the United States claimed that certain of the LA/MSF measures were prohibited export subsidies within the meaning of Article 3 of the SCM Agreement. The Panel and the Appellate Body ruled in favour of many of the claims made by the United States. At the same time, some other claims did not lead to findings of inconsistency, because they were found not to be sufficiently substantiated. The Panel and Appellate Body reports in the original dispute were adopted by the DSB on 1 June 2011.

Specifically, the original panel and Appellate Body found in the underlying dispute that the United States had demonstrated that the European Communities and certain member States had caused adverse effects, in the form of certain kinds of serious prejudice to the United States' interests, within the meaning of Articles 5(c), 6.3(a), (b) and (c) of the SCM Agreement, through the use of the following specific subsidies:

- LA/MSF provided to Airbus for the development of the models of Airbus LCA listed above (except for the A350);

- "capital contributions" that the French and German Governments provided in connection with the corporate restructuring of Aérospatiale and Deutsche Airbus, both corporate entities of the Airbus Consortium; and

- "infrastructure-related measures" provided by German and Spanish authorities.

As a result of these findings, and consistent with Article 7.8 of the SCM Agreement, the original panel and Appellate Body recommended that the European Union "take appropriate steps to remove the adverse effects or … withdraw the subsidy". The original Panel also concluded that the German, Spanish, and UK A380 LA/MSF measures constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement. The Appellate Body reversed this finding but could not complete the relevant legal analysis because of a lack of uncontested facts and relevant findings by the original panel.

3.2.2 The compliance panel proceeding

On 1 December 2011, the European Union informed the DSB that it had taken "appropriate steps to bring its measures fully into conformity with its WTO obligations and to comply with the DSB's recommendations and rulings". The European Union provided information in relation to its alleged compliance "steps" in an annex containing 36 numbered paragraphs. The United States considered that the European Union's 36 alleged compliance "steps" failed to satisfy the European Union's obligation to bring the measures into conformity with the rulings and recommendations adopted by the DSB. In addition, the United States argued that the European Union and certain member States worsened the compliance situation by providing allegedly subsidized LA/MSF for Airbus' newest model of LCA, the A350XWB, during the course of the original proceeding.

At the organizational meeting held on 1 May 2012, the parties requested the Panel to adopt additional procedures for the protection of confidential and highly sensitive business information, submitting a joint

proposal. After considering the parties' request and their joint proposal, the Panel adopted the Additional Procedures to Protect Business Confidential Information and Highly Sensitive Business Information (BCI/HSBI Procedures) on 11 May 2012.

The Panel held one substantive meeting with the parties on 16-18 April 2013. A session with the third parties took place on 17 April 2013. At the request of the parties, the Panel's meeting with the parties was opened to the public by means of a delayed video showing. A portion of the Panel's meeting with the third parties was also opened to the public by means of a delayed video showing.

The United States argued that the European Union and certain member States failed to comply with the DSB's recommendations and rulings for two main reasons. First, the United States claimed that the European Union and certain member States had failed to act in conformity with the obligation in Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" on the grounds that the subsidies found to have caused adverse effects in the original proceeding continued to cause adverse effects, and because by agreeing to provide Airbus with LA/MSF for Airbus' latest model of LCA, the A350XWB, France, Germany, Spain, and the United Kingdom "continued and even expanded" the subsidization of Airbus' LCA activities, thereby causing "additional adverse effects" to the United States' interests, within the meaning of Articles 5(c) and 6.3 of the SCM Agreement. Second, the United States claimed that France, Germany, Spain, and the United Kingdom failed to comply with the recommendations and rulings adopted by the DSB because, according to the United States, the A350XWB and A380 LA/MSF measures are prohibited export and/or import substitution subsidies, within the meaning of Articles 3.1 and 3.2 of the SCM Agreement.

The European Union rejected the entirety of the United States' claims. In particular, the European Union maintained that the subsidies found to cause adverse effects in the original proceeding had either been "withdrawn" or were no longer a "genuine and substantial" cause of "adverse effects". Moreover, the European Union argued that the United States' claims against the A350XWB LA/MSF measures and the prohibited subsidy claims raised by the United States against the A380 LA/MSF subsidies were outside of the scope of the compliance proceeding or, in any case, without merit.

3.2.2.1 Prohibited subsidy claims

The first part of the Panel's evaluation of the United States' prohibited subsidy claims against the A350XWB LA/MSF measures was focused on determining the merits of the United States' claim that each measure amounted to a specific subsidy, within the meaning of Articles 1 and 2 of the SCM Agreement.

The United States argued that each of the A350XWB LA/MSF measures entered into by Airbus and France, Germany, Spain, and the United Kingdom was a "financial contribution" in the form of a "loan", within the meaning of Article 1.1(a)(1)(i) of the SCM Agreement, that conferred a "benefit" on Airbus, within the meaning of Article 1.1(b) of the SCM Agreement, by virtue of the below-market interest rates Airbus was charged for the financing. The European Union did not contest the United States' characterization of the LA/MSF measures as "financial contributions". However, according to the European Union, the A350XWB LA/MSF measures did not confer a "benefit" upon Airbus because the United States could not show that the financing was provided at below-market interest rates.

The Panel began its analysis of the parties' positions by reviewing the terms of the four A350XWB LA/MSF contracts and comparing them to the core terms of the LA/MSF contracts associated with previous models of Airbus LCA that were at issue in the original proceeding. The Panel found that, not unlike the LA/MSF contracts entered into for the purpose of financing the development of previous models of Airbus LCA, the A350XWB LA/MSF measures involved the provision of financing for a portion of the development costs associated with an Airbus LCA on the basis of repayment terms that were, overall, back-loaded, primarily levy-based, tied to the proceeds of aircraft sales and unsecured by any assets. The Panel concluded that, as

with the LA/MSF measures at issue in the original proceeding, full repayment of the principal, interest, and any royalties due under each of the A350XWB LA/MSF measures would be dependent upon achieving the A350XWB revenue and sales targets projected at the time of the conclusion of those contracts.

Turning to the question of "benefit", the Panel explained that, consistent with the approach taken in the original proceeding, it would first determine the "rates of return" of each of the relevant LA/MSF contracts and then subsequently compare these with a benchmark for the market interest rate that would be charged for comparable loans by a market lender.

The Panel found that neither party had advanced entirely credible estimates of the rates of return that would be payable by Airbus under each of the LA/MSF contracts in the event that the A350XWB would be developed and sold as anticipated at the time of entry into force of the relevant contracts. Nevertheless, the Panel continued its analysis on the basis of the European Union's "unvalidated" figures, preferring not to use the United States' estimates because they did not account for expected royalty revenues and certain fees and charges, which the Panel considered should be included in the calculation.

In the next step of its analysis, the Panel examined the parties' positions with respect to the benchmark for the market interest rate – that is, the interest rate that a market lender would ask Airbus to pay for the provision of financing on comparable terms to the A350XWB LA/MSF measures. Both parties had constructed this rate by adding a project-specific risk premium to a corporate borrowing rate. The project-specific risk premium represented the premium that a market lender would charge Airbus for the provision of financing, the full repayment of which would depend upon the success of the A350XWB programme, and the corporate borrowing rate represented the number of basis points that a market lender would charge Airbus for borrowing intended to be used for a general, non-project-specific purpose.

In evaluating the parties' arguments on the market interest rate benchmark, the Panel analysed in detail what would be an appropriate project-specific risk premium. The ultimate question that the Panel considered was whether the project-specific risk premium used in the original proceeding in relation to the A380 LA/MSF measures could also be used for the A350XWB LA/MSF measures. The Panel answered this question by exploring *inter alia* the parties' submissions concerning the similarities and differences between the relative development and marketing risks of the A380 and the A350XWB. The Panel concluded that the development risks of the A350XWB were at least as high as, or sufficiently similar to, those associated with the A380, and that the respective marketing risks, although different in nature, were overall comparable in their importance. Thus, the Panel found that the overall project-specific risks of the A380 and the A350XWB programmes were sufficiently similar to justify applying the risk premium associated with the A380 LA/MSF measures in the original proceeding to the A350XWB LA/MSF measures.

After constructing the relevant market interest rate benchmarks, the Panel compared the results with the internal rates of return determined for each of the relevant LA/MSF contracts and found that, in each case, the rates of return were, to differing degrees, below the market interest rate benchmark. Thus, the Panel found that the A350XWB LA/MSF measures were provided at below-market interest rates. Accordingly, the Panel concluded that the terms of the A350XWB LA/MSF measures conferred a "benefit" upon Airbus, making them subsidies, within the meaning of Article 1 of the SCM Agreement. The Panel went on to find that the A350XWB LA/MSF subsidies were also specific, within the meaning of Article 2 of the SCM Agreement. The European Union did not contest the United States allegations concerning specificity.

Finally, the Panel turned to discuss certain additional pieces of evidence concerning the extent to which the European Union member States had undertaken formal project appraisals of the A350XWB programme before entering into the LA/MSF agreements. The Panel found the additional evidence to demonstrate that: (i) the governments of France, Germany, and Spain did not undertake any written appraisal of the A350XWB project; (ii) to the extent that any unwritten appraisals were performed by the same governments, they were based on information from Airbus that did not address the development risks associated with the

A350XWB; (iii) the "detailed analysis" of the "technical viability" of the A350XWB project undertaken by the United Kingdom was based on information that was not provided by Airbus about the technical specifications and/or development risks associated with the A350XWB; and (iv) information on projected revenue streams necessary for France, Germany, and the United Kingdom to accurately determine the internal rates of return of their respective LA/MSF contracts, *including royalties*, was not provided. After recalling certain statements made by the Appellate Body in the original proceeding, which the Panel considered recognized that a commercial investor would be normally expected to perform a certain degree of due diligence in relation to the current and future "economic conditions" of a particular project before agreeing to enter into a loan contract, the Panel found that the facts it had highlighted suggested that in agreeing to the A350XWB LA/MSF measures, each of the Airbus governments, to differing degrees, fell short of the standard that one would expect a commercial lender to normally satisfy. For the Panel, this evidence suggested that the relevant European Union member States entered into the A350XWB LA/MSF contracts in a manner that was inconsistent with the standard of a commercial lender, thereby confirming its finding of subsidization.

The second part of the Panel's evaluation of the United States' prohibited subsidy claims focused on determining whether the A350XWB and A380 LA/MSF measures were prohibited export subsidies, within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.

The United States claimed that the A380 LA/MSF measures and the A350XWB LA/MSF measures are prohibited export subsidies because they envisage the granting of subsidies contingent *in fact* upon export performance. The Panel rejected the United States' claims.

Although the compliance Panel found that the United States had demonstrated that the challenged measures were subsidies granted in anticipation of export performance, the Panel found that the United States had not demonstrated that the granting of those subsidies was, in fact, *contingent* upon export performance.

In making this finding, the Panel followed the guidance provided by the Appellate Body in the original proceeding in relation to the correct legal standard for demonstrating *de facto* export contingency, namely, that the granting of a subsidy must be shown to be "geared to induce the promotion of future export performance by the recipient". The United States attempted to demonstrate that it had satisfied this standard by performing the comparison, which the Appellate Body had explained in the original proceeding could be used to inform the analysis – a comparison of the ratio of anticipated export sales to anticipated domestic sales of the subsidized LCA with and without the LA/MSF subsidies (ratios analysis).

The Panel found that the "ratios analysis" described by the Appellate Body and applied by the United States could not by itself demonstrate *de facto* export contingency, and that in order to avoid false positive and false negative conclusions, it needed to be combined with a meaningful analysis of the extent to which the design and structure of a subsidy contributes to the presence of an incentive for a recipient to favour export sales over domestic sales. Thus, the Panel dismissed the United States' claims because, in effect, the United States had only relied upon a "ratios analysis" to make out its case of *de facto* export contingency. In any case, the Panel went on to examine the validity of the United States' "ratios analyses", finding that the evidence the United States relied upon could not be used to represent the ratio of export sales to domestic sales with respect to both the A350XWB and the A380. Accordingly, the Panel concluded that the United States had failed to demonstrate that the A350XWB and A380 LA/MSF agreements were prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement.

The third part of the Panel's evaluation of the United States' prohibited subsidy claims focused on determining whether the A350XWB LA/MSF measures were prohibited import substitution subsidies, within the meaning of Article 3.1(b) of the SCM Agreement.

The United States claimed that the A350XWB LA/MSF measures are prohibited import substitution subsidies because, to the extent that they explicitly provide for the granting of subsidies contingent upon Airbus producing certain domestic LCA-related goods, which are subsequently assembled or used to make Airbus LCA, the LA/MSF measures envisage the granting of subsidies contingent *in law* and/or *in fact* upon the use of domestic over imported goods. The Panel rejected the United States' claim.

The Panel found that even if the A350XWB LA/MSF contracts were contingent on the domestic *production* of certain LCA-related goods that were then used in the production of Airbus LCA, as the United States claimed, this fact alone could not establish that the subsidy measures were *contingent*, whether in law or in fact, on the use of domestic over imported goods. In other words, while it was clear that the *domestically* produced LCA-related goods would be used by Airbus in the development and manufacture of LCA, the Panel found that this was not enough to find that the LA/MSF measures, by subsidizing the *production* of those LCA-related goods, were tied to the use of domestic over imported products.

In reaching this finding, the Panel noted that all domestic production subsidies could in one way or another increase the consumption of domestically produced goods by downstream entities. In this context, the Panel considered that the United States' theory of contingency could result in many domestic production subsidies being considered prohibited import substitution subsidies. The Panel considered such a result to be particularly questionable given that Article III:8(b) of the GATT 1994 explicitly provides that the practice of a WTO Member granting subsidies exclusively to domestic producers (i.e. domestic production subsidies) should not be disciplined under Article III:4 of the GATT 1994, which, like Article 3.1(b) of the SCM Agreement, also prohibits import substitution subsidies. The Panel further noted that subsidies found by previous WTO panels to be prohibited import substitution subsidies required firms to use certain amounts of domestic goods as production inputs, that is, to discriminate between upstream sources of domestic and imported goods in favour of the former. However, no subsidy had been found to be contingent on the use of domestic over imported goods simply because the subsidy was only available to a firm so long as it engaged in domestic production activities. Accordingly, the Panel concluded that the United States failed to demonstrate that the A350XWB LA/MSF measures were prohibited import substitution subsidies within the meaning of Article 3.1(b) of the SCM Agreement.

3.2.2.2 Whether the European Union complied with the obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy", pursuant to Article 7.8 of the SCM Agreement

Article 7.8 of the SCM Agreement specifies what an implementing Member must do following the adoption of a panel and/or Appellate Body report in which it is determined that any specific subsidy has caused adverse effects to the interests of another Member, within the meaning of Article 5 of the SCM Agreement. In particular, Article 7.8 calls upon the "Member granting or maintaining such subsidy" to "take appropriate steps to remove the adverse effects or withdraw the subsidy". The Panel considered that the interpretative question that was at the centre of the United States' claims of non-compliance in this dispute was how to give meaning to this requirement in the context of the substantive disciplines of Article 5 of the SCM Agreement, which focus not on the *existence* of a particular type of measure (as other disciplines found in the covered agreements), but rather on the *trade effects* that may be attributed to a measure, *whether or not it continues to exist*.

The parties (and certain third parties) expressed profoundly different views about not only whether the European Union and certain member States had complied with the terms of Article 7.8, but also, more fundamentally, the extent to which the European Union and certain member States had any ongoing compliance obligation at all with respect to subsidies found to cause adverse effects in the original proceeding that allegedly ceased to exist by the time of the DSB's adoption of the panel and Appellate Body recommendations and rulings on 1 June 2011.

The Panel commenced its evaluation of the merits of the United States' claims by first of all addressing this important threshold question – namely, whether the European Union and certain member States had any obligation to comply with Article 7.8 of the SCM Agreement with respect to subsidies that had allegedly ceased to exist before 1 June 2011, that is, before the DSB's adoption of the recommendations and rulings in the original proceeding.

3.2.2.2.1 Did the European Union and certain member States have an obligation to comply with Article 7.8 of the SCM Agreement with respect to subsidies that allegedly ceased to exist before 1 June 2011?

The European Union argued that the express language of Article 7.8 of the SCM Agreement imposed an obligation on the European Union and certain member States to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" only to the extent that the European Union and certain member States continued to be "granting or maintaining" the same subsidies found to have caused adverse effects in the original proceeding after the adoption of the relevant recommendations and rulings by the DSB. The United States disagreed with the European Union's contention, submitting that the European Union was under an obligation to "take appropriate steps to remove the adverse effects" or "withdraw the subsidy" in respect of all of the challenged subsidy measures irrespective of whether they had ceased to exist at any particular point in time.

Although the Panel considered that the European Union's legal interpretation could arguably find some support when the text of Article 7.8 was read in isolation, the Panel found that the European Union's position could not be sustained once the language of Article 7.8 was interpreted in light of its proper context as well as the object and purpose of WTO compliance obligations. After reviewing various provisions of the DSU governing when and how WTO compliance obligations are incurred, including Articles 19.1 and 21.1, the Panel found that any violation of the covered agreements will attract an obligation to bring a WTO-inconsistent measure into conformity with the covered agreement that was the source of the infringement for as long as that infringement persists. The Panel considered Article 7.8 to manifest this principle in the specific context of the SCM Agreement. Thus, the Panel found that the objective of Article 7.8 is to clarify how a Member found to have caused adverse effects through the use of subsidies is to come into conformity with its obligations under the SCM Agreement, in particular, Article 5.

The Panel recalled that Article 5 of the SCM Agreement imposes an *effects-based* discipline on the use of subsidies that can be infringed even when a Member is no longer granting or maintaining a particular subsidy. Thus, for example, in the original proceeding, France, Germany, Spain, and the United Kingdom were found to have caused adverse effects to the United States' interests between 2001-2006 through the use of LA/MSF subsidies that were no longer being granted or maintained during that period. It followed, therefore, that the fact that an implementing Member may be no longer granting or maintaining a particular subsidy found to have caused adverse effects in an original proceeding, could not, *ipso facto*, bring that Member into conformity with its obligation under Article 5 of the SCM Agreement to avoid causing adverse effects through the use of subsidies.

Thus, the Panel found the European Union's interpretation of Article 7.8 to be problematic because it was based on a conception of compliance that ignored the *effects-based* disciplines of Article 5 of the SCM Agreement. In the Panel's view, accepting the European Union's position would mean that any Member able to demonstrate in an original proceeding that a subsidy, which has ceased to exist, causes adverse effects to its interests, and would have no possibility of obtaining relief for that WTO-inconsistent conduct were it to continue into the implementation period and beyond. Accordingly, the Panel found that the European Union had failed to demonstrate that the mere fact that one or more of the challenged subsidies may have ceased to exist prior to 1 June 2011 meant that the European Union and certain member States did not have a compliance obligation under the terms of Article 7.8 of the SCM Agreement in respect of those subsidies.

3.2.2.2.2 Whether the United States demonstrated that the European Union and certain member States had failed to "withdraw the subsidy"

Having rejected the European Union's contention that Article 7.8 of the SCM Agreement imposed no compliance obligation on the European Union and certain member States in relation to subsidies that ceased to exist prior to the DSB's adoption of the recommendations and rulings in the original proceeding, the Panel turned to examine the merits of the United States' claim that the European Union and certain member States had failed to "withdraw the subsidy" for the purpose of Article 7.8.

The United States argued that the European Union and certain member States had failed to "withdraw the subsidy" because they had failed to take any affirmative action to "remove" or "take away" any of the relevant subsidies. The European Union rejected the United States' submission, arguing that the relevant subsidies had already been "withdrawn" by virtue of their "lives" having come to an end before the end of the implementation period as a result of their "expiry", "extinction", and/or "extraction".

The Panel commenced its analysis of the parties' positions by determining the extent to which the European Union had demonstrated that, as a matter of fact, the relevant subsidies had "expired" or had been "extinguished" or "extracted" prior to the end of the implementation period. The Panel's analysis was guided by its understanding of the findings and statements made by the Appellate Body in the original proceeding in relation to the notion of the "life" of a subsidy and the relevance of this concept to the matters raised in the compliance proceeding. The Panel considered that the Appellate Body had clarified that: (a) a subsidy which no longer exists may be found to cause adverse effects; (b) understanding how the "life" of a subsidy has "materialized over time" will help to inform an assessment of its effects; and (c) the "life" of a subsidy may be determined by examining the extent to which its "projected value" at the time of grant has been altered by any one or more subsequent "intervening events".

After closely reviewing the European Union's submissions, the Panel concluded that the European Union had established that the anticipated (*ex ante*) "lives" of the French, German, and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340, all came to an end before the end of the implementation period. Furthermore, the Panel also found that the European Union had demonstrated that the *ex ante* "lives" of the French and German Government capital contribution subsidies came to an end before the end of the implementation period. The Panel was satisfied that the European Union had shown that the *ex ante* "lives" of these subsidies had "expired" *not* because they were somehow brought to a *premature* end by, for example, having been repaid or because of the alignment of their terms with a market benchmark, but rather because the total period of time over which their "projected value" was expected to "materialize" had *passively* transpired in the absence of any "intervening event". In other words, the Panel found that the *ex ante* "lives" of the relevant subsidies had "expired" simply because they had been fully provided to Airbus as originally planned and expected. With respect to all other subsidies at issue in this dispute, the Panel found that the European Union had failed to demonstrate that they "expired", or were "extinguished" or "extracted", before the end of the implementation period.

The Panel recalled that, in dismissing the European Union's contention that Article 7.8 of the SCM Agreement imposed no compliance obligation on the European Union and certain member States in relation to subsidies that ceased to exist prior to 1 June 2011, it had found that one of the fundamental objectives of Article 7.8 is to bring an implementing Member into conformity with its obligations under Article 5 of the SCM Agreement. According to the Panel, the logical implication of this finding was that it cannot be concluded on the *sole* basis of the "expiry" of the relevant LA/MSF and capital contribution subsidies that the European Union and certain member States had *ipso facto* complied with the obligation to "withdraw the subsidy" with respect to those measures. Rather, in light of the effects-based nature of the subsidy disciplines of Article 5, the Panel was of the view that the extent to which the *passive* "expiry" events may

be found to amount to the "withdrawal" of subsidies for the purpose of Article 7.8 will depend upon the extent to which they bring the European Union and certain member States into conformity with Article 5 of the SCM Agreement.

The European Union argued, however, that an interpretation of Article 7.8 of the SCM Agreement that failed to acknowledge that the "expiry", "extinction", and/or "extraction" events it relied upon will *always* amount to the "withdrawal" of subsidies for the purpose of Article 7.8 would not only be inconsistent with how similar language has been interpreted and applied in the context of Article 4.7 of the SCM Agreement and Article 3.7 of the DSU, but it would also be at odds with the Appellate Body's recognition that the "expiry" of a subsidy may, in circumstances that are not "usual" or "normal", be sufficient to bring an implementing Member into compliance with Article 7.8. Indeed, the European Union maintained that such an interpretation of Article 7.8 would be tantamount to reading an implementing Member's right to "withdraw the subsidy" out of Article 7.8 because it would make the availability of this compliance option subject to the "removal of adverse effects", thereby rendering the specific treaty language *inutile*. The Panel was unconvinced by the European Union's submissions.

According to the Panel, finding that the two compliance options referred to in Article 7.8 must be interpreted in a way that brings an implementing Member into conformity with the effects-based disciplines of Article 5 of the SCM Agreement would not deprive them of independent meaning. The Panel could not see how saying that either of the two options must be understood in a way that achieves the *same result* necessarily implies that they must have an *identical meaning*. Indeed, in the Panel's view, the express terms of the two options envisage that an implementing Member has potentially two *different* pathways to achieve the *same compliance objective*. Thus, after examining the text of the two options and considering *inter alia* how the obligation to "withdraw the subsidy without delay" has been interpreted for the purpose of Article 4.7 of the SCM Agreement, the Panel found that the option to "withdraw the subsidy" that is provided for in Article 7.8 should be understood to refer to any conduct on the part of an implementing Member *in relation to the subsidy* found to cause adverse effects, which brings that Member into conformity with its obligations under Article 5 of the SCM Agreement.

In contrast, the Panel found that the option to "take appropriate steps to remove the adverse effects" referred to an approach to compliance that envisaged an implementing Member coming into conformity with its obligations under Article 5 of the SCM Agreement *without* taking any specific action *in relation to the subsidy* found to cause adverse effects. For the Panel, the focus of this option was on other more effects-based or market-focused solutions. Thus, the Panel concluded that while the efforts of an implementing Member taking up the option to "withdraw" the subsidy will be focused on the *subsidy itself*, an implementing Member wanting to "take appropriate steps to remove the adverse effects" may pursue a different course action that is *unrelated to the subsidy* measure itself.

In concluding this part of its analysis, the Panel emphasized that an implementing Member would be free to choose between any possible alternative means of pursuing the two compliance options envisaged under Article 7.8. However, for the Panel, it was clear that whatever approach an implementing Member finally decided upon, it must be, in the words of the Appellate Body, "sufficient to bring that Member into compliance with its WTO obligations". Accordingly, the Panel found that the European Union had failed to demonstrate that the mere fact that the "lives" of certain subsidies had expired before the end of the implementation period implied that the European Union and certain member States had complied with the obligation to "withdraw the subsidy" for the purpose of Article 7.8. Thus, the Panel found that the United States had established that the European Union and certain member States had failed to "withdraw" the subsidies, for the purpose of Article 7.8.

3.2.2.2.3 Whether the United States demonstrated that the European Union and certain member States had failed to "take appropriate steps to remove the adverse effects"

The Panel proceeded to examine whether the United States had established that the European Union and certain member States had also failed to "take appropriate steps to remove the adverse effects". The Panel did so by examining the United States' claims that the challenged LA/MSF and capital contribution and infrastructure-related subsidies all continued to contribute to the causation of "serious prejudice" to United States' interests in the form of: (i) displacement and/or impedance of imports of United States' LCA into the European Union market; (ii) displacement and/or impedance of exports of United States' LCA from certain third-country markets; and (iii) significant lost sales of United States' LCA, within the meaning of Articles 6.3(a), (b), and (c) of the SCM Agreement.

3.2.2.2.3.1 The relevant product markets

In the original proceeding, the Appellate Body had indicated that a "subsidized product" may only be found to displace or impede the importation or exportation of a "like product", or cause significant lost sales to a "like product", if it is determined that the two products compete in the same product market. Thus, as a threshold step in assessing the United States' claims that the challenged subsidies continued to cause serious prejudice to United States' interests within the meaning of Article 6.3(a), (b) and (c) of the SCM Agreement, the Panel first sought to determine whether the United States' claims had been made in relation to the relevant product markets.

The United States argued that LCA compete in essentially three relevant product markets: (i) the single-aisle LCA market; (ii) the twin-aisle LCA market; and (iii) the very large aircraft market. The same three markets were used by the Appellate Body in the original proceeding to complete the legal analysis of the United States' claims of serious prejudice. The European Union argued that the conditions of competition had changed significantly since the original proceeding and that today there were more than three, and up to six or seven, different LCA product markets.

One of the first issues that arose in the Panel's evaluation of the parties' submissions concerned the kind of evidence that should be used to identify relevant product markets. According to the European Union, the Appellate Body had declared in the original proceeding that the identification of relevant product markets should be "rooted in" evidence of a quantitative nature. Thus, according to the European Union, the fact that the United States had sought to establish the existence of the relevant product markets on the basis of evidence that was of a qualitative nature implied that the United States had failed to meet its burden of proof.

The Panel found that, contrary to the European Union's assertions, the Appellate Body did not, in the original proceeding, establish a rule that the United States, and all complainants in serious prejudice cases, must use quantitative analysis when identifying relevant product markets. While the Panel recognized that the Appellate Body signalled that the three quantitative methods of analysis explicitly referred to in its report (the SSNIP test, cross-price elasticity of demand, and price correlation analysis) may serve to *inform* a determination of the extent to which different products are substitutable, the Panel detected nothing in the Appellate Body's report to suggest that those methods or any other quantitative methods of analysis must, *as a legal matter*, always be used to inform a determination of relevant product markets in a serious prejudice dispute.

Moreover, in light of the particularly complex characteristics of the LCA industry, the absence of reliable pricing information and the recognized difficulties associated with identifying relevant product markets made up of differentiated products, the Panel found that the task of performing a reliable econometric analysis of the demand for LCA products would face a number of significant methodological and data

challenges, making it a formidable task. The Panel went on to note that in such circumstances, competition authorities, including the European Commission, would tend to focus on evidence of a qualitative nature. Thus, the Panel found no reason to fault the United States' decision not to use the SSNIP test or any other price-based quantitative analysis to substantiate its view that there are three relevant product markets in the LCA industry. Accordingly, the Panel concluded that the United States was entitled to advance its case using any and all evidence it considered could demonstrate the existence of the three relevant product markets.

The European Union then argued that the United States had failed to establish the existence of the three LCA product markets because it had not shown that all of the aircraft that allegedly compete in each of the three distinct product markets exercise "*significant* competitive constraints" on each other. The Panel explained that it did not understand the Appellate Body, in the original proceeding, to have declared that two products could only ever be found to compete with each other in the same product market if they imposed "significant" competitive constraints on each other. Moreover, according to the Panel, there was no textual basis for interpreting the word "market" that appears in Article 6.3(a), (b) and (c) of the SCM Agreement in a way that would mean that "serious prejudice" could only ever be found to exist in the context of product markets where there is vigorous ("significant" or "close") competition, as opposed to markets where competition between products is relatively weak or, in certain circumstances, even markets where strong competitive constraints are imposed by one product on one or more other products, which themselves impose little, if any, competitive constraint on the stronger competitor.

In this respect, the Panel found it important to recall that the fundamental purpose of identifying relevant product markets in a serious prejudice dispute is to determine whether certain specific trade effects have been caused by *the use of subsidies*. In the Panel's view, the fact that the competitive relationships examined for this purpose may have been shaped by the very subsidies that are claimed to cause adverse trade effects implies that it may be necessary, depending upon the circumstances, to account for the distorting impact of those subsidies in the assessment of relevant product markets. Otherwise, the adverse trade effects of a subsidy that transforms an otherwise vigorous competitive relationship into one of no competition at all or competition that is insignificant could *never* be addressed under the disciplines of Articles 5 and 6 of the SCM Agreement, and WTO Members would be left without a remedy under the SCM Agreement against the use of subsidies to marginalize or completely eradicate the ability of a like product to compete in international trade. Thus, the Panel dismissed the European Union's contentions concerning the requisite degree of competition necessary to show that two or more products compete in the same product market for the purpose of bringing a claim of serious prejudice under the SCM Agreement.

The Panel went on to evaluate the merits of the parties' submissions concerning the existence of the three separate product markets – the markets for single-aisle, twin-aisle, and very large LCA. For each alleged product market, the Panel examined the parties' arguments and evidence, including multiple expert statements, addressing: (i) the physical and performance characteristics, end-uses, and customers of the various LCA; (ii) the extent to which the different LCA exercised pricing constraints on each other; and (iii) Airbus and Boeing marketing strategies and sales campaigns.

The Panel found that the United States had demonstrated that it would be appropriate to evaluate the merits of its claims on the basis of the following three separate product markets: (a) the product market for single-aisle aircraft in which Airbus and Boeing sell the A320neo, A320ceo, 737MAX, and 737ng families of LCA; (b) the product market for twin-aisle aircraft in which Airbus and Boeing sell the A330, A350XWB, 767, 777, and 787 families of LCA; and (c) the product market for very large aircraft (VLA) in which Airbus and Boeing sell the A380 and the 747.

In coming to this conclusion, the Panel explained how the LCA industry today continues to be an effective Airbus-Boeing duopoly, with each producer having a comparable range of aircraft to offer potential customers, and where competition takes place between these two players at different levels, including with respect to price, technology, and the timing and availability of new and improved aircraft in line with

their responses to the complex, constantly evolving and often idiosyncratic nature of aircraft demand. The Panel found that, from the perspective of aircraft customers, there are no perfect substitutes within this competitive landscape, only different degrees of imperfect substitution. Moreover, according to the Panel, finding exactly where to draw a line between these relationships in order to define the *precise* boundaries within which relevant "product markets" may exist posed a number of significant evidentiary and conceptual challenges.

Finally, the Panel emphasized that in finding that the United States had established the existence of three separate LCA product markets, it did not intend to suggest that it was of the view that the degree of competition existing within each of the three relevant markets will be identical between all pairings or combinations of aircraft. The Panel explained that there would be weaker and stronger competitive relationships within each market depending upon the particular circumstances of a sale. Moreover, the Panel noted that important competitive relationships may also exist between pairings or combinations of aircraft *across* two, or even all three, of the product markets. Thus, while the Panel found that it was apparent that the three product markets the United States had chosen to rely upon to bring its complaint of non-compliance could not exhaustively capture how competition takes place between aircraft in the LCA sector at all times, the Panel was satisfied that for the purpose of the compliance dispute (as was the case in the original proceeding) those three markets represented the three segments within which most competitive interactions between the relevant aircraft will commonly take place.

3.2.2.2.3.2 The effects of the challenged subsidies in the relevant product markets

In examining the United States' claims concerning the effects of the challenged subsidies, the Panel undertook a "unitary" causation analysis pursuant to which the effects of the subsidies were determined by conducting a counterfactual analysis that entailed comparing the *actual* market situation in the post-implementation period with the market situation that would have existed *in the absence of the challenged subsidies*. Consistent with the approach followed in the original proceeding, the Panel first examined whether the United States had demonstrated that the aggregated effects of the challenged LA/MSF subsidies were a "genuine and substantial" cause of various forms of serious prejudice to the United States' interests, within the meaning of Article 6.3 of the SCM Agreement, before turning to assess whether the United States had demonstrated that the effects of the non-LA/MSF subsidies could be cumulated with those of the LA/MSF subsidies, to the extent that they were, themselves, a "genuine" cause of the same forms of serious prejudice.

3.2.2.2.3.2.1 The effects of the LA/MSF subsidies

The Panel explained that in order to determine the merits of the United States' claims, it would perform a counterfactual analysis directed at identifying the situation in the relevant product markets in the absence of the challenged LA/MSF subsidies after the end of the implementation period, that is, after 1 December 2011. The Panel stated that the point of departure for its analysis would be the adopted panel and Appellate Body findings from the original proceeding concerning the effects of the pre-A350XWB LA/MSF subsidies in the 2001 to 2006 period.

The Panel recalled the findings made by the original panel in relation to the "product" effects of the pre-A350XWB LA/MSF subsidies in the 2001-2006 period and considered the Appellate Body's review of those findings on appeal. The Panel observed that the panel in the original proceeding arrived at its ultimate causation findings after having considered two "plausible" and two "unlikely" counterfactual scenarios describing the market situation in the 2001-2006 period in the absence of the challenged subsidies. In essence, the two "plausible" counterfactual scenarios envisaged that in the absence of the subsidies, Airbus would not exist in the 2001-2006 period, and there would be instead either: (i) a Boeing monopoly; or (ii) a duopoly consisting of Boeing and another United States' LCA manufacturer (possibly McDonnell Douglas).

In the two "unlikely" counterfactual scenarios, a non-subsidized Airbus would have existed as a "much weaker" company with "at best a more limited offering of LCA models" competing in either: (i) a duopoly with Boeing; or (ii) with Boeing and another United States' LCA manufacturer (possibly McDonnell Douglas).

The Panel chose to proceed to evaluate the alleged "product" effects of the challenged LA/MSF subsidies in the post-implementation period by using, as the *principal* starting point of the analysis, the adopted "plausible" counterfactual scenarios from the original proceeding. Given the Appellate Body's conclusion in the original proceeding that the original panel's findings, based on the "plausible" counterfactual scenarios, were "without more" sufficient to establish a "genuine and substantial" causal connection between the effects of the pre-A350XWB LA/MSF subsidies and the claimed instances of serious prejudice to the United States' interests in the 2001-2006 period, the Panel was of the view that its "objective assessment of the matter" in the compliance dispute could proceed solely on this basis.

Nevertheless, in keeping with the approach adopted in the original proceeding, the Panel explained that it would also explore the parties' arguments concerning the effects of the challenged LA/MSF subsidies in the post-implementation period using the "unlikely" counterfactual scenario as the starting point of its analysis.

The key question for the Panel to resolve in this part of its report was whether, as argued by the European Union, the mere "passage of time" between the granting of the pre-A350XWB LA/MSF subsidies and the post-implementation period meant that those subsidies could no longer be found to be a "genuine and substantial" cause of the market presence of the A320, A330, and A380.

The Panel recalled that the Appellate Body in the original proceeding had, on a number of occasions, emphasized the importance of the passage of time to the assessment of the effects of a subsidy. Like the parties, the Panel understood the Appellate Body's position to be that the effects of any subsidy will eventually come to an end with the passage of time. The Panel also found that it was apparent from the Appellate Body's statements that the precise *duration* of the effects of a subsidy *will depend upon the specific facts of the case at hand*, including any pertinent facts shedding light on how the "life" of a subsidy has materialized over time. The Panel noted, however, that in emphasizing the importance to an adverse effects analysis of considering "the trajectory of the life of a subsidy", "how a subsidy is expected to materialize", and "whether the life of a subsidy has ended", the Appellate Body at no stage equated the end of the "life" of a subsidy with the complete dissipation of its effects. Thus, the Panel stated that the extent to which the effects of a subsidy will dissipate with the passage of time and eventually come to an end will be a *fact-specific* matter that may be informed, but *not necessarily defined*, by how the "life" of that subsidy has evolved over time.

The Panel next turned to examine the findings adopted in the original proceedings in relation to the effects of the pre-A350XWB LA/MSF subsidies in more detail. The Panel found that two types of effects were identified in the original proceeding: (a) *direct effects* – namely, the effects of any given LA/MSF loan on Airbus' ability to launch and bring to market the particular model of Airbus LCA specifically funded by that LA/MSF loan; and (b) *indirect effects* – namely, the "learning", scope, and financial effects that any given LA/MSF loan provided for the specific purpose of one model of LCA may have on the ability of Airbus to launch and bring to market another model of LCA. The Panel found that the adopted findings established that the direct and indirect effects of the preA350XWB LA/MSF subsidies on the market presence of the A320, A330, and A380 families of Airbus LCA were profound and long-lasting, explaining (under both the "plausible" and "unlikely" counterfactual scenarios) the very existence of the entire range of Airbus LCA that was actually sold in the 2001-2006 period.

After examining the nature of these effects in more detail, the Panel concluded that the fundamental "product-creating" nature of the pre-A350XWB LA/MSF subsidies meant that their effects were likely to endure for as long as the market presence of any model of Airbus LCA continued to be tied to those effects by means of a genuine and substantial relationship of cause and effect. Thus, the Panel found that, in the

absence of any event or development capable of breaking the genuine and substantial causal link that was found to exist in the original proceeding, the same causal connection between the direct and indirect effects of the pre-A350XWB LA/MSF subsidies and the A320, A330, and A380 must continue to exist today. The Panel saw no factual basis to accept that the *mere passage of time* had reduced the "product-creating" effects of the pre-A350XWB LA/MSF subsidies to only a remote or insignificant cause of the ongoing market presence of these models of Airbus LCA.

The Panel was also not convinced that certain post-launch investments undertaken by Airbus in the A320 and the A330 were sufficient to dilute the causal connection between the "product-creating" effects of the pre-A350XWB LA/MSF subsidies and the present-day market presence of the A320 and A330 families such that it was no longer possible or appropriate to characterize that link as "a genuine and substantial relationship of cause and effect". While the Panel found the post-launch investments to be significant in value and instrumental to Airbus' ability to upgrade the technologies and production processes associated with the original A320 and A330, the Panel also found that they could not have been undertaken in the absence of the effects of the pre-A350XWB LA/MSF subsidies on Airbus' ability to launch and bring to market the original A320 and A330 as and when it did. Thus, although important to the development of the current versions of the A320 and A330, the Panel ultimately found that the post-launch investments were, at best, only part of the reason why Airbus was able to sell the two families of LCA today.

Accordingly, the Panel found that the direct and indirect effects of the pre-A350XWB LA/MSF subsidies continue to be a "genuine and substantial" cause of the present-day market presence of the A320, A330, and A380 families. In other words, the Panel found that in the absence of the preA350XWB LA/MSF subsidies, Airbus would not be selling those aircraft today.

The Panel began its evaluation of the parties' extensive arguments and evidence, including multiple expert reports, on the effects of the LA/MSF subsidies on the launch and market presence of Airbus' newest model of LCA, the A350XWB, by noting that using the "plausible" counterfactual scenarios adopted in the original proceeding as the *starting point* of the effects analysis, a non-subsidized Airbus could not have launched the A350XWB at the end of 2006, simply because a non-subsidized Airbus would not have existed in 2006, and there was, furthermore, no evidence to suggest (and indeed the European Union did not argue) that a non-subsidized Airbus would have come into being any time thereafter. Thus, the Panel found that under the "plausible" counterfactual scenarios concerning the effects of the pre-A350XWB LA/MSF subsidies, there was no doubt that the A350XWB could not have been launched and brought to market in the relevant period in the absence of LA/MSF.

Although the Panel explained that it considered its findings on the basis of the "plausible" counterfactual scenarios to be a sufficient basis to satisfy its obligation to make an "objective assessment of the matter", the Panel nevertheless went on to examine the merits of the parties' positions using the "unlikely" counterfactual scenarios as the starting point of the analysis. In performing this analysis, the Panel first set out a detailed description of the A350XWB project, from the time of its origins when it was conceived as a replacement for the Original A350 to its post-launch development and the provision of LA/MSF. The Panel then examined the impact of the *direct effects* of A350XWB LA/MSF on the *subsidized* (i.e. the actual) Airbus' ability to bring the A350XWB to market in light of these facts. The Panel considered that by understanding the extent to which the A350XWB LA/MSF subsidies facilitated the ability of the subsidized Airbus company to launch and bring to market the A350XWB, it would be possible to understand whether the "much weaker" *non-subsidized* Airbus company that would have existed in the "unlikely" counterfactual scenarios could have done the same.

The Panel found that there were strong strategic reasons for the *subsidized* Airbus to launch and develop the A350XWB and that alternative financing options were available, making the A350XWB sufficiently attractive and, therefore, *viable* to the subsidized Airbus company even without A350XWB LA/MSF. However, the Panel also found that the evidence demonstrated that pursuing the A350XWB in the absence

of A350XWB LA/MSF would have been a more complicated, more costly, and riskier endeavour. On this basis, the Panel concluded that, in the absence of A350XWB LA/MSF, the *subsidized* Airbus company that *actually existed* in the 2006 to 2010 period would have been able to launch and bring to market the A350XWB or an A350XWB-type aircraft. The Panel emphasized, however, that *without* A350XWB LA/MSF, the *subsidized* Airbus company that *actually existed* could have pursued such a programme only by a narrow margin, with a high likelihood that it would, to some degree, have had to make certain compromises with respect to the pace of the programme and/or the features of the aircraft.

The Panel next assessed the implications of its findings on the ability of the *non-subsidized* Airbus company that would have existed in the "unlikely" counterfactual scenario. Drawing from the findings made in the original proceeding, the Panel first briefly described the type of competitor that the non-subsidized Airbus company that would have existed at the end of the 2006 in the "unlikely" counterfactual scenarios could have been. The Panel found that it was apparent from the evidence and the adopted findings in the original proceeding that a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios at the end of the 2006 would not have had the same range and quality of aircraft on the market that the subsidized Airbus did at the time of the launch of the A350XWB. The Panel determined that a non-subsidized Airbus operating in the "unlikely" counterfactual scenarios would have had neither the technical or managerial expertise nor the financial resources that were available to the Airbus company that actually existed at the end of 2006. Accordingly, the Panel concluded that a *non-subsidized* Airbus existing in the "unlikely" counterfactual scenarios could *not* have launched the A350XWB or an A350XWB-type aircraft by the end of 2006.

Finally, the Panel confirmed its findings in the context of the "unlikely" counterfactual scenarios by examining the extent to which the *indirect effects* of *pre-A350XWB LA/MSF* contributed to the ability of the *subsidized* Airbus company that actually existed over the relevant period to undertake the A350XWB programme as and when it did.

After carefully reviewing the "learning", scope, and financial effects associated with the pre-A350XWB LA/MSF subsidies on the A350XWB programme, the Panel concluded that the *indirect effects* of pre-A350XWB LA/MSF were fundamental to Airbus' ability to launch and develop the A350XWB. In particular, the Panel found that the "learning" effects arising from the pre-A350XWB programmes that would not have existed in the absence of pre-A350XWB LA/MSF were wide-ranging, significant, and critical to the A350XWB. Likewise, the Panel found that the financial effects of pre-A350XWB LA/MSF, in the form of significant revenue generation through the sale of Airbus LCA and reduced financing costs (resulting in a reduced debt burden), were also instrumental to the A350XWB programme. There was no doubt in the Panel's mind that had Airbus not benefitted from these *indirect effects* of the pre-A350XWB LA/MSF measures, it would not have been possible to launch and bring to market the A350XWB.

Thus, using all four of the adopted counterfactual scenarios from the original proceeding concerning the effects of the pre-A350XWB LA/MSF subsidies until the end of 2006 as the starting point of its analysis, the Panel found that the A350XWB could not have been launched and brought to market in the absence of LA/MSF as and when it was.

Having found that the effects of the challenged LA/MSF subsidies continue to be a "genuine and substantial" cause of the current market presence of the A320, A330, A380, and A350XWB families of LCA, the Panel next turned to determine the extent to which the LA/MSF subsidies, through their continued "product" effects, are a "genuine and substantial" cause of significant lost sales, market impedance, and displacement of United States LCA in the post-implementation period.

In light of the continued "product" effects of the challenged LA/MSF subsidies and the conditions of competition in the LCA industry, the United States claimed that: (i) the United States LCA industry suffered serious prejudice in the form of displacement and/or impedance of its LCA products in all three relevant

product markets in the European Union, and in six third-country product markets, within the meaning of Articles 6.3(a) and 6.3(b) of the SCM Agreement; and that (ii) eight orders, accounting for 380 individual Airbus LCA, made after 1 December 2011 constituted "significant lost sales" of United States LCA, within the meaning of Article 6.3(c) of the SCM Agreement.

In order for the Panel to evaluate the merits of the United States' claims, one of the key questions that had to be resolved was whether the United States had established not only that *Airbus* would not have won the relevant sales or market share in the absence of the LA/MSF subsidies, but also that *Boeing or another United States LCA manufacturer* (as opposed to a non-United States LCA producer) would have won those sales or market share. According to the United States, nothing had happened since the end of 2006 to suggest that the conditions of competition used as the basis for the two "plausible" counterfactual scenarios in the original proceeding should change in any material way for the purpose of the post-implementation period. Thus, in the view of the United States, the sales and market share won by Airbus in the post-implementation period constituted serious prejudice to the United States' interests because in the "plausible" counterfactual scenarios, Boeing or a duopoly involving Boeing and another United States manufacturer of LCA (possibly McDonnell Douglas) would continue to be the only player(s) in the LCA industry after 1 December 2011. However, the European Union argued that there was evidence to suggest that other non-United States LCA manufacturers would be operating in the LCA industry in the absence of Airbus, implying that the relevant sales and market shares the United States claimed were lost as a result of Airbus' market presence, could have been captured by the non-US companies.

Thus, the Panel had to determine whether, in the absence of Airbus, another *non-United States producer* of LCA would have entered the LCA industry in the years following 2006, such that it could have been a source of competition to Boeing in the "plausible" monopoly counterfactual scenario or Boeing and another United States manufacturer of LCA in the "plausible" duopoly counterfactual scenario.

The Panel found that the nature of the existing competitive relationship between potential new entrants in the *current* duopoly environment, consisting of Airbus and Boeing, strongly suggested that it would have been highly unlikely for a non-United States producer to have entered the LCA market in the "plausible" counterfactual scenario that envisages a duopoly involving Boeing and another United States manufacturer of LCA. According to the Panel, there was no evidence or argument before it to suggest that any one or more of the non-United States companies that have been trying to enter the existing LCA market would have been in a better competitive position vis-à-vis a duopoly involving Boeing and another United States manufacturer of LCA than they actually are in the present-day Airbus-Boeing duopoly. In this light, the Panel found that it was reasonable to conclude that competition from potential new entrants in this "plausible" counterfactual scenario that envisaged a United States' LCA company duopoly, would have been the same or similar to what it is today – very weak and limited to the smaller-seating-capacity-end of the single-aisle product market or in the words of Airbus' Vice President for Contracts, Christophe Mourey: "not yet … significant or widespread".

The Panel came to a similar conclusion with respect to how the other "plausible" counterfactual scenario (the Boeing monopoly) would have evolved between 2006 and the present day. According to the Panel, it was reasonable to assume that Boeing, as a monopolist, would have been in a stronger competitive position relative to any potential new entrant than in a duopoly situation. Boeing's incumbency advantages would have therefore been more difficult to overcome. Nevertheless, the Panel considered that the very existence of a monopoly would have created strong incentives for new entrants to materialize as well as for potential customers to purchase newly introduced products. Moreover, in the face of increasing demand, Boeing may not have been able to satisfy all potential customers. However, at the same time, the Panel considered that given the expensive, technologically complex, and uncertain nature of LCA production, it was likely that any new LCA company entering a market dominated by a Boeing monopoly could only have done so in the single-aisle segment and only with respect to products that, technology-wise, would have been inferior to Boeing's more advanced offerings. In this respect, the Panel found it very difficult to conceive that any new

entrant (even one with years of experience in the smaller regional aircraft sector) could have developed and brought to market by the beginning of the post-implementation period the same range and quality of LCA that are in competition with Boeing's LCA today. Accordingly, the Panel found that it may well have been possible for one of the more experienced non-United States aircraft producers that exist today to enter the LCA market by the time of the post-implementation period in a "plausible" counterfactual scenario where Boeing is a monopolist. However, the Panel considered that it was likely that in the limited period of time from the end of 2006 to the beginning of the post-implementation period, such an entity would have only been able to enter the single-aisle segment with aircraft that, as a general matter, could only impose weak competitive constraints on Boeing.

The Panel then applied the two "plausible" counterfactuals it had developed to the facts pertaining to the significant lost sales and market displacement and impedance claimed by the United States.

Because any new entrant could have only been present as a potential competitor to Boeing and/or Boeing and another United States LCA manufacturer in the single-aisle LCA segment, it was clear that any relevant sales won by Airbus in the twin-aisle and VLA LCA markets must have constituted lost sales and market displacement and impedance to the United States LCA industry. In terms of the competition from a non-United States producer in the single-aisle LCA market, the Panel considered that it was unlikely that any such competitor could impose greater competitive constraints on the incumbent United States producers than those actually imposed by any of the non-US companies trying to enter the LCA market today. For the Panel, this implied that a new entrant could not have prevented any of the incumbent United States LCA producers from winning the relevant sales and market share in the relevant markets in the absence of Airbus.

Accordingly, the Panel found that all eight orders for the 380 LCA identified by the United States to have taken place after 1 December 2011 were significant lost sales to the United States LCA industry and, therefore, that the challenged LA/MSF subsidies continued to be a "genuine and substantial" cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement. Likewise, the Panel concluded that in the absence of the "product" effects of the challenged LA/MSF subsidies, the volume of deliveries and market shares that would have been achieved by the United States' LCA industry between 1 December 2011 and the end of 2013 would have been higher than its actual level in all relevant product markets. The United States had, therefore, established that the "product" effects of the challenged LA/MSF subsidies were a "genuine and substantial" cause of displacement and/or impedance of United States LCA in the markets for single-aisle LCA in the European Union, Australia, China, and India; twin-aisle LCA in the European Union, China, Korea, and Singapore; and VLA in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.

3.2.2.2.3.2.2 The effects of the non-LA/MSF subsidies

Having reached the above conclusions in relation to the effects of the challenged LA/MSF subsidies, the compliance Panel next examined the extent to which the effects of the non-LA/MSF subsidies (i.e. the capital contributions and infrastructure-related grants) were a "genuine" cause of serious prejudice to the United States' interests and could, therefore, be "cumulated" with those effects for the purpose of making serious prejudice findings.

The following capital contribution subsidies were at issue in this compliance proceeding: (i) the French Government's equity infusions into Aérospatiale in 1987, 1988, 1992 and 1994; and (ii) the German Government's acquisition of a 20% interest in Deutsche Airbus in 1989 and its subsequent transfer to Messerschmitt-Bölkow-Blohm GmbH in 1992.

The Panel considered that the aggregated effects of the capital contribution subsidies played a fundamental role in the market presence of Airbus' full range of LCA *in the post-implementation period* in much the same (although not identical) way as the *direct* and *indirect* effects of the LA/MSF subsidies. The Panel recalled

that the findings of the original panel, as upheld by the Appellate Body, established that the aggregated effects of the capital contribution subsidies not only ensured that Airbus would be able to continue the A320 programme and launch and develop the A330/A340 programme, but they also secured the *very existence* of a financially stable Airbus Consortium going forward and, thereby, Airbus' ability to continue to launch, develop, and produce *other models of LCA*. The Panel was of the view that by securing the very existence of a financially stable Airbus Consortium and providing significant support at a crucial time for Airbus to pursue its development and production work on the A320 and A330/A340 programmes, the capital contribution subsidies meaningfully contributed to the development of new Airbus LCA products in much the same way as the *direct effects* of the LA/MSF subsidies. Likewise, to the extent that the launch, development, and production of LCA supported in part by the capital contribution subsidies gave rise to "learning", scope and scale, and financial effects, the Panel found that it was apparent that the capital contribution subsidies must have also generated effects that were not unlike the *indirect effects* of the LA/MSF subsidies.

These considerations led the Panel to conclude that, just as in the original proceeding, the aggregated effects of the capital contribution subsidies continued to "complement and supplement" the "product" effects of the LA/MSF subsidies in the post-implementation period by operating along a similar causal pathway. Accordingly, the Panel found that the aggregated effects of the capital contribution subsidies were a "genuine" cause of the "product" effects of the challenged LA/MSF subsidies and, consequently, also the relevant instances of serious prejudice to the United States interests caused by those subsidies in the relevant product markets.

Eleven infrastructure-related grants by German and Spanish authorities were at issue in this compliance proceeding. The United States argued that all 11 subsidies "complemented and supplemented" the effects of the LA/MSF subsidies in the post-implementation period and, thereby, were a "genuine" cause of serious prejudice to the United States' interests.

The Panel disagreed with the United States with respect to 4 of the 11 subsidies, finding that the United States had not demonstrated that they benefitted Airbus' LCA-related activities. The Panel, however, agreed with the United States regarding the remaining seven infrastructure-related grants.

The Panel recalled its previous finding concerning the *ex ante* "lives" of the infrastructure-related regional grant subsidies that, even accepting the European Union's submissions, Airbus would be continuing to "benefit" from significant portions of the grants provided by the Spanish authorities for decades to come, with the "benefit" of the German regional development grant amortizing in 2014. For the Panel, the fact that Airbus was at present consuming the "benefit" of the Spanish regional grant subsidies suggested that the effects of all but the German regional development grant subsidies that were found to exist in the original proceeding were likely to continue to be felt today.

Moreover, according to the Panel, the facts demonstrated that the regional development grant subsidies continued to make a meaningful contribution to Airbus' ability to develop and produce parts and components of, especially, the A380, but also other non-specified Airbus LCA in the post-implementation period. The Panel found that, as in the original proceeding, the aggregated effects of the regional development grants continued to "complement and supplement" the "product" effects of the LA/MSF subsidies in two ways. First, the grants "complement and supplement" the *direct* effects of LA/MSF by meaningfully contributing to Airbus' ability to produce the LCA connected to the LCA programmes that would not have existed as and when they did in the absence of LA/MSF. Second, the Panel considered the grants to "complement and supplement" the *indirect* effects arising from LA/MSF because they meaningfully contributed to Airbus' ability to produce its relevant LCA, the development *and production* of which both gave rise to the accumulation of the beneficial "learning", scale and scope, and financial effects.

The Panel found that by meaningfully contributing to Airbus' ongoing LCA development and production efforts in the ways described above, the regional development grant subsidies continued to be a "genuine" cause of the "product" effects of the challenged LA/MSF subsidies and, consequently, also the relevant instances of serious prejudice to the United States' interests caused by those subsidies in the relevant product markets.

3.2.2.2.3.3 Conclusions with respect to the United States' claim that the European Union and certain member States failed to "take appropriate steps to remove the adverse effects"

In summary, the Panel found the United States to have demonstrated that the European Union and certain member States failed to "take appropriate steps to remove the adverse effects" because:

i. the "product effects" of the challenged LA/MSF subsidies are a "genuine and substantial" cause of displacement and/or impedance of United States LCA from the markets for single-aisle, twin-aisle, and very large LCA in the European Union, within the meaning of Article 6.3(a) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;

ii. the "product effects" of the challenged LA/MSF subsidies are a "genuine and substantial" cause of displacement and/or impedance of exports of United States LCA to the market for single-aisle LCA in Australia, China, and India; the market for twin-aisle LCA in China, Korea, and Singapore; and the market for VLA in Australia, China, Korea, Singapore, and the United Arab Emirates, within the meaning of Article 6.3(b) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement;

iii. the "product effects" of the challenged LA/MSF subsidies are a "genuine and substantial" cause of significant lost sales of United States LCA in the global markets for single-aisle, twin-aisle, and very large LCA, within the meaning of Article 6.3(c) of the SCM Agreement, constituting serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement; and the effects of the aggregated capital contribution subsidies and certain infrastructure-related grants "complement and supplement" the relevant effects of the aggregated LA/MSF subsidies and, therefore, are a "genuine" cause of serious prejudice to the interests of the United States within the meaning of Article 5(c) of the SCM Agreement.

3.2.3 Overall conclusions and recommendations

The Panel's overall conclusions and recommendations in relation to the United States' non-compliance claims may be summarized as follows:

i. The United States *failed to demonstrate* that the French, German, Spanish, and UK A380 and A350XWB LA/MSF measures constituted prohibited export subsidies within the meaning of Article 3.1(a) and footnote 4 of the SCM Agreement;

ii. The United States *failed to demonstrate* that the French, German, Spanish and UK A350XWB LA/MSF measures constituted prohibited import substitution subsidies within the meaning of Article 3.1(b) of the SCM Agreement; and

iii. The United States *demonstrated* that the European Union and certain member States failed to comply with the adopted DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement "to take appropriate steps to remove the adverse effects or … withdraw the subsidy", to the extent that the effects of the challenged LA/MSF subsidies

and the non-LA/MSF subsidies continue to be, respectively, a "genuine and substantial" and "genuine", cause of serious prejudice to the United States' interests in the post-implementation period, within the meaning of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement.

The Panel therefore concluded that the European Union and certain member States failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement, and to the extent, that the adopted recommendations and rulings remained operative.

3.2.4 Appellate proceedings

3.2.4.1 Protection of sensitive information

By letter dated 13 October 2016, the European Union and the United States submitted a joint request for the Appellate Body to adopt additional procedures to protect the BCI and HSBI. The participants suggested that the additional procedures adopted by the Appellate Body in the appeal in *United States – Measures Affecting Trade in Large Civil Aircraft (Second Complaint)* (WT/DS353) should form the basis for any procedural ruling on the protection for confidentiality in these compliance proceedings, and identified certain modifications that could be made to those additional procedures. The Division decided to provide additional protection to all BCI/HSBI contained in the panel record transmitted to the Appellate Body in this dispute. The Division further specified the form of such protection. Following a joint request of the participants, the Division authorized public observation of the opening and closing statements at the Appellate Body hearings by means of a delayed video showing.

3.2.4.2 Article 21.5 of the DSU

The European Union claimed that the Panel erred in its interpretation and application of Article 21.5 of the DSU, and under Article 11 of the DSU, in finding that there was no disagreement for it to resolve within the meaning of that provision regarding the Mühlenberger Loch aircraft assembly site and Bremen runway extension measures.

The Appellate Body recalled that it is open to either party to refer a matter to a compliance panel under Article 21.5 to resolve a disagreement as to the existence or consistency with a covered agreement of a measure taken to comply. A "disagreement" arises from the existence of conflicting views: the original complainant's view that such a measure is inconsistent with the WTO agreements or brings about only partial compliance, and the original respondent's view that a measure is consistent with the WTO agreements and brings about full compliance with the DSB's recommendations and rulings". In carrying out its adjudicatory function, the task of a panel under Article 21.5 is to decide "disputes" arising out of any "disagreement as to the existence or consistency with a covered agreement of measures taken to comply with the recommendations and rulings". By virtue of Article 11 of the DSU, which also governs proceedings under Article 21.5, the task of a compliance panel is to "examine fully", and in an objective manner, the issues raised by the parties. Much like it is for the Article 21.5 panel – and not for the complainant or the respondent – to determine whether a particular measure is one "taken to comply", it is also for the Article 21.5 panel, and not for either party, to determine whether an objectively identifiable "disagreement" exists between the parties.

Turning to the specifics of the issues appealed, the Appellate Body noted that by including the Bremen Airport and Mühlenberger Loch measures in its Compliance Communication, the European Union took the view that those measures were consistent with the WTO agreements and brought the European Union into full compliance with the relevant recommendations and rulings by the DSB. In the Appellate Body's understanding, based on a collective reading of its representations before the Panel, the United States did not take issue with or challenge this view held by the European Union. Thus, in light of the United States' and European Union's statements before it, the Panel had rightly found that there was no "disagreement"

for it to resolve within the meaning of Article 21.5 of the DSU. Noting that the United States had not contested the European Union's view that these measures complied with the relevant recommendations and rulings of the DSB, the Appellate Body found no error in the approach adopted by the Panel, and saw no need to make further findings in respect of those measures. Finally, the Appellate Body agreed with the Panel that "the United States would not be entitled to request the suspension of concessions or other obligations under the covered agreements in relation {to} the Mühlenberger Loch and the Bremen Airport runway measures."

3.2.4.3 United States' cross-appeal under Article 3.1(b) of the SCM Agreement

With respect to the admissibility of the United States' appeal under Article 3.1(b) of the SCM Agreement, the Appellate Body found that the United States' appeal fell within the scope of appellate review contrary to what the European Union had argued. In particular, the Appellate Body found that the United States' appeal adequately identified "issues of law covered in the panel report and legal interpretations developed by the panel" pursuant to Article 17.6 of the DSU, as well as "specific allegations of errors" within the meaning of the Working Procedures, with regard to the Panel's interpretation and application of Article 3.1(b) of the SCM Agreement.

Regarding the merits of the United States' appeal, the Appellate Body noted that it had dealt with the interpretation of Article 3.1(b) in *United States – Conditional Tax Incentives for Large Civil Aircraft*. It recalled that the legal standard for establishing the existence of "contingency" under Article 3.1(b) is the same as under Article 3.1(a) of the SCM Agreement. A subsidy would be "contingent" upon the use of domestic over imported goods where the use of those goods is a condition, in the sense of a requirement, for receiving the subsidy. The term "contingency" under Article 3.1(b) covers contingency both in law and in fact, but the legal standard expressed by the term "contingent" is the same for *de jure* and *de facto* contingency. A subsidy will be *de jure* contingent upon the use of domestic over imported goods "when the existence of that condition can be demonstrated on the basis of the very words of the relevant legislation, regulation or other legal instrument constituting the measure", or can "be derived by necessary implication from the words actually used in the measure". The Appellate Body observed that proving *de facto* contingency "is a much more difficult task". The existence of *de facto* contingency "must be *inferred* from the total configuration of the facts constituting and surrounding the granting of the subsidy, none of which on its own is likely to be decisive in any given case". Factors that may be relevant in this regard include the design and structure of the measure granting the subsidy, the modalities of operation set out in such a measure, and the relevant factual circumstances surrounding the granting of the subsidy that provide the context for understanding the measure's design, structure, and modalities of operation. The Appellate Body noted that the analysis of *de jure* and *de facto* contingency under Article 3.1(b), in light of the above-mentioned factors and circumstances, should be understood as a continuum, and a panel should conduct a holistic assessment of all relevant elements and evidence on record. The Appellate Body further noted that insofar as Article 3.1(b) does not prohibit the subsidization of domestic "production" *per se*, but rather the granting of subsidies contingent upon the use of domestic over imported goods, subsidies that relate to domestic production are not, for that reason alone, prohibited. In particular, such subsidies can ordinarily be expected to increase the supply of the subsidized domestic goods in the relevant market, thereby increasing the use of these goods downstream and adversely affecting imports, without necessarily requiring the use of domestic over imported goods as a condition for granting the subsidy. The Appellate Body therefore agreed with the Panel that *the fact that a subsidy results in the use of domestic over imported goods* cannot by itself demonstrate that that subsidy *is contingent on the use of domestic over imported goods, whether in law or in fact*. It found that the Panel's interpretation of Article 3.1(b) in this case was consistent with the Appellate Body's interpretation of that provision.

Given that the United States' appeal of the Panel's findings on the application of Article 3.1(b) was dependent upon its challenge of the Panel's interpretation of that provision, the Appellate Body declined to make findings regarding the application of this provision to the facts of the present case, or to address the

United States' arguments concerning completion of the legal analysis. The Appellate Body observed that the Panel's finding under Articles 3.1(b) and 3.2 of the SCM Agreement therefore stands that the United States had failed to establish that the subsidies at issue are prohibited import substitution subsidies. The Panel finding rejecting the United States' claim that the subsidies at issue are contingent on export performance and prohibited under Article 3.1(a) of the SCM Agreement was not appealed.

3.2.4.4 Benefit analysis for the A350XWB

Regarding the Panel's analysis of LA/MSF for the A350XWB, the European Union put forth a series of arguments. The European Union asserted that the Panel erred in identifying the appropriate point in time from which to draw the corporate borrowing rate component of the market benchmark to determine whether each A350XWB LA/MSF contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the SCM Agreement. Moreover, the European Union contended that by rejecting the yield on the day of the conclusion of each contract, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU. In the alternative, the European Union appealed the Panel's inclusion, in its construction of the corporate borrowing rate, of the six-month average yield on the relevant European Aeronautic Defence and Space Company N.V. (EADS) bond within the Panel's range of average yields. Specifically, the European Union submitted that the Panel erred in the application of Articles 1.1(b) and 7.8 of the SCM Agreement. Separately, the European Union contended that by including the sixmonth average yield within its range, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU.

The European Union also took issue with the Panel's identification of the project risk premium component of the market benchmark to determine whether each A350XWB LA/MSF contract confers a "benefit", and therefore constitutes a subsidy, under Article 1.1(b) of the SCM Agreement. The European Union submitted that in selecting a single undifferentiated project risk premium for each A350XWB LA/MSF contract, which was developed for a different programme (i.e. the A380) in the original proceedings, the Panel erred because: (a) the Panel failed to establish a project-specific risk premium for A350XWB LA/MSF based on the risks associated with the A350XWB programme and further that by failing to consider more appropriate benchmarks and by deviating from the approach to project-specific benchmarks taken in the original proceedings, the Panel failed to make an objective assessment of the matter, under Article 11 of the DSU; (b) by failing to establish similarity between the risks involved in the A350XWB project and the A380 LA/MSF project, as well as between the risks involved in the A350XWB LA/MSF contracts and the A380 LA/MSF contracts, the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU; and (c) the Panel erroneously adopted a single project risk premium to benchmark all four A350XWB LA/MSF contracts.

3.2.4.4.1 The calculation of Airbus' general corporate borrowing rate

The Appellate Body agreed with the European Union that, in conducting the benefit analysis, the comparison focuses on the moment in time when the lender and borrower commit to the transaction. The Appellate Body disagreed, however, with the European Union to the extent that it suggested that the Panel was required to limit its analysis to data from "the day of conclusion" of each A350XWB LA/MSF contract regardless of the time period over which the parties may have committed to the terms and conditions of that financing instrument. Rather, the Panel was required to take into account the specific financing instrument at issue, including the relevant circumstances surrounding the conclusion of that instrument, to determine the period over which the terms and conditions of the relevant contract were agreed. The Panel provided two reasons in support of its decision to determine the corporate borrowing rate using the average yields one month prior and six months prior to the conclusion of the A350XWB LA/MSF contracts, in the form of a range. First, the Panel considered that "the yield on the day of the signature of contract may reflect atypical fluctuations." The Panel's second reason was that "{p}arties agreeing to a complex loan contract may rather set the rates in the lead-up to the conclusion of the contract, and prior to the actual day on which the contract is signed." The Appellate Body found this understanding to be in line with its

observation that, in some cases, parties may have committed to a transaction – or to key aspects thereof – during a finalization period of the negotiations preceding the moment of formal conclusion of all aspects of that transaction. In the present case, the financial contribution at issue consists of complex financing, the terms and conditions of which have been negotiated and agreed over a certain contracting period. In these circumstances, the Appellate Body found that the Panel did not err in its application of Article 1.1(b) of the SCM Agreement in finding that the corporate borrowing rate component of the market benchmark could be based on the average yields of the EADS bond "one-month prior and six-months prior to the conclusion" of the French, German, Spanish, and UK A350XWB LA/MSF contracts, "in the form of a range", attributing more weight to the former average yields than it did to the latter.

Moreover, the Appellate Body rejected the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it lacked a sufficient evidentiary basis for rejecting the EADS bond yield on the day of conclusion of each A350XWB LA/MSF contract. In addition, the European Union did not establish that the Panel's decision to set the corporate borrowing rate in the form of a range of average yields, or the fact that such decision was done against the background of a downward trend in the yield of the EADS bond, reflects a lack of objectivity and even-handedness contrary to the requirements of Article 11 of the DSU. Consequently, the Appellate Body found that the European Union has failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU.

The Appellate Body also rejected the European Union's alternative claims that the Panel erred in its application of Article 1.1(b) of the SCM Agreement and acted inconsistently with Article 11 of the DSU by accepting the average yield of the EADS bond over the six months prior to the conclusion of the French, German, Spanish, and UK A350XWB LA/MSF contracts as part of the range of average yields that was used to determine the corporate borrowing rate. Although the corporate borrowing rate was determined in the form of a range of average yields, the Panel rightly gave more prominence to the one-month average yield of the EADS bond than to the six-month average yield, which was considered only to be a "helpful indication of market expectations". In these circumstances, the Appellate Body found that the European Union failed to establish that the Panel erred in its application of Article 1.1(b) of the SCM Agreement or acted inconsistently with Article 11 of the DSU by deciding to observe the EADS bond yield on the basis of the average yields one month prior and six months prior to the conclusion of each of the four A350XWB LA/MSF contracts, in the form of a range, attributing more weight to the former average yields than it did to the latter.

For these reasons, the Appellate Body upheld the Panel's finding that the corporate borrowing rate component of the market benchmark be based on "the average yields one-month prior and six-months prior to the conclusion of the {French, German, Spanish, and UK A350XWB LA/MSF contracts}, in the form of a range".

3.2.4.4.2 The calculation of project-specific risk premium

The Appellate Body disagreed with the European Union's claim that "the Panel failed to adopt the most appropriate benchmark, tailored to the risks associated with the A350XWB, based on a 'progressive search' for the benchmark that shared 'as many elements as possible in common with' the A350XWB LA/MSF loans." The Appellate Body also disagreed that the Panel erred under Article 1.1(b) of the SCM Agreement merely because it applied a single, undifferentiated project risk premium derived from the A380 project to the A350XWB project. Moreover, given that the Appellate Body addressed and rejected the European Union's claim that the Panel erred under Article 1.1(b) by failing to undertake a "progressive search" for a market benchmark, the Appellate Body considered it unnecessary to address further the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU by failing to consider alternative, and more appropriate, benchmarks than those proposed by the United States. In addition, the Appellate Body disagreed with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU because it allegedly deviated from the original panel's findings by adopting a "constant, undifferentiated

project risk premium" for the A350XWB. Consequently, the Appellate Body found that the European Union did not establish that the Panel erred in its application of Article 1.1(b) of the SCM Agreement, and that the European Union failed to establish that the Panel acted inconsistently with Article 11 of the DSU.

The Appellate Body also disagreed with the European Union's claim that the Panel acted inconsistently with Article 11 of the DSU in its examination of the risk profiles of the A380 and A350XWB projects, including in its assessment of: (i) programme risk; (ii) contract risk; and (iii) the price of risk. Contrary to the European Union's view, the Panel did not simply assume that the risk premium proposed by Professor Whitelaw in the original proceedings for the A380 project, also referred to as the Whitelaw Risk Premium (WRP) would serve as an appropriate project-specific risk premium for the A350XWB. Instead, the Panel assessed the relative project-specific risks associated with the A380 and A350XWB projects. The purpose of this comparative analysis was, in the Panel's view, to determine "whether the United States ha{d} demonstrated that the project-specific risks of the A350XWB programme {were} sufficiently similar to those of the A380 programme such that it would be reasonable to conclude that the WRP could be used as the project-specific risk premium for the A350XWB". Regarding the Panel's analysis of programme risk, the Appellate Body found that the European Union failed to establish that the Panel acted inconsistently with its obligations under Article 11 of the DSU in its analysis of development risk, market risk, or in its comparison of the development and market risks. With regard to contract risk, the Appellate Body found that the European Union failed to establish that the Panel's comparison of the A350XWB and A380 LA/MSF contracts lacks a sufficient evidentiary basis in a manner inconsistent with the requirements of Article 11 of the DSU. The Appellate Body also found that the European Union failed to establish that the Panel acted inconsistently with Article 11 of the DSU by failing to compare the terms of the A350XWB LA/MSF contracts to the terms of the A380 risk-sharing supplier contracts. Finally, the Appellate Body found that the European Union failed to establish that the Panel acted inconsistently with Article 11 of the DSU in its analysis of the price of risk.

The Appellate Body also rejected the European Union's claims that, in adopting a single, undifferentiated project-specific risk premium for each of the four A350XWB LA/MSF contracts, the Panel erred in its application of Article 1.1(b) of the SCM Agreement, and also failed to make an objective assessment of the matter as required by Article 11 of the DSU. The Panel recognized that there were some differences among the risk profiles of the four A350XWB LA/MSF contracts. However, based on its analysis, the Panel was not persuaded that the terms of those contracts rendered them significantly different so as to require the application of two or more different projectspecific risk premia in these proceedings. Given the Panel's analysis and the arguments that were put before it, the Appellate Body found that the European Union did not establish that the Panel erred under Article 1.1(b) of the SCM Agreement by applying a "single, undifferentiated project risk premium" without making adjustments for differences among the risk profiles of the A350XWB LA/MSF contracts. Moreover, contrary to the European Union's claim under Article 11 of the DSU, the Appellate Body found no error in the Panel's decision to adopt, on the one hand, an undifferentiated project-specific risk premium for the four A350XWB LA/MSF contracts and, on the other hand, a contract-specific approach to the corporate borrowing rate. Thus, the Appellate Body found that the European Union failed to establish that, by applying a single, undifferentiated project risk premium to all four of the A350XWB LA/MSF contracts, the Panel acted inconsistently with Article 11 of the DSU.

For these reasons, the Appellate Body upheld the Panel's finding that the development risks associated with the A350XWB were at least as high as, or sufficiently similar to, those associated with the A380; the Panel's findings that the market risks experienced by the A380 and A350XWB were overall comparable in importance and that the A350XWB market risks would not have been much lower than the A380 market risks; the Panel's finding that the A350XWB LA/MSF contracts containing such "risk-reducing" terms are no less risky than at least [BCI] for A380 LA/MSF that also contained similar terms in the original proceedings; the Panel's findings that it was not persuaded that the differences in certain terms affecting the risk profiles of the individual A350XWB LA/MSF contracts would require the application of two or more different project-specific risk premia; and, consequently, the Panel's finding that the overall project-specific risks of the A380 and A350XWB projects were sufficiently similar to allow the risk premium applied to the A380 LA/MSF in the original proceedings to be applied to the A350XWB LA/MSF.

Accordingly, the Appellate Body upheld the Panel's findings that Airbus paid a lower interest rate for the A350XWB LA/MSF than would have been available to it on the market and, consequently, a benefit was thereby conferred within the meaning of Article 1.1(b) of the SCM Agreement. Consequently, the Appellate Body also upheld the Panel's findings that the French, German, Spanish, and UK A350XWB LA/MSF contracts each constitute a subsidy within the meaning of Article 1.1 of the SCM Agreement and, thus, that the United States demonstrated that the French, German, Spanish, and UK A350XWB LA/MSF contracts are specific subsidies within the meaning of Articles 1 and 2 of the SCM Agreement.

3.2.4.4.3 Article 7.8 of the SCM Agreement

On appeal, the European Union asserted that the Panel erred in interpreting Article 7.8 of the SCM Agreement to require an implementing Member to remove the adverse effects found to arise from an actionable subsidy irrespective of whether that subsidy had been withdrawn and was no longer maintained. In addition, the European Union contended that the Panel erred in its interpretation of Article 7.8 (in conjunction with Article 1.1(a) of the SCM Agreement) in finding that bringing about the end of a financial contribution does not result in withdrawal of the subsidy.

The Appellate Body found that the obligation to "take appropriate steps to remove the adverse effects or … withdraw the subsidy" concerns the subsidies that are "grant{ed} or maintain{ed}" by the implementing Member at the end of the implementation period. The Appellate Body underscored that an implementing Member cannot be required to withdraw a subsidy that has ceased to exist. Nor did the Appellate Body see a basis, under Article 7.8 of the SCM Agreement, to require that an implementing Member "take appropriate steps to remove the adverse effects" of subsidies that no longer exist. In this regard, the Appellate Body reasoned that, although a subsidy and its effects need not be contemporaneous, it does not follow from this that the effects of a subsidy can be detached from the subsidy itself such that these effects could be subject to a separate compliance obligation under Article 7.8. The Appellate Body underscored that, while a past subsidy that no longer exists may be found to cause or have caused adverse effects under Article 5, the *source* of that inconsistency under Article 5 is nonetheless the *subsidy*. Thus, when a subsidy has expired such that it is no longer in existence, the Appellate Body did not see how a compliance obligation under Article 7.8 could still apply to lingering effects of such a past subsidy. The Appellate Body therefore disagreed with the Panel that it follows from the socalled "effects-based nature" of the discipline of Article 5 that an implementing Member would have a compliance obligation under Article 7.8 regardless of whether the subsidy continues to exist. Accordingly, the Appellate Body reversed the Panel's interpretation of Article 7.8 of the SCM Agreement whereby an implementing Member would be required to "withdraw" or "take appropriate steps to remove the adverse effects" of past subsidies *irrespective* of whether such subsidies have expired prior to the end of the relevant implementation period. It follows from the Appellate Body's finding that, in the present dispute, the European Union had no compliance obligation with respect to subsidies that had expired before 1 December 2011.

3.2.4.4.4 Conditional appeals under Article 7.8 of the SCM Agreement

The Appellate Body found that an *ex ante* analysis regarding the benefit of a subsidy serves as *the starting point* of the analysis to determine whether a subsidy continues to exist at the end of the implementation period. For such a determination, it is also necessary to conduct an analysis regarding "whether there are 'intervening events' that occurred after the grant of the subsidy that may affect the projected value of the subsidy as determined under the *ex ante* analysis". The Appellate Body further found that the Panel's ultimate conclusion regarding the *actual* duration of relevant pre-A380 LA/MSF subsidies was based on a proper analysis of both the expiry of the *ex ante* "lives" of the subsidies and the alleged intervening events after the granting of the subsidies. The Appellate Body considered this to be consistent with its approach in the original proceedings, whereby the assessment of the "life" of a subsidy should encompass both an *ex ante* analysis and an evaluation of intervening events. For these reasons, the Appellate Body upheld the Panel's finding that the European Union had demonstrated that the *ex ante* "lives" of the French, German,

and Spanish LA/MSF subsidies for the A300B/B2/B4, A300-600, A310, A320, and A330/A340, and the UK LA/MSF subsidies for the A320 and A330/A340, "expired" before 1 June 2011. The Appellate Body saw no reason to make additional findings on whether the French LA/MSF for the A310-300, the French and Spanish LA/MSF for the A300B/B2/B4 and A300-600, and the French, Spanish, and UK LA/MSF for the A320 and A330/A340 *also* came to an end due to the actual repayment of the loans with interests. The Appellate Body did not consider such findings to be necessary to resolve this dispute.

3.2.4.4.5 European Union's consequential appeal under Article 7.8 of the SCM Agreement

The Appellate Body disagreed with the European Union that it *necessarily* follows from the manner in which the Panel characterized the scope of the compliance obligation under Article 7.8 of the SCM Agreement that the Panel's findings of adverse effects must be reversed for each of the specific country and product markets with respect to which the United States brought its claims. The Appellate Body noted that the Panel's adverse effects analysis led to its final conclusion that "the European Union and certain member States have failed to comply with the DSB recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement 'to take appropriate steps to remove the adverse effects or … withdraw the subsidy'." In the Appellate Body's view, whether the Panel had a sufficient basis for this ultimate conclusion was a question that could only be answered following a careful review of the Panel's reasoning and analysis, in particular its analysis relating to the adverse effects of the *existing* LA/MSF subsidies that are maintained or granted in the post-implementation period. The Appellate Body stated that a consideration of expired subsidies is relevant for this purpose insofar as it sheds light on whether LA/MSF subsidies granted or maintained by the European Union in the post-implementation period cause adverse effects.

3.2.4.4.6 Articles 5, 6, and 7.8 of the SCM Agreement – adverse effects

3.2.4.4.6.1 The relevant product markets

According to the European Union, the Panel erred in its interpretation of the term "market" in Article 6.3 of the SCM Agreement, as permitting two products to be placed in the same product market on the basis of any competition between them, rather than on the basis of the existence of significant competitive constraints between them. In the alternative, the European Union claimed that the Panel erred in its application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement when it identified the relevant product markets for purposes of assessing the United States' adverse effects claims in a manner that is inconsistent with its own legal standard. The European Union further submitted that, by limiting its assessment of the existence of the relevant product markets for purposes of assessing the United States' adverse effects claims to competition between only those products that the United States had placed in the same product markets, the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU.

Regarding the term "market" in Article 6.3 of the SCM Agreement, the Appellate Body found that two products are in the same market if they are sufficiently substitutable and they exercise "meaningful" competitive constraints on each other. The Appellate Body noted that a consideration of *quantitative* tools and evidence may assist a panel in defining the relevant product markets and in answering the question of whether products exercise meaningful competitive constraints on each other and are sufficiently substitutable to fall in the same product market. However, like the Panel, the Appellate Body did not see a reason to preclude that a careful scrutiny of *qualitative* evidence may also be sufficient provided that it permits an informative and meaningful analysis of the relevant product markets. Depending on the particularities of a given case, the Appellate Body found that it may be sufficient for a panel to examine *qualitative* evidence regarding demand-side and supply-side substitutability, product characteristics, end-uses, and customer preferences in order to reach a conclusion as to the nature and degree of competition between two products.

Having reviewed the Panel's analysis of competition in the single-aisle LCA, twin-aisle LCA, and VLA product markets, the Appellate Body was satisfied that the Panel's identification of the product markets in the present dispute was based on a proper analysis of the competition among the relevant products, which the Panel found to demonstrate sufficient substitutability, in accordance with the standard articulated by the Appellate Body in the original proceedings. The Appellate Body was also satisfied that the Panel's analyses identifying the single-aisle LCA, twin-aisle LCA, and VLA product markets reflect a proper reading of the term "market" and did not agree with the European Union to the extent that it argued that the Panel erred in its interpretation of the term "market" in Article 6.3 of the SCM Agreement. Accordingly, the Appellate Body upheld the Panel's finding that the United States had brought its adverse effects claims with respect to appropriately defined product markets for LCA, namely, the global markets for single-aisle LCA, twin-aisle LCA, and VLA.

3.2.4.4.6.2 Non-subsidized like product

Regarding the Panel's findings concerning the "non-subsidised like product" provisions of Articles 6.4 and 6.5 of the SCM Agreement, the European Union claimed that the Panel erred in reaching its findings on whether there is a "new matter", and acted inconsistently with Article 11 of the DSU. The European Union also asserted that the Panel erred in its interpretation and application of "security and predictability" within the meaning of Article 3.2 of the DSU as it relates to the "cogent reasons rule".

The Appellate Body found that the Panel was required to examine the meaning of Article 6.3(b), including the relationship between this provision and Article 6.4, as clarified by the Appellate Body in the original proceedings in this dispute and in *US – Large Civil Aircraft (2nd complaint)*. According to the Appellate Body, it was also appropriate for the Panel to take into account the findings and reasoning by the original panel regarding the meaning of Article 6.4. The Appellate Body considered that the Panel could not simply refuse to address the arguments and evidence before it in dealing with the United States' claims under Article 6.3(b). Rather, it was required to adjudicate the United States' claims under Article 6.3(b) in light of the arguments raised and evidence submitted by both parties to the dispute, and it erred by declining to do so. Accordingly, the Appellate Body declared moot and of no legal effect the Panel's finding concerning the European Union's reliance on Article 6.4 to reject the United States' claims under Article 6.3(b) of the SCM Agreement. However, the Appellate Body disagreed with the European Union that a complainant is required to demonstrate, in each case, that its like product is non-subsidized in order to show that the effect of the subsidy is displacement and/or impedance of its like product in a third country market.

3.2.4.4.6.3 "Product effects" of LA/MSF subsidies on Airbus LCA

As regards the Panel's findings relating to "adverse effects", the European Union submitted that the Panel erred in the interpretation of Article 5(c) of the SCM Agreement in adopting a "but for" approach to causation that failed to consider the passage of time, and events that occurred during that time, and consequently attributing the current market presence of the A320, A330, and A380 families of aircraft to pre-A350XWB LA/MSF. Additionally, the European Union submitted that, to the extent the Panel found that LA/MSF for the A380 resulted in "direct effects" on the launch and market presence of the A380, the Panel acted inconsistently with Article 11 of the DSU. The European Union also argued that the Panel erred in the application of Articles 5(c) and 7.8 of the SCM Agreement by attributing the market presence of the A350XWB to the "indirect effects" of LA/MSF for the A380. Separately, the European Union claimed that to the extent the Panel found that LA/MSF for the A350XWB resulted in "direct effects" on the launch and market presence of the A350XWB, the Panel failed to make an objective assessment of the matter as required under Article 11 of the DSU.

The Appellate Body noted that the errors alleged by the European Union regarding the Panel's findings on the "product effects" of the pre-A350XWB LA/MSF subsidies on the market presence of the A320 and A330 families of Airbus LCA concern primarily the LA/MSF subsidies that were found by the Panel to have expired

before the end of the implementation period – namely, the subsidies for the A300, A310, A320, A330, and A340. The Appellate Body recalled that, under its interpretation of Article 7.8 of the SCM Agreement, the European Union does not bear a compliance obligation with respect to the subsidies that were found by the Panel to have expired by the end of the implementation period. Thus, to the extent that some subsidies had expired, a further examination of the removal of the effects of those subsidies would not be necessary. The Appellate Body considered therefore that it was not pertinent to examine whether the Panel's findings on the "product effects" of the *expired* subsidies could support its ultimate conclusion of non-compliance under Article 7.8 of the SCM Agreement. In line with this view, the Appellate Body did not consider it necessary to make separate findings on the European Union's claims on appeal insofar as they concerned the Panel's alleged failure to assess properly the passage of time and the events during that time in reaching its findings on the "product effects" of the expired subsidies. In addition, the Appellate Body disagreed with the Panel insofar as its reference to the aggregated LA/MSF subsidies in the above findings includes the expired subsidies.

The Appellate Body underscored that the pertinent question for purposes of these compliance proceedings was whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects. The Panel found, and the European Union did not disagree, that the French, German, Spanish, and UK A380 LA/MSF subsidies had not expired by the end of the implementation period. Furthermore, the Panel found that, subsequent to the original reference period (2001-2006), the European Union had granted new LA/MSF subsidies to Airbus for developing its A350XWB family of LCA, and that these subsidies were "closely connected" with the adopted recommendations and rulings of the DSB and the European Union's alleged compliance "actions". Given the scope of these compliance proceedings, the Appellate Body therefore focused its review on the Panel's analysis and findings regarding the effects of subsidies existing in the post-implementation period – namely, the A380 LA/MSF and the A350XWB LA/MSF subsidies – and the European Union's appeal thereof to determine whether those findings support the Panel's ultimate conclusion regarding serious prejudice.

As part of its analysis, the Appellate Body disagreed with the European Union's claim under Article 11 of the DSU that the Panel's understanding of the "direct effects" of A380 LA/MSF on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did* lacks sufficient evidentiary basis. Furthermore, the Appellate Body found that the European Union failed to establish that the Panel acted inconsistently with Article 11 of the DSU in reaching its conclusion that, "*without* A350XWB LA/MSF, the Airbus company that *actually existed* {in 2006-2010} could have pursued such a programme only by a narrow margin, with a high likelihood that it would, to some degree, have had to make certain compromises with respect to the pace of the programme and/or the features of the aircraft." The Appellate Body also rejected the European Union's claim that the Panel erred in finding that the A380 LA/MSF subsidies had "indirect effects" on the A350XWB.

The findings by the Panel on the issues surrounding the Original A350 and the launch of the A350XWB, together with its findings on the severe implications of the extensive delays with the A380 programme, establish that Airbus was faced with considerable overall uncertainty in the years following the original reference period. Moreover, the original panel's findings, together with the Panel's analysis, indicate that A380 LA/MSF had "direct effects" on Airbus' ability to launch, bring to market, and continue developing the A380 *as and when it did*, given that the A380 LA/MSF subsidies had not expired, as well as the fact that Airbus continued to receive disbursements under the French, German, and Spanish LA/MSF contracts at a time when it was experiencing severe financial difficulties resulting from the extensive production delays in the A380 programme. The Panel's findings regarding the "direct effects" of the A350XWB LA/MSF, read together with its findings concerning the "indirect effects" of the A380 LA/MSF, also indicate that, without the aggregated "product effects" of the existing LA/MSF subsidies for the A380 and A350XWB programmes, Airbus would not have been able to launch the A350XWB *as and when it did*. In other words,

the existing LA/MSF subsidies that Airbus continued to receive made it possible to proceed with the timely launch of the A350XWB – a high-risk and expensive programme of considerable strategic importance to Airbus – and to bring to market the A380, which had suffered extensive delays.

In sum, the Appellate Body found, based on the Panel's findings, that the LA/MSF subsidies existing in the post-implementation period – i.e. the A380 and the A350XWB LA/MSF subsidies – enabled Airbus to proceed with the timely launch and development of the A350XWB, and to bring to market and to continue developing the A380.

3.2.4.4.6.4 Lost sales, displacement, and impedance

The European Union submitted that the Panel erred in the application of Articles 5(c), 6.3, and 7.8 of the SCM Agreement by failing, in its assessment of lost sales, displacement, and impedance, to account for the differences in closeness of competition between various aircrafts and non-attribution factors. The European Union also claimed that the Panel erred in the interpretation of Articles 6.3(a) and 6.3(b) of the SCM Agreement in finding that non-withdrawn subsidies cause "displacement and/or impedance", thereby conflating the two separate forms of serious prejudice. The European Union further contended that the Panel erred in the application of Articles 6.3(a) and 6.3(b) of the SCM Agreement as permitting findings of "displacement" and "impedance" without any assessment of sales volume and market share data, and by finding "displacement" and "impedance" without any assessment of sales volume and market share data, the Panel erred in the application of Articles 5(c), 6.3(a), 6.3(b), and 7.8 of the SCM Agreement.

The Appellate Body recalled that "displacement or impedance" would arise where the counterfactual analysis shows that the sales of the complaining Member would have declined less or would have been higher in the absence of the challenged subsidy. The Appellate Body understood the Panel to have sought to apply this framework when it turned to assess whether the volume of deliveries and market shares that "would have been achieved by the United States' LCA industry between 1 December 2011 and the end of 2013 would have been higher than *its actual level* in all relevant product markets" in the absence of the "product effects" of the LA/MSF subsidies. The Appellate Body further considered that the Panel's finding that "the United States has established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of *displacement and/or impedance* of United States LCA" in the relevant geographic markets for single-aisle LCA, twin-aisle LCA, and VLA is informed by the manner in which the United States framed its claims. The Appellate Body did not read the Panel's use of the term "displacement and/or impedance" when summing up its serious prejudice findings regarding the relevant markets at issue as suggesting that the Panel found the existence of these serious prejudice phenomena in an undifferentiated manner with respect to one and the same product and country market. Therefore, contrary to what the European Union appeared to suggest, the Appellate Body considered that it does not necessarily follow from the Panel's use of the term "displacement and/or impedance" that the Panel treated "displacement" and "impedance" as interchangeable and indistinguishable concepts for purposes of its adverse effects analysis.

The Appellate Body recalled its finding that the Panel's assessment of the relevant product markets in these compliance proceedings was based on a proper analysis of the nature and degree of competition between products that the Panel found to demonstrate sufficient substitutability. However, the Appellate Body observed that an assessment of the nature and degree of competition in the relevant product market(s) did not, in and of itself, answer the question of whether the subsidies existing in the post-implementation period were a genuine and substantial cause of adverse effects in the relevant market(s).

The Appellate Body recalled that, with regard to the single-aisle LCA market, the Panel's findings regarding the "product effects" of LA/MSF subsidies on the market presence of the *A320* concerned primarily the effects of those subsidies that had expired prior to the end of the implementation period. The Appellate Body found, however, that the European Union had no compliance obligation in respect of those expired

subsidies. Rather, the pertinent question in these compliance proceedings was whether the subsidies existing in the post-implementation period (i.e. after 1 December 2011) cause adverse effects, such that the European Union has failed to comply with its obligation under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". With respect to this issue, the Appellate Body did not find any analysis by the Panel as to whether, and to what extent, Airbus' competitiveness in the single-aisle LCA market, gained through the preA380 LA/MSF subsidies, was renewed and sustained beyond the original reference period as a result of the subsidies that the European Union maintained or granted in the post-implementation period. Thus, the Appellate Body was not convinced that, insofar as the single-aisle LCA market was concerned, the Panel's analysis provided a sufficient basis to sustain its conclusion that "the orders identified in Table 19 {in the single-aisle LCA market} represent 'significant' 'lost sales' to the United States LCA industry and, therefore, that the challenged LA/MSF subsidies continue to be a 'genuine and substantial' cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement". Similarly, the Appellate Body was not convinced that, with regard to the various country markets for single-aisle LCA, the Panel's analysis was sufficient to sustain its conclusion that "the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement and/or impedance of United States LCA in the markets for single-aisle LCA in the European Union, Australia, China and India". The Appellate Body therefore reversed these findings by the Panel insofar as they related to the single-aisle LCA market. Having so found, the Appellate Body did not consider it necessary to address the European Union's additional arguments. The Appellate Body further found that it was unable to complete the legal analysis of the United States' claims of "displacement and/or impedance" in the single-aisle LCA markets in Australia, China, and India, and impedance in the single-aisle LCA market in the European Union, or, in the alternative, threat of displacement and impedance in that market.

With regard to *significant lost sales* in the twin-aisle LCA market, the Appellate Body's review of the Panel's finding on the product effects of LA/MSF subsidies on the A350XWB indicated that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. The Appellate Body noted that the Panel's finding that the sales of the A350XWB in the post-implementation period constituted "lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement was also supported by relevant Panel findings regarding the competitive dynamics between Boeing's and Airbus' respective product offerings in the twin-aisle LCA market. Furthermore, the Appellate Body was not convinced by the European Union's argument that the Panel failed to take into account market-specific and salespecific non-attribution factors. The Appellate Body considered therefore that the Panel's findings supported the conclusion that the sales of the A350XWB identified in Table 19 of the Panel Report represented "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. The Appellate Body noted that this conclusion also finds support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' timely launch of the A350XWB, and the existence of sufficient substitutability between Boeing's and Airbus' twin-aisle product offerings. In light of the Appellate Body's interpretation of Article 7.8 of the SCM Agreement, however, the Appellate Body disagreed with the Panel's conclusion on "significant lost sales" in the twin-aisle LCA market to the extent that its conclusion was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

Accordingly, the Appellate Body modified the Panel's conclusion, and found instead that the orders identified in Table 19 of the Panel Report in the twin-aisle LCA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

With regard to *displacement* and *impedance* in the twin-aisle LCA market, the Appellate Body noted that, according to the Panel, the LA/MSF subsidy for the A330-200 expired in the post-implementation period. The Appellate Body noted, however, that the original panel found that it was likely that the A330-200 could have been launched even in the absence of the specific LA/MSF granted in respect of that programme because it was a derivative of the A330 and, therefore, required a comparatively small amount of funding to develop. Moreover, unlike for the A380 and A350XWB LA/MSF subsidies, there are no specific findings by the Panel relating to the issue of whether and how the "product effects" of the A330-200 LA/MSF subsidy continued beyond 2006 and into the post-implementation period. Based on its review of the Panel's finding on the "product effects" of LA/MSF subsidies on the A350XWB, the Appellate Body found that, in the absence of the LA/MSF subsidies for the A380 and A350XWB existing in the post-implementation period, Airbus would not have been able to offer the A350XWB at the time it did and with the features it had. The Appellate Body further recalled the Panel's finding that Airbus' A350XWB product offering was in direct competition with Boeing's twin-aisle LCA.

The Appellate Body noted, however, that the United States framed its claim of "displacement and/or impedance" in the twin-aisle LCA market on the basis of data concerning market shares and *deliveries* of Airbus and Boeing LCA during the period 2001-2013. There were no deliveries of the A350XWB during that period. Thus, for purposes of the claim of displacement and/or impedance in the twin-aisle LCA market, the Panel relied on market shares and delivery data relating to the A330, rather than orders of the A350XWB, in making its finding. The Appellate Body recalled, in this regard, that the Panel's findings regarding the "product effects" of LA/MSF subsidies on the A330 concerned primarily the effects of those subsidies that had expired. The Appellate Body found, however, that the European Union has no compliance obligation in respect of those expired subsidies. Rather, the pertinent question was whether the subsidies existing in the post-implementation period cause adverse effects, such that the European Union failed to comply with its obligations under Article 7.8 of the SCM Agreement to "take appropriate steps to remove the adverse effects". However, given the way the claims of displacement and/or impedance were raised before the Panel and its approach to assessing these claims, the Panel did not explore, and made no findings on, the issue of whether and, if so, how the A380 and A350XWB subsidies existing in the post-implementation period may have contributed to the deliveries of the A330 occurring during that period. In these circumstances, the Appellate Body was not convinced that the Panel's analysis and findings provided a sufficient basis to sustain the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period was to displace or impede US LCA in the twin-aisle LCA market in the European Union and relevant third-country markets. Accordingly, the Appellate Body reversed the Panel's conclusion that "the United States ha{d} established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement and/or impedance of United States LCA in the markets for … twin-aisle LCA in the European Union, China, Korea and Singapore". Having done so, the Appellate Body saw no further reason to address the European Union's additional arguments. The Appellate Body further found that it was unable to complete the legal analysis of the United States' claims of displacement in the twin-aisle LCA markets in China, Korea, and Singapore, and impedance in the twin-aisle LCA markets in the European Union, China, Korea, and Singapore.

With regard to *significant lost sales* in the VLA market, the Appellate Body's review of the Panel's findings, as well as the relevant findings from the original proceedings, indicated that, in the absence of the LA/MSF subsidies existing in the post-implementation period (i.e. after 1 December 2011), Airbus would not have been able to offer the A380 at the time it did. Moreover, the Panel's analysis regarding the conditions of competition in the VLA market confirmed that Airbus' and Boeing's respective VLA products – the A380 and 747 – are sufficiently substitutable with each other. Such competitive dynamics, in the Appellate Body's view, provided further support to the proposition that the sales won by Airbus in the VLA market were at the expense of the US LCA producer. Finally, like the Panel, the Appellate Body had doubts as to whether Airbus' preexisting commonality advantages and other product-related advantages over Boeing could be characterized as non-attribution factors that could be said to "dilute" the causal link between the LA/MSF subsidies existing in the post-implementation period and the relevant market phenomena.

The Appellate Body considered therefore that the Panel's findings support the conclusion that the sales of the A380 identified in Table 19 of the Panel Report represented "significant lost sales" to the US LCA industry within the meaning of Article 6.3(c) of the SCM Agreement, and that such lost sales were the effect of the LA/MSF subsidies existing in the post-implementation period. According to the Appellate Body, this conclusion also finds support in the analytical framework adopted by the Panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of its interpretation of Article 7.8 of the SCM Agreement, however, the Appellate Body disagreed with the Panel's conclusion on "significant lost sales" in the VLA market to the extent that its conclusion was based on effects of challenged LA/MSF subsidies that the Panel found to have expired. Accordingly, the Appellate Body modified the Panel's conclusion, and found instead that the orders identified in Table 19 of the Panel Report in the VLA market represent "significant lost sales" to the US LCA industry and, therefore, that the LA/MSF subsidies existing in the post-implementation period continue to be a genuine and substantial cause of serious prejudice to the United States within the meaning of Article 6.3(c) of the SCM Agreement.

With regard to *displacement* and *impedance* in the VLA market, the Appellate Body found that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. Referring to the Panel's analysis of the competitive dynamics in the VLA market, the Appellate Body found that Boeing's and Airbus' respective product offerings – the 747 and the A380 – were sufficiently substitutable. With respect to the non-attribution factor alleged by the European Union concerning the development and production delays affecting the 747-8, the Appellate Body noted the Panel's observation that the larger versions of the 777 may also at times challenge for sales in the VLA market. On this basis, the Appellate Body saw no reason to disturb the Panel's finding that this non-attribution factor would not be capable of diluting the genuine and substantial relationship of cause and effect between the LA/MSF subsidies and the alleged market phenomena.

The Appellate Body noted that in reaching its finding of *displacement* the Panel did not examine whether there existed any discernible trends in volumes and market shares in the VLA markets at issue, including whether or not there existed declining trends that could have supported the Panel's findings. In these circumstances, the Appellate Body considered that the Panel should have engaged with the evidence before it in order to explain sufficiently the basis for its finding that the LA/MSF subsidies had the effect of displacing US LCA in these VLA markets in the post-implementation period. Accordingly, insofar *as displacement in the VLA market was concerned*, the Appellate Body disagreed with the Panel to the extent that it found that "the United States ha{d} established that the 'product' effects of the challenged LA/MSF subsidies are a 'genuine and substantial' cause of displacement … of United States LCA in the markets for … {VLA} in the European Union, Australia, … Korea, {and} Singapore." The Appellate Body further found that it was unable to complete the legal analysis of the United States' claim of displacement in the VLA markets in the European Union, Australia, Korea, and Singapore.

As for the finding of *impedance*, the Appellate Body recalled that the phenomenon of impedance refers to situations where the exports or imports of the like product of the complaining Member would have expanded had they not been "obstructed" or "hindered" by the subsidized product. The Appellate Body also recalled that its review of the Panel's findings with respect to the A380 and A350XWB programmes, as well as relevant findings from the original proceedings, indicates that, in the absence of the LA/MSF subsidies existing in the post-implementation period, Airbus would not have been able to offer the A380 at the time it did. Moreover, as the Panel's analysis of the competitive dynamics in the VLA market showed, Boeing's and Airbus' respective product offerings – the 747-8 and the A380 – are sufficiently substitutable. Thus, contrary to the situation regarding alleged impedance in the twin-aisle LCA market, the "product effects" of the LA/MSF subsidies existing in the post-implementation period, including the A380 LA/MSF subsidies, and the VLA delivery data underlying the United States' claim, concerned the same aircraft model,

and, as explained above, the Panel made necessary findings on both "product effects" and delivery data. On the basis of these considerations, and in light of the deliveries of the A380 in the post-implementation period, the Appellate Body saw no error in the Panel's conclusion that, absent the LA/MSF subsidies, the US LCA industry would have achieved a higher volume of deliveries and market share than its actual level in the post-implementation period.

The Appellate Body considered therefore that the Panel's findings supported the conclusion that the effect of the LA/MSF subsidies existing in the post-implementation period was impedance of US VLA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates. According to the Appellate Body, this conclusion also found support in the analytical framework adopted by the panel and the Appellate Body in the original proceedings, as well as in a number of the Panel's findings, including its finding concerning the "product effects" of the LA/MSF subsidies existing in the post-implementation period on Airbus' continued offering of the A380, and the existence of sufficient substitutability between Boeing's and Airbus' VLA product offerings. In light of its interpretation of Article 7.8 of the SCM Agreement, however, the Appellate Body disagreed with the Panel's conclusion on impedance in the VLA market to the extent it was based on the effects of the challenged LA/MSF subsidies that the Panel found to have expired.

Accordingly, the Appellate Body modified the Panel's conclusion, and found instead that the United States has established that the "product effects" of the LA/MSF subsidies existing in the post-implementation period are a genuine and substantial cause of impedance of US LCA in the VLA markets in the European Union, Australia, China, Korea, Singapore, and the United Arab Emirates.

In light of these considerations, in respect of subsidies existing in the post-implementation period, the Appellate Body therefore upheld, *albeit for different reasons*, the Panel's conclusions: that "{b}y continuing to be in violation of Articles 5(c) and 6.3(a), (b) and (c) of the SCM Agreement" insofar as the twin-aisle LCA and VLA markets are concerned, "the European Union and certain member States have failed to comply with the DSB's recommendations and rulings and, in particular, the obligation under Article 7.8 of the SCM Agreement 'to take appropriate steps to remove the adverse effects or … withdraw the subsidy'"; and that "the European Union and certain member States have failed to implement the recommendations and rulings of the DSB to bring its measures into conformity with its obligations under the SCM Agreement" and that, "{t}o the extent that the European Union and certain member States have failed to comply with the recommendations and rulings of the DSB in the original dispute, those recommendations and rulings remain operative."

The Appellate Body recommended that the DSB request the European Union to bring its measures found in its Report, and in the Panel Report as modified by its Report, to be inconsistent with the SCM Agreement into conformity with its obligations under that Agreement.

3.3 Appellate Body Report, *European Union – Countervailing Measures on Certain Polyethylene Terephthalate from Pakistan*, WT/DS486/AB/R

This dispute concerned countervailing duties imposed by the European Union on imports of certain polyethylene terephthalate (PET) originating in, *inter alia*, Pakistan. These countervailing duties were imposed on 27 September 2010, when the Council of the European Union issued a regulation imposing definitive countervailing duties and collecting definitively the provisional duty imposed on imports of PET originating in, *inter alia*, Pakistan (Definitive Determination).

In its countervailing duty investigation leading to the Definitive Determination, the European Commission (Commission) had investigated several schemes that allegedly involved the granting of subsidies by the Government of Pakistan, including the Manufacturing Bond Scheme (MBS) and Long Term Financing of Export-Oriented Projects (LTF-EOP). The MBS permits the import of duty-free material on condition that it

is used as an input in the manufacture of goods that are subsequently exported. Systems like the MBS are commonly referred to as "duty drawback schemes". Duty drawback schemes allow domestic producers to obtain exemptions or remissions of import duties otherwise payable on production inputs, if such inputs are consumed in the manufacture of finished goods destined for export.

Before the Panel, Pakistan claimed that the countervailing measure imposed by the European Union was inconsistent with several provisions of the SCM Agreement and the GATT 1994. In particular, Pakistan challenged the findings by the Commission that Pakistan's MBS and LTF-EOP were countervailable subsidies contingent upon export performance. Pakistan also claimed that the Commission had acted inconsistently with Article 15.5 of the SCM Agreement in conducting its causation analysis. Additionally, Pakistan claimed that the Commission had acted inconsistently with Article 12.6 of the SCM Agreement in connection with its obligation to disclose the results of the verification visit to the Pakistani exporting producer, Novatex Limited, Karachi (Novatex).

The European Union submitted a request for a preliminary ruling asking the Panel to cease all work in this dispute because the relevant countervailing measure on PET from Pakistan, contained in the Definitive Determination, had expired on 30 September 2015. Alternatively, the European Union requested the Panel to find that certain of Pakistan's claims were outside the Panel's terms of reference under the standards set forth in Article 6.2 of the DSU. On 19 May 2016, the Panel sent a communication to the parties denying the European Union's request that the Panel cease all work in this dispute.

The Panel made several findings that were not appealed. With respect to the European Union's request for a preliminary ruling concerning the Panel's terms of reference under Article 6.2 of the DSU, the Panel found that Pakistan's claim that the Commission had acted inconsistently with Annex II(II)(1) and Annex III(II)(2) to the SCM Agreement fell outside its terms of reference. However, the Panel rejected the European Union's objections relating to Pakistan's claims under Article 1.1(a)(1)(ii) and Article 12.6 of the SCM Agreement, finding that these claims were within the Panel's terms of reference. In addition, the Panel found that the Commission had acted inconsistently with Article 14(b), Article 1.1(b), and the *chapeau* of Article 14 of the SCM Agreement in connection with its finding that the LTF-EOP loan was a countervailable subsidy contingent upon export performance. With respect to the Commission's causation analysis, the Panel found that the Commission had acted inconsistently with Article 15.5 of the SCM Agreement by failing to conduct a proper non-attribution analysis of certain specific other known factors. The Panel also found that the Commission had acted inconsistently with Article 12.6 of the SCM Agreement in connection with its verification visit to Novatex.

The Panel also made three sets of findings that were appealed. The first set of findings concerned the expiry of the measure at issue. The European Union submitted a request for a preliminary ruling asking the Panel to cease all work in this dispute because the relevant countervailing measure on PET from Pakistan had expired on 30 September 2015. The European Union referred to Articles 3.4, 3.7, and 11 of the DSU in support of its assertion that the role of a panel is to make recommendations or rulings when these contribute to securing a positive solution to a dispute. Pakistan asked the Panel to reject the European Union's request. Pakistan asserted that the expiry of a measure does not limit a panel's jurisdiction to issue findings regarding that measure, and that a panel cannot decline to rule on the entirety of the claims over which it has jurisdiction.

The Panel acknowledged that the measure at issue had expired on 30 September 2015, at which time the countervailing duties on certain PET from Pakistan had been removed. Thus, the Panel considered that the measure at issue had ceased to have legal effect. For the Panel, this meant that it was not possible for the European Union to "withdraw" the measure at issue within the meaning of Article 3.7 of the DSU. Taking note of WTO panel and Appellate Body jurisprudence stating that panels have discretion in deciding whether to make findings regarding expired measures, the Panel indicated that it had not identified any reason to depart from this jurisprudence.

In deciding how to exercise its discretion, the Panel first noted that the measure at issue had expired after the Panel had been established. Second, the Panel took into account that Pakistan continued to request that the Panel make findings with respect to the expired measure. Third, the Panel considered it a reasonable possibility that the European Union could impose countervailing measures on Pakistani goods in a manner that could give rise to certain potential WTO inconsistencies that would be the same as, or materially similar to, those alleged in this dispute. In particular, the Panel took note of Pakistan's assertion that a wide range of Pakistani exports benefit from the MBS, and of the fact that the parties disputed, on a fundamental level, how investigating authorities should determine the extent to which duty drawback schemes like the MBS may constitute countervailable subsidies within the meaning of the SCM Agreement. For these reasons, the Panel decided to proceed with its work in this dispute.

The second set of findings concerned government revenue foregone. Before the Panel, Pakistan argued that by finding that all duties remitted under the MBS, rather than only the excess remission, constituted a financial contribution and thus a countervailable subsidy, the European Union had acted inconsistently with, *inter alia*, Articles 1.1(a)(1)(ii) and 3.1(a) of the SCM Agreement. Pakistan asserted that, when examining duty drawback schemes like the MBS to determine whether a financial contribution exists in the form of government revenue foregone otherwise due, within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, footnote 1 of the SCM Agreement limits the financial contribution that may be found to exist to the *excess* remission. The European Union argued that footnote 1 and Annexes I to III to the SCM Agreement contain no requirement that investigating authorities, with respect to duty drawback schemes, must always equate excess remissions with the amount of the subsidy. The European Union maintained that, if the conditions set out in Annexes II and III are not satisfied, footnote 1 cannot be interpreted to mean that a subsidy can exist only by reason of excess remissions.

The Panel noted the explanation in Annex II(I)(2) to the SCM Agreement that, pursuant to Annex I(i), drawback schemes can constitute an export subsidy to the extent that they result in a remission or drawback of import charges in excess of those actually levied on inputs that are consumed in the production of the exported product. For the Panel, a subsidy, in the form of government revenue foregone that is otherwise due, exists only insofar as the former exceeds the latter, i.e. where an "excess" remission occurs. The Panel referred to this as the "excess remissions principle". The Panel analysed Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement, as well as the provisions listed in footnote 1: the *Ad* Note to Article XVI of the GATT 1994, and Annexes I to III to the SCM Agreement.

Following its analysis, the Panel found that the excess remissions principle provides the legal standard for determining whether remissions of import duties obtained under a duty drawback scheme constitute a financial contribution in the form of government revenue foregone that is otherwise due within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement. The Panel rejected the European Union's position that Annex II and/or Annex III provides a relevant reason to depart from the excess remissions principle. The Panel considered that, even if an exporting Member has no reliable system of tracking inputs consumed in the production of a relevant exported product, and in the absence of a further examination by the exporting Member of that issue, investigating authorities must still determine whether an excess remission occurred.

Turning to the facts of this case, the Panel concluded that, by failing to provide a reasoned and adequate explanation for why the entire amount of unpaid duties was a financial contribution and that those duties were "in excess of those which have accrued", within the meaning of footnote 1 of the SCM Agreement, the Commission had acted inconsistently with Article 1.1(a)(1)(ii) of the SCM Agreement. Owing to its finding that the Commission had incorrectly identified the existence of a subsidy, the Panel also found that the Commission had acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance.

The third set of findings concerned the Commission's causation analysis. Before the Panel, Pakistan claimed that the Commission's "approach to causation", and specifically its use of the "break the causal link"

approach, was inconsistent with the requirements of Article 15.5 of the SCM Agreement. Pakistan argued, *inter alia*, that the Commission's approach had prejudged its non-attribution analysis. Pakistan also stated that the "causal link" that the Commission had found at the start of its causation analysis was used to dismiss the significance of the non-attribution factors the Commission purported to analyse.

The Panel explained that Article 15.5 of the SCM Agreement requires an investigating authority to demonstrate the existence of a causal link between the subsidized imports and the injury to the domestic industry, and this "causal link" must involve a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury. The Panel also stated that the non-attribution language in the third sentence of Article 15.5 calls for an assessment that involves separating and distinguishing the injurious effects of other known factors from the injurious effects of the subsidized imports. The third sentence also requires an investigating authority to provide a satisfactory explanation of the nature and extent of the injurious effects of other known factors, as distinguished from the injurious effects of the subsidized imports.

Turning to the facts of this case, the Panel observed that the Commission had "considered" that a "causal link" existed between the subsidized imports and the observed injury to the EU industry before it examined whether other known factors "broke the causal link". The Panel observed that it was only after the assessment of the other known factors that the Commission had "concluded" that the subsidized imports had caused material injury to the EU industry. On this basis, the Panel found it "evident" that the Commission had "allowed for the possibility that the analysis of other known factors could have negated its initial consideration that a causal link existed between subject imports and the observed injury to the domestic industry".

The Panel also failed to see how the Commission's approach had led to a disregard of the relevant legal standard "in this case" or how this approach had precluded the Commission from separating and distinguishing the injurious effects of any other known factors from those of the subsidized imports.

For these reasons, the Panel rejected Pakistan's argument that the Commission's "break the causal link" approach had precluded the Commission from satisfying the non-attribution requirements of Article 15.5 of the SCM Agreement in this case. Having also rejected Pakistan's other arguments in support of its claim, the Panel concluded that Pakistan had failed to demonstrate that the Commission's use of the "break the causal link" approach in this case was inconsistent with Article 15.5 of the SCM Agreement.

3.3.1 European Union's claim of error regarding the expiry of the measure at issue

On appeal, the European Union claimed that the Panel had failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue during the Panel proceedings. The European Union submitted that the measure at issue had expired, and had ceased to have any legal effect before the Panel commenced its work, thereby rendering the Panel proceeding moot. The European Union requested the Appellate Body to reverse the entirety of the Panel Report and to declare moot and of no legal effect the findings and legal interpretations contained therein.

The Appellate Body explained that panels have a margin of discretion in the exercise of their inherent adjudicative powers under Article 11 of the DSU. Within this margin of discretion, it is for a panel to decide how it takes into account subsequent modifications to, or expiry or repeal of, the measure at issue. The fact that a measure has expired is not dispositive of the question of whether a panel can address claims in respect of that measure. Rather, a panel, in the exercise of its jurisdiction, has the authority to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined following the expiry of the measure at issue.

In this vein, the Appellate Body reviewed each of the three considerations that the Panel took into account. First, the Appellate Body found that the Panel did not err by giving importance to the fact that, in the present dispute, the measure expired after the DSB had established the Panel. Second, the Appellate Body observed that the Panel did not consider Pakistan's continued request for findings, on its own, to be dispositive of the Panel's need to make findings in this dispute. Moreover, given the largely self-regulating nature of a complaining Member's decision to initiate WTO dispute settlement proceedings, the Appellate Body agreed with the Panel that a complaining Member's continued request for findings following the expiry of the measure at issue is a relevant consideration. Nonetheless, the Appellate Body recalled that the deference accorded to a Member's exercise of its judgement in bringing a dispute is not entirely boundless. Rather, where a measure expires in the course of the panel proceedings, the panel should, in the exercise of its jurisdiction, objectively assess whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined. To this end, the Appellate Body observed that the Panel took account of, *inter alia*, the fact that the parties disagreed, on a fundamental level, on how investigating authorities should determine the extent to which the MBS may constitute a countervailable subsidy within the meaning of the SCM Agreement. From its consideration of the arguments of the parties before the Panel, and the Panel's reasoning, the Appellate Body considered it apparent that there still existed a dispute between the parties on the "applicability of and conformity with the relevant covered agreements", within the meaning of Article 11 of the DSU, as regards the Commission's findings underpinning the measure at issue, despite its expiry.

Thus, for the Appellate Body, the Panel in this dispute made an objective assessment that "the matter" before it still required to be examined because the parties were still in disagreement as to the "applicability of and conformity with the relevant covered agreements" in respect of the Commission's findings underpinning the expired measure at issue.

Accordingly, the Appellate Body found that the European Union had not demonstrated that the Panel had failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding to proceed to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue. The Appellate Body therefore rejected the European Union's request that the Appellate Body reverse the entirety of the Panel Report and declare moot and of no legal effect the findings and legal interpretations contained therein.

With respect to this issue, one member of the Appellate Body Division hearing this appeal issued a separate opinion. The Appellate Body Member first clarified that he agreed with the legal interpretation and reasoning of the majority, regarding a panel's terms of reference, jurisdiction, its margin of discretion in deciding how to take into account the expiry of a measure, and the parameters that should guide a panel's objective assessment of whether a "matter" before it has been fully resolved or still requires to be adjudicated. His separate opinion was limited to the question of whether, in the specific circumstances of this case, the Panel's reasoning reflected an objective assessment of whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, had been fully resolved or still required to be examined, following the expiry of the measure at issue.

The Appellate Body Member noted that among its inherent adjudicative powers is the authority of a panel to assess objectively whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, has been fully resolved or still requires to be examined, following the expiry of the measure at issue. According to the Appellate Body Member, a panel should make this assessment before undertaking its duty under Article 11 of the DSU to "make an objective assessment of the matter before it, including an objective assessment of the facts of the case and the applicability of and conformity with the relevant covered agreements". Turning to this specific case, the Appellate Body Member did not see any reasoning in the Panel Report demonstrating an objective assessment by the Panel, of whether the "matter" before it, within the meaning of Article 7.1 and Article 11 of the DSU, had been fully resolved or still required to be examined, following the expiry of the measure at issue. For those reasons, the Appellate Body Member disagreed with

the finding of the majority that the European Union had not demonstrated that in the circumstances of this case, the Panel failed to comply with its duty under Article 11 of the DSU, as informed by Article 3 of the DSU, by deciding to proceed to make findings on Pakistan's claims in this dispute, notwithstanding the expiry of the measure at issue.

3.3.2 European Union's claim of error regarding government revenue foregone

The European Union appealed the Panel's interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes I to III to the SCM Agreement, in connection with the Commission's finding that the MBS is a countervailable subsidy contingent upon export performance. In particular, the European Union challenged the Panel's finding that, in the context of duty drawback schemes, a subsidy exists only when an "excess" remission occurs representing government revenue foregone that is otherwise due, within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement. The European Union requested the Appellate Body to reverse this interpretation by the Panel of the relevant provisions of the SCM Agreement. Owing to the expiry of the measure at issue, the European Union did not request the Appellate Body to complete the legal analysis in the present case. Instead, the European Union requested the Appellate Body to declare moot and of no legal effect the entirety of the Panel's findings with respect to the MBS on the grounds that the Panel applied the wrong legal standard.

The Appellate Body observed that the European Union's claim of error and its arguments in support thereof raised the question of what, in the context of duty drawback schemes, constitutes the financial contribution element of the subsidy within the meaning of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement. The Appellate Body recalled that the foregoing (or noncollection) of revenue otherwise due, within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement, implies that less (or no) revenue has been raised by the government than would have been raised in a different situation, and the word "foregone" suggests that the government has given up an entitlement to raise revenue that it could "otherwise" have raised. While Article 1.1(a)(1)(ii) provides a general description of revenue foregone, footnote 1, appended thereto, identifies specific instances of revenue foregone that "shall not be deemed to be" subsidies. Footnote 1 deals with the exemption or remission of duties or taxes on exported products. The Appellate Body noted that, with respect to duty drawback schemes, the government revenue foregone that is described in footnote 1 of the SCM Agreement is concerned with the "duties or taxes" in the form of "import charges" on inputs that are consumed in the production of goods destined for export.

Significantly, footnote 1 is prefaced by the words "in accordance with", followed by a list of several provisions of the GATT 1994 and the SCM Agreement: "Article XVI of GATT 1994 (Note to Article XVI) and the provisions of Annexes I through III to this Agreement". Like footnote 1 of the SCM Agreement, the wording of Annex I(i), Annex II(l)(2) of the SCM Agreement, and the *Ad* Note to Article XVI of the GATT 1994, confirms that, for duty drawback schemes, the focus on the *excess* amount of the remission or drawback underpins the definition of the subsidy, and in particular the financial contribution element thereof, in the form of government revenue foregone. The Appellate Body also noted that similar language appears in Annex III(l) with respect to substitution drawback schemes.

The Appellate Body considered that a harmonious reading of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad* Note to Article XVI of the GATT 1994 confirms that duty drawback schemes can constitute an export subsidy that can be countervailed only if they result in a remission or drawback of import charges "in excess" of those actually levied on the imported inputs consumed in the production of the exported product. Thus, in the context of duty drawback schemes, the financial contribution element of the subsidy (i.e. the government revenue foregone that is otherwise due) is limited to the *excess* remission or drawback of import charges on inputs and does not encompass the entire amount of the remission or drawback of import charges.

The Appellate Body also explained that the perceived "silence" in Annexes II and III to the SCM Agreement, referred to by the European Union, is not one that pertains to the definition of the subsidy, and in particular to what constitutes the financial contribution element of the subsidy, in the form of government revenue foregone. Instead, the perceived "silence" relates to a procedural step in the context of an investigating authority's inquiry into whether the *excess* remission or drawback of import charges occurred. As regards this procedural step, where an investigating authority determines that there is no verification system in place in the exporting Member, or a verification system is in place but it is not reasonable, effective for the purpose intended, and based on generally accepted commercial practices in the country of export, or it has not been applied effectively by the exporting Member, and where a further examination by the exporting Member has not been undertaken or is considered unsatisfactory by the investigating authority, it is true that Annexes II and III do not explicitly provide for what should happen next. Nonetheless, the SCM Agreement, as a whole, is not silent, and the perceived "silence" in Annexes II and III does not grant an investigating authority the liberty to depart from these other disciplines of the SCM Agreement. In particular, Article 12.7 of the SCM Agreement allows an investigating authority to rely on the "facts available" on its investigation record to complete its inquiry into whether a duty drawback scheme conveys a subsidy by reason of excess drawback of import charges on inputs.

Accordingly, the Appellate Body found that the European Union had not demonstrated that the Panel erred in its interpretation of Article 1.1(a)(1)(ii), footnote 1, and Annexes I(i), II, and III to the SCM Agreement and the *Ad* Note to Article XVI of the GATT 1994.

The Appellate Body noted that the European Union had not challenged the Panel's review of the Commission's findings on the MBS, beyond the European Union's claim that the Panel had applied the wrong legal standard to the facts of this case. Accordingly, the Appellate Body found that the European Union had not demonstrated that the Panel erred in its application of Article 1.1(a)(1)(ii) and footnote 1 of the SCM Agreement to the facts of this case.

Consequently, the Appellate Body upheld the Panel's finding that the Commission had erred under Article 1.1(a)(1)(ii) of the SCM Agreement by failing to provide a reasoned and adequate explanation for why the entire amount of remitted duties was "in excess of those which have accrued" within the meaning of footnote 1 of the SCM Agreement. The Appellate Body also upheld the Panel's finding that the Commission had acted inconsistently with Article 3.1(a) of the SCM Agreement by improperly finding the existence of a "subsidy" that was contingent upon export performance.

3.3.3 Pakistan's claim of error regarding the Commission's causation analysis

Pakistan challenged the Panel's rejection of Pakistan's claim that the Commission's use of the "break the causal link" approach in this case was inconsistent with Article 15.5 of the SCM Agreement because this approach had precluded the Commission from satisfying the non-attribution requirement of this provision. Pakistan argued that the "primary objective" of a causation analysis under Article 15.5 is to determine whether there exists a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury to the domestic industry. According to Pakistan, a proper test for determining the existence of such a "genuine and substantial" causal relationship is whether other known factors "attenuate" or "dilute" the link between the subsidized imports and the observed injury such that this link cannot be characterized as a "genuine and substantial relationship of cause and effect". Pakistan considered that the Commission's "break the causal link" approach fell short of this proper standard and the Panel erred in endorsing such an approach.

According to Pakistan, the Commission's approach: (i) was "illogical" because, if factors other than the subsidized imports are capable of breaking the causal link, this causal link should never have existed in the first place; (ii) precluded the Commission from assessing the effects of the subsidized imports alone because, by examining whether each non-attribution factor individually broke the causal link, the Commission assessed

the effect of each non-attribution factor against the compounded effects of the subsidized imports plus the effects of the remaining other factors; (iii) was not "even-handed" and skewed the Commission's causation analysis because it required each non-attribution factor to be "the cause" of the injury, while requiring the subsidized imports to be only "a contributing cause" of the injury; and (iv) tainted the Commission's analysis of non-attribution factors and precluded the Commission from properly separating and distinguishing the effects of those factors.

The Appellate Body observed that the key objective of a causation analysis under Article 15.5 of the SCM Agreement is for an investigating authority to establish whether there is a "genuine and substantial relationship of cause and effect" between the subsidized imports and the injury to the domestic industry. A showing of such a "genuine and substantial" causal relationship entails: (i) an examination of the existence and extent of the link between the subsidized imports and the injury suffered by the domestic industry through an assessment of the "effects" of the subsidized imports; and (ii) a non-attribution analysis of the injurious effects of other known factors. The Appellate Body thus held that an investigating authority is required under Article 15.5 to determine whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause of the injury suffered by the domestic industry.

The Appellate Body further noted that, while an investigating authority must conduct a non-attribution analysis before it reaches an overall conclusion as to the existence of a "causal relationship", Article 15.5 does not prescribe any particular methodology an investigating authority must use in carrying out such analysis. Thus, it is possible for an investigating authority to address the two components of causation in a "unitary" analysis or in two separate steps. The Appellate Body observed that, in carrying out such a two-step causation analysis, an investigating authority can consider a "causal link" to exist between the subsidized imports and the injury on the basis of the first step of its analysis, provided that the authority compares the significance of such a "causal link" with the significance of the injurious effects of other known factors and objectively assesses whether this link qualifies as a "genuine and substantial" causal relationship in light of those other factors.

In addition, the Appellate Body noted that, when the subsidized imports and *several* other factors are simultaneously injuring the domestic industry, an investigating authority must ensure that the contribution of the subsidized imports to the injury is "genuine and substantial" in light of the effects of all of these other factors. However, an investigating authority may not necessarily be required to carry out an assessment of the *collective* effects of the other known factors in *addition* to examining those factors' *individual* effects, for example, where an investigating authority's assessment of the individual effects of the other known factors reveals that only a limited number of those other factors contribute to the injury, and each of them to a limited degree.

Turning to the relevant findings by the Panel, the Appellate Body observed that the Panel had correctly found that, while the Commission had stated that a "causal link" existed between the subsidized imports and the injury before it turned to its non-attribution analysis, such consideration of a "causal link" was not a final conclusion, and the Panel had not necessarily prejudged the Commission's assessment of the effects of the other known factors.

The Appellate Body also addressed, and rejected, Pakistan's arguments regarding the four alleged flaws in the Commission's approach to causation that were raised in support of its claim that this approach had precluded the Commission from satisfying the correct legal standard under Article 15.5. In particular, the Appellate Body explained that it is inappropriate for an investigating authority to examine whether other known factors "break" the causal link in the sense that the injurious effects of each non-attribution factor are so significant that they eliminate the link between the subsidized imports and the injury. This is because the correct causation standard requires instead an examination of whether, in light of the injurious effects of other known factors, the subsidized imports can be considered a "genuine and substantial" cause

of the injury. However, with respect to the countervailing duty investigation at issue, the Appellate Body found that the Commission had effectively examined whether and why the subsidized imports could be considered a "genuine and substantial" cause of the injury taking into account the injurious effects of all of the other known factors that it found to have contributed to the injury.

Accordingly, the Appellate Body found that the Panel had not erred in its interpretation or application of Article 15.5 of the SCM Agreement in rejecting Pakistan's claim that the Commission's approach to examining causation precluded the Commission from satisfying the non-attribution requirements of Article 15.5 in this case. Consequently, the Appellate Body upheld the Panel's finding that Pakistan had failed to establish that the Commission's approach to examining causation in this case was inconsistent with Article 15.5.

3.4 Appellate Body Report, *Indonesia – Safeguard on Certain Iron or Steel Products*, WT/DS490/AB/R, WT/DS496/AB/R

This dispute concerned a specific duty applied by Indonesia on imports of galvalume, a type of flat-rolled products of iron or non-alloy steel. The duty was adopted in 2014 for a period of three years following an investigation initiated and conducted under Indonesia's domestic safeguards legislation by Indonesia's competent authority. Imports of galvalume originating in 120 allegedly developing countries are exempt from the scope of application of the specific duty.

Chinese Taipei and Viet Nam challenged the measure at issue on the assumption that such measure was a safeguard subject to the WTO safeguard disciplines. Specifically, Chinese Taipei and Viet Nam claimed that Indonesia's specific duty on imports of galvalume, the investigation leading to its adoption, and the related notifications to the WTO Committee on Safeguards were inconsistent with Article XIX:1(a) and XIX:2 of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 12.2, and 12.3 of the Agreement on Safeguards. Indonesia, also proceeded on the assumption that the measure at issue is a safeguard, and requested the Panel to reject Chinese Taipei's and Viet Nam's claims in their entirety.

Following the first Panel meeting, Indonesia explained that it does not have a tariff binding on galvalume in its WTO Schedule of Concessions. On this basis, the Panel considered that a fundamental question arose as to whether the measure at issue is, indeed, a safeguard within the meaning of Article 1 of the Agreement on Safeguards. The Panel found that the measure at issue does not suspend, withdraw, or modify Indonesia's obligations under Article II of the GATT 1994. It further dismissed Indonesia's argument that the measure at issue suspends the GATT exception under Article XXIV of the GATT 1994. Finally, the Panel rejected Indonesia's assertion that the exemption of 120 countries from the scope of application of the specific duty results in a suspension of Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994. On this basis, the Panel concluded that Indonesia's specific duty on imports of galvalume is not a safeguard subject to the WTO safeguard disciplines. Having so found, the Panel found that there was no legal basis to address the complainants' claims under Article XIX:1(a) and XIX:2 of the GATT 1994 and Articles 2.1, 3.1, 4.1, 4.2(a), 4.2(b), 4.2(c), 12.2, and 12.3 of the Agreement on Safeguards with respect to the specific duty *as a safeguard measure*.

However, the Panel considered that Chinese Taipei and Viet Nam had put forward an alternative claim that the specific duty "as a stand-alone measure" – i.e. not as a safeguard measure – is inconsistent with Article I:1 of the GATT 1994. The Panel went on to find that the exemption of galvalume originating in 120 countries from the scope of application of the specific duty is an "advantage" granted to "like products" that is not "accorded immediately and unconditionally" to imports of galvalume from all WTO Members. Hence, the Panel concluded that the measure at issue is inconsistent with Indonesia's obligations under Article I:1 of the GATT 1994.

On appeal, Chinese Taipei and Viet Nam claimed that certain portions of Indonesia's Notice of Appeal and appellant's submission did not identify the Panel's alleged errors with sufficient precision to meet the

requirements of Rules 20(2)(d) and 21(2)(b)(i) of the Working Procedures. In addition, Indonesia, Chinese Taipei, and Viet Nam all appealed the Panel's finding that the measure at issue is not a safeguard subject to the WTO safeguard disciplines. Finally, Indonesia claimed that the Panel exceeded its terms of reference by finding a violation of Article I:1 of the GATT 1994 in respect of the measure at issue "as a stand-alone measure" – i.e. not as a safeguard measure.

3.4.1 The sufficiency of Indonesia's appeal under the Working Procedures for Appellate Review

Chinese Taipei and Viet Nam claimed that certain portions of Indonesia's Notice of Appeal and appellant's submission did not identify the Panel's alleged errors with sufficient precision. Based on its review of Indonesia's Notice of Appeal, the Appellate Body understood Indonesia's appeal to encompass allegations of error concerning: (i) the Panel's finding that the measure at issue is not a safeguard; (ii) the scope of the Panel's terms of reference concerning the characterization of the measure at issue; (iii) the scope of the Panel's terms of reference concerning the claim against the specific duty as a "stand-alone measure"; and (iv) the Panel's objective assessment under Article 11 of the DSU of the characterization of the measure at issue. Given that these grounds of appeal were discernible in Indonesia's Notice of Appeal, the Appellate Body did not consider that Indonesia had failed to set out "a brief statement of the nature of the appeal" or to provide an "identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel", as required under Rule 20(2)(d).

Moreover, the Appellate Body found that Indonesia's appellant's submission sets out more specific legal argumentation in support of the grounds of appeal identified by Indonesia in its Notice of Appeal. In addition, regarding the complainants' reliance on Rule 21(2)(b)(i), the Appellate Body found that the complainants' objection concerning Indonesia's appellant's submission was not pertinent to the scope of appellate review, but rather related to the merits and substance of Indonesia's legal arguments. Accordingly, the Appellate Body declined the complainants' request that certain portions of Indonesia's appeal be rejected for failure to comply with the Working Procedures.

3.4.2 The Panel's finding that the measure at issue is not a safeguard

Chinese Taipei, Viet Nam, and Indonesia all appealed the Panel's finding that the measure at issue is not a safeguard subject to the WTO safeguard disciplines. Specifically, Indonesia claimed that the Panel's finding exceeded the Panel's terms of reference under Articles 6.2 and 7.1 of the DSU and constituted a failure to conduct an objective assessment of the matter pursuant to Article 11 of the DSU. Moreover, all participants claimed that, in reaching that finding, the Panel erred in it its interpretation and application of Article 1 of the Agreement on Safeguards and Article XIX of the GATT 1994.

Beginning with Indonesia's claim under Articles 6.2, 7.1 and 11 of the DSU, the Appellate Body recalled that a panel's terms of reference under Article 7.1 of the DSU are governed by the panel request(s) provided under Article 6.2 of the DSU. In this regard, the Appellate Body observed that Article 6.2 does not contain a requirement that a panel request expressly indicate the provisions governing the legal characterization of a measure for purposes of the *applicability* of a given covered agreement.

With respect to Indonesia's claim under Article 11 of the DSU, the Appellate Body recalled that Article 11 requires panels to examine, as part of their "objective assessment of the matter", whether the provisions of the covered agreements invoked by complainants as the basis for their claims are applicable and relevant to the case at hand. The Agreement on Safeguards applies to the "measures provided for in Article XIX of GATT 1994". A panel's assessment of claims brought under that agreement may therefore require a threshold examination of whether the measure at issue qualifies as a safeguard measure within the meaning of Article XIX of the GATT 1994. A panel is not precluded from determining the applicability of a particular covered agreement in cases where the issue has not been raised by the parties. Indeed, the duty to conduct

an "objective assessment of the matter" may, at times, *require* a panel to depart from the positions taken by the parties and determine for itself whether a measure falls within the scope of a particular provision or covered agreement. Moreover, the description of a measure proffered by a party and the label given to it under municipal law are not dispositive of the proper legal characterization of that measure under the covered agreements.

The Appellate Body noted that the complainants in this dispute had claimed that Indonesia's specific duty on imports of galvalume is inconsistent with Article XIX of the GATT 1994 and certain substantive provisions of the Agreement on Safeguards. Therefore, according to the Appellate Body, it was the Panel's duty, pursuant to Article 11 of the DSU, to assess objectively whether the measure at issue constitutes a safeguard measure in order to determine the applicability of the substantive provisions relied upon by the complainants as the basis for their claims.

On this basis, the Appellate Body found that the Panel did not exceed its terms of reference or fail to conduct an objective assessment of the matter by ascertaining whether the measure at issue constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

Having so found, the Appellate Body proceeded to assess whether the Panel's finding stemmed from an erroneous interpretation or application of Article 1 of the Agreement on Safeguards or Article XIX of the GATT 1994. The Appellate Body held that, in order to constitute one of the "measures provided for in Article XIX", a measure must present certain constituent features, absent which it could not be considered a safeguard. First, that measure must suspend, in whole or in part, a GATT obligation or withdraw or modify a GATT concession. Second, the suspension, withdrawal, or modification in question must be designed to prevent or remedy serious injury to the Member's domestic industry caused or threatened by increased imports of the subject product.

The Appellate Body further stated that, in order to determine whether a measure presents such features, a panel is called upon to assess the design, structure, and expected operation of the measure as a whole. In making its independent and objective assessment, a panel must identify all the aspects of the measure that may have a bearing on its legal characterization, recognize which of those aspects are the most central to that measure, and, thereby, properly determine the disciplines to which the measure is subject. As part of its determination of whether a measure is a safeguard, a panel should evaluate and give due consideration, where relevant, to the manner in which the measure is characterized under the domestic law of the Member concerned, the domestic procedures that led to the adoption of the measure, and any relevant notifications to the WTO Committee on Safeguards. However, none of these is, in and of itself, dispositive of the question of whether the measure constitutes a safeguard measure within the meaning of Article 1 of the Agreement on Safeguards.

Having reviewed the design, structure, and expected operation of the measure at issue, together with all the relevant facts and arguments on record, the Appellate Body found that this measure does not present the constituent features of a safeguard for purposes of the applicability of the WTO safeguard disciplines. First, it noted, the imposition of the specific duty on galvalume may seek to prevent or remedy serious injury to Indonesia's industry, but it does not suspend any GATT obligation or withdraw or modify any GATT concession because Indonesia does not have a tariff binding on galvalume in its WTO Schedule of Concessions.

Second, continued the Appellate Body, the exemption of 120 countries from the scope of application of the specific duty may arguably be seen as suspending Indonesia's MFN treatment obligation under Article I:1 of the GATT 1994, but it has not been shown to be designed to prevent or remedy serious injury to Indonesia's domestic industry. Rather, that exemption appears to constitute an ancillary aspect of the measure, which is aimed at according S&D treatment to developing countries with *de minimis* shares in imports of galvalume as contemplated under Article 9.1 of the Agreement on Safeguards. The disciplines of Article 9.1 set out conditions for the WTO-*consistent* application of safeguard measures, and do not speak to the question of

whether a measure constitutes a safeguard measure for purposes of the *applicability* of the WTO safeguard disciplines. Hence, the Appellate Body found that the measure at issue, considered in light of those of its aspects most central to the issue of legal characterization, does not constitute one of the "measures provided for in Article XIX of GATT 1994".

Based on the foregoing, the Appellate Body upheld the Panel's overall conclusion that the measure at issue does not constitute a safeguard within the meaning of Article 1 of the Agreement on Safeguards. Having upheld the Panel's conclusion, the Appellate Body found no legal basis to rule on the complainants' request for completion of the legal analysis with respect to their claims under Article XIX of the GATT 1994 and Articles 2.1, 3.1, 4.1(a), 4.1(b), 4.2(a), 4.2(b), 4.2(c), 12.2, and 12.3 of the Agreement on Safeguards.

3.4.3 The Panel's finding of inconsistency with Article I:1 of the GATT 1994 in respect of the specific duty "as a stand-alone measure"

Indonesia challenged the Panel's finding of inconsistency with Article I:1 of the GATT 1994 with respect to the specific duty as a stand-alone measure (as opposed to a safeguard measure), claiming that the Panel's finding exceeded the Panel's terms of reference. According to Indonesia, the complainants' panel requests did not include claims to the effect that the measure at issue, as a stand-alone measure, was inconsistent with Article I:1. Instead, argued Indonesia, those requests limited the claims under Article I:1 to the measure at issue construed as a safeguard.

The Appellate Body considered that the description and presentation of the specific duty as a "measure at issue" in the complainants' panel requests clearly identified the specific duty as a measure that is alleged to be causing the violation of an obligation contained in a covered agreement. The Appellate Body further noted that the panel requests plainly connected the relevant measure, that is, the specific duty, with the MFN treatment obligation provided under Article I:1 of the GATT 1994 by explicitly linking the discriminatory application of that duty with the substantive requirement that any advantage that is granted to a product be accorded immediately and unconditionally to the like products originating in all WTO Members. For the Appellate Body, the additional language in the panel requests in the nature of factual background or legal argument concerning the characterization of the measure did not narrow the claims raised under Article I:1 of the GATT 1994.

The Appellate Body further found that the complainants' submissions to the Panel confirmed that their claims of inconsistency with Article I:1 of the GATT 1994 encompassed alleged discrimination between countries exempted from the scope of application of the specific duty and countries to which such an exemption does not apply (including Chinese Taipei and Viet Nam themselves). In light of the foregoing, the Appellate Body considered that the formulations used in the panel requests were sufficient to articulate a claim against the specific duty as a stand-alone measure (i.e. as a nonsafeguard measure).

Accordingly, the Appellate Body found that the Panel did not err in concluding that the complainants properly raised a claim under Article I:1 of the GATT 1994 against the specific duty as a stand-alone measure. As the Panel did not err in identifying the matter within its terms of reference, and given that Indonesia did not otherwise challenge the Panel's substantive analysis or findings under Article I:1 of the GATT 1994, the Appellate Body upheld the Panel's finding that the application of the specific duty on imports of galvalume originating in all but the 120 countries listed in Regulation 137 is inconsistent with Indonesia's obligation to accord MFN treatment under Article I:1 of the GATT 1994.

3.5 Appellate Body Reports, *Brazil – Certain Measures Concerning Taxation and Charges*, WT/DS472/AB/R, WT/DS497/AB/R

These disputes concerned three groups of measures through which Brazil provides exemptions, reductions, or suspensions of certain federal taxes and contributions. The taxes and contributions relevant for these disputes are: (i) the Tax on Industrialised Products (IPI tax); (ii) the Social Integration Programme/Civil Service Asset Formation Programme (PIS/PASEP) contribution and the Contribution to Social Security Financing (COFINS); (iii) the Social Integration and Civil Service Asset Formation Programmes contribution applicable to Imports of Foreign Goods or Services (PIS/PASEP-Importation) and the Contribution to Social Security Financing applicable to Imports of Goods or Services (COFINS-Importation); and (iv) the Contribution of Intervention in the Economic Domain (CIDE).

The first group of measures at issue concerns the information and communication technology (ICT) sector and comprises tax treatment granted under: (i) the Informatics programme; (ii) the programme of Incentives for the Semiconductors Sector (PADIS programme); (iii) the programme of Support for the Technological Development of the Industry of Digital TV Equipment (PATVD programme); and (iv) the programme for Digital Inclusion (the Digital Inclusion programme). The second group comprises tax treatment granted under the programme of Incentive to the Technological Innovation and Densification of the Automotive Supply Chain (the INOVAR-AUTO programme), which targets the automotive sector. The third group of measures comprises tax treatment granted under: (i) the regime for Predominantly Exporting Companies (PEC programme); and (ii) the Special Regime for the Purchase of Capital Goods for Exporting Enterprises (RECAP programme).

The Informatics programme provides for exemptions and reductions on the IPI tax on the sale of information technology goods. It also provides for suspensions of the IPI tax on the purchase or import of raw materials, intermediate goods, and packaging materials used in the production of information technology, and automation goods incentivized under the programme. In order to benefit from the tax treatment, companies must obtain an accreditation. The eligible companies under the Informatics programme are companies that: (i) develop or produce information technology and automation goods and services in compliance with the relevant Basic Productive Processes (PPBs), which are defined as the minimum set of operations performed at a manufacturing facility that characterizes the actual industrialization of a given product; and (ii) invest in information technology research and development (R&D) activities in Brazil. Moreover, under this programme, products that have obtained the status of "developed in Brazil" are subject to additional tax reductions.

The PADIS programme exempts, through zero rates, accredited companies from paying certain taxes with respect to semiconductors and information displays, as well as inputs, tools, equipment, machinery, and software for the production of semiconductors and displays. In order to obtain accreditation, legal persons must: (i) invest in R&D in Brazil; and (ii) engage in certain activities in Brazil with respect to semiconductor electronic devices, information displays, and inputs and equipment intended for the manufacture of electronic semiconductor devices and information displays.

The PATVD programme exempts accredited companies from paying certain taxes with respect to radio frequency signal transmitting equipment for digital television (digital television transmission equipment), as well as machinery, apparatus, instruments, equipment, inputs, and software for the production of digital television transmission equipment (production goods). In order to obtain accreditation, legal persons must: (i) invest in R&D in Brazil; (ii) engage in developing and manufacturing activities of digital television transmission equipment; and (iii) either comply with the relevant PPB or, alternatively, meet the criteria for a product to be considered "developed in Brazil".

The Digital Inclusion programme exempts, through zero rates, Brazilian retailers from paying PIS/PASEP and COFINS contributions with respect to the sale of certain digital consumer goods produced in Brazil in accordance with the relevant PPBs.

The INOVAR-AUTO programme provides for reduction of the IPI tax burden on certain motor vehicles either: (i) through presumed IPI tax credits granted to accredited companies; or (ii) through reduced IPI tax rates on the importation of vehicles originating in certain countries, as well as on certain domestic vehicles. All companies using presumed IPI tax credits, and certain companies using reduced IPI tax rates, must obtain one of three forms of accreditation: (i) domestic manufacturer; (ii) importer/distributor; or (iii) investor. In order to obtain accreditation, a company must comply with certain requirements of both a general and specific nature. All such companies must comply with the same two general requirements and also with certain additional specific requirements that vary by the type of accreditation. A company applying for accreditation as a domestic manufacturer shall comply with the two general requirements as well as "three out of four specific requirements, one of which must be the performance of a minimum number of defined manufacturing and engineering infrastructure activities in Brazil". A company applying for accreditation as importer/distributor shall comply with the two general requirements and "the following three specific requirements: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology and capacity-building of suppliers in Brazil; and, (iii) participation in the vehicle labelling programme by [the] National Institute of Metrology, Quality and Technology (INMETRO)". A company applying for accreditation as an investor shall submit to the Ministry of Development, Industry and Trade (MDIC) an investment project containing a description and the technical features of the vehicles to be imported and manufactured. Accreditation shall be granted once the investment project is approved by that Ministry. An investor shall be required to apply for a specific accreditation for every factory, plant, or industrial project that it plans to establish.

Under the PEC programme, the IPI tax and the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions are suspended with respect to raw materials, intermediate goods, and packaging materials purchased by predominantly exporting companies. Similarly, under the RECAP programme, the PIS/PASEP, COFINS, PIS/PASEP-Importation, and COFINS-Importation contributions are suspended with respect to purchases of new machinery, tools, apparatus, instruments, and equipment by predominantly exporting companies.

Before the Panel, the European Union and Japan raised claims, *inter alia*, under Articles III:2, III:4, and III:5 of the GATT 1994; Article 2.1 of the TRIMs Agreement; and Article 3.1(b) of the SCM Agreement with respect to tax treatment established under the Informatics, PADIS, PATVD, and Digital Inclusion programmes (the ICT programmes) and the INOVAR-AUTO programme. Brazil invoked Article XX(a) of the GATT 1994 to justify certain inconsistencies with respect to the PATVD programme and Articles XX(b) and XX(g) to justify certain inconsistencies with respect to the INOVAR-AUTO programme. The European Union and Japan also raised claims under Article I:1 of the GATT 1994 with respect to the INOVAR-AUTO programme, in response to which Brazil invoked the Enabling Clause as a defence. With respect to the PEC and RECAP programmes, the European Union and Japan raised claims under Article 3.1(a) of the SCM Agreement.

The Panel first addressed two broad defences raised by Brazil concerning the ICT and INOVAR-AUTO programmes. First, the Panel rejected Brazil's argument that Article III of the GATT 1994, Article 2 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement are inapplicable to "pre-market" measures. The Panel found that these provisions are not *per se* inapplicable to "pre-market" measures directed at producers. Second, the Panel rejected Brazil's argument that the ICT and INOVAR-AUTO programmes constitute payment of subsidies exclusively to domestic producers within the meaning of Article III:8(b) of the GATT 1994, and therefore are exempted from the disciplines of Article III of the GATT 1994 and Article 2.1 of the TRIMs Agreement. To the Panel, those aspects of a measure resulting in product discrimination are not exempted *per se* from these disciplines, even if the measure takes the form of a subsidy paid exclusively to domestic producers.

With respect to the ICT programmes, the Panel found that: (i) the production-step requirements and the requirement for products to obtain the status of "developed in Brazil" result in imported products being subject to internal taxes in excess of those applied to like domestic products, inconsistently with Article III:2, first sentence, of the GATT 1994; (ii) the production-step requirements and the requirement for products to obtain the status of "developed in Brazil", as well as the lower administrative burden on companies purchasing domestic incentivized intermediate ICT products accord to imported products treatment less favourable than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994; (iii) the ICT programmes constitute trade-related investment measures, and the aspects of these programmes found to be inconsistent with Articles III:2 and III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement; (iv) the tax exemptions, reductions, and suspensions granted under the ICT programmes are subsidies within the meaning of Article 1.1 of the SCM Agreement, which are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement; and (v) those aspects of the PATVD programme found to be inconsistent with the GATT 1994 and the TRIMs Agreement are not justified under Article XX(a) of the GATT 1994.

With respect to the INOVAR-AUTO programme, the Panel found that: (i) certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil result in imported products being subject to internal taxes in excess of those applied to like domestic products, inconsistently with Article III:2 of the GATT 1994; (ii) certain aspects of the accreditation process, the system of rules on accrual and calculation of presumed tax credits, and the rules on the use of presumed tax credits resulting from expenditure on strategic inputs and tools in Brazil; the accreditation requirement to perform a minimum number of manufacturing steps in Brazil; that aspect of the rules on accrual of presumed IPI tax credits pertaining to expenditure in strategic inputs and tools; and those aspects of the accreditation requirements to invest in R&D in Brazil and make expenditures on engineering, basic industrial technology, and capacity-building of suppliers in Brazil, pertaining to the purchase of Brazilian laboratory equipment, accord less favourable treatment to imported products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994; (iii) the INOVAR-AUTO programme constitutes a trade-related investment measure, and those aspects of the programme found to be inconsistent with Articles III:2 and III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement; (iv) the tax reductions through presumed tax credits granted under the INOVAR-AUTO programme are subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Articles 3.1(b) and 3.2 of the SCM Agreement; and (v) those aspects of the INOVAR-AUTO programme found to be inconsistent with the GATT 1994 and the TRIMs Agreement are not justified under Article XX(b) or XX(g) of the GATT 1994.

The Panel also found that: (i) tax reductions accorded to imported products from Mercado Comùn del Sur (Southern Common Market) (MERCOSUR) members and Mexico under the INOVAR-AUTO programme are advantages granted by Brazil to products originating in those countries, which are not accorded immediately and unconditionally to like products originating in other WTO Members, inconsistently with Article I:1 of the GATT 1994; (ii) the complaining parties were not under a burden to invoke the Enabling Clause in their panel requests, and their claims under Article I:1 of the GATT 1994 are therefore within the Panel's terms of reference; and (iii) the tax reductions accorded to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraphs 2(b) or 2(c) of the Enabling Clause.

In relation to the PEC and RECAP programmes, the Panel found that the tax suspensions granted thereunder are subsidies within the meaning of Article 1.1 of the SCM Agreement and contingent upon export performance under Article 3.1(a) of the SCM Agreement, and thus are prohibited subsidies, inconsistent with Articles 3.1(a) and 3.2 of the SCM Agreement.

In accordance with Article 19.1 of the DSU, and having found that Brazil acted inconsistently with its obligations under Articles I:1, III:2, and III:4 of the GATT 1994; Article 2.1 of the TRIMs Agreement; and Articles 3.1(a), 3.1(b), and 3.2 of the SCM Agreement with respect to the measures at issue, the Panel recommended that the DSB request Brazil to bring its measures into conformity with its obligations under the covered agreements. Pursuant to Article 4.7 of the SCM Agreement, the Panel also recommended that Brazil withdraw the subsidies found to be WTO-inconsistent within 90 days.

3.5.1 Articles III:2 and III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement

The Appellate Body began by recalling certain terminologies employed by the Panel in these disputes regarding the categories of products involved under the ICT and INOVAR-AUTO programmes. The Appellate Body recalled that the Panel noted that the European Union's and Japan's claims with respect to the ICT and INOVAR-AUTO programmes pertained to two distinct types of products: "incentivised products" and inputs for the "incentivised products". The Panel further observed that Brazil subcategorized the "incentivised products" as "intermediate" and "finished" products. The Appellate Body recalled that the Panel noted that a "finished product", as identified by Brazil, is a product that will not undergo any further manufacturing and will be "incentivised" if "the company producing them is accredited under a particular programme" and if a finished product is incentivized, it means that it receives a particular tax benefit on its sale. The Appellate Body further recalled that "intermediate products", as the Panel explained, will be subject to further manufacturing and will also be "incentivised" if the company producing them is accredited under a particular programme. The Panel noted that, if an intermediate product is incentivized, it will be subject to a particular tax benefit on its sale.

The Appellate Body further noted that, on appeal, Brazil took issue with the Panel's finding that Article III of the GATT 1994 is not *per se* inapplicable to certain measures, in particular premarket measures directed at producers. Brazil contended that Article III deals with nondiscrimination between domestic and imported products, thus being applicable only to measures which affect a product once it has been produced and enters the marketplace and not to production (pre-market) measures. However, in response to questioning at the oral hearing, Brazil confirmed that it did not wish to pursue any further this line of argument regarding the inapplicability of Article III to producer-related measures.

With that background in mind, the Appellate Body turned to address Brazil's discrete claims on appeal.

3.5.1.1 The ICT programmes

3.5.1.1.1 Whether the Panel erred in finding that imported finished and intermediate ICT products were taxed in excess of like domestic finished and intermediate ICT products inconsistently with Article III:2, first sentence, of the GATT 1994

In relation to *imported finished ICT products*, Brazil contended on appeal that the Panel failed to undertake a thorough analysis of the case presented by the complaining parties and to carefully scrutinize the design, structure, and operation of the ICT programmes in applying Article III:2 to the facts of this dispute. Brazil submitted that there is nothing in the design, structure, and operation of the challenged measures that by necessary implication would amount to *de jure* tax discrimination within the meaning of Article III:2.

The Appellate Body noted that, in order for an ICT product to be subject to the tax treatment provided for in the ICT programmes, companies that manufacture these products must be located (and operate) in Brazil and must comply with one or more of the following requirements: (i) invest in R&D in Brazil (in the case of the Informatics, PADIS, and PATVD programmes); (ii) manufacture in Brazil in accordance with the relevant PPBs (in the case of the Informatics, PADIS, PATVD, and Digital Inclusion programmes) or carry out certain manufacturing steps in Brazil (in the case of the PADIS and PATVD programmes); and/or (iii) develop the products in Brazil (in order to obtain additional tax reductions under the Informatics programme or to obtain

tax exemptions (through zero rates) under the PATVD programme). The Appellate Body noted that Brazil accepted that it is undisputed that foreign producers cannot be accredited under the ICT programmes. The Appellate Body found that the Panel rightly considered that that imported finished ICT products cannot qualify for the relevant tax treatment because they: (i) are never manufactured in Brazil by companies located or operating in Brazil and are never produced in accordance with the relevant PPBs or similar production-step requirements; and (ii) will never be able to obtain the status of being "developed in Brazil". Accordingly, the Appellate Body found that imported finished ICT products are therefore not eligible for either tax reductions or exemptions under the ICT programmes and consequently, bear the full tax burden, as opposed to like domestic finished ICT products. The Appellate Body further noted that a finished product is a product that will not undergo any further manufacturing and the sale of a finished product represents the last stage of a transaction. In the case of an imported finished ICT product, when an importer sells the imported finished ICT product to a wholesaler, retailer, or distributor, the importer will charge the IPI tax to the wholesaler or retailer or distributor and remit the tax to the Brazilian Government. In contrast, in the case of a like domestic finished ICT product that is subject to IPI tax exemption or reduction under the ICT programmes, the seller does not charge any tax or charges a reduced tax, as the case may be, to the wholesaler, retailer, or distributor. At this last stage, the Appellate Body found that the tax rate is thus higher for imported finished ICT products than for like domestic finished ICT products, and the tax burden on the former is necessarily in excess of that on the latter.

For these reasons, the Appellate Body upheld the Panel's findings that that imported finished ICT products are subject to a higher tax burden than like domestic ICT products and are consequently taxed in excess of like domestic finished ICT products, contrary to Article III:2, first sentence, of the GATT 1994.

In relation to *imported intermediate ICT products*, on appeal, Brazil argued that the Panel opted to ignore the fact that the credit-debit system in a value added tax ensures that the amount collected at each step of production is equivalent to the value added at that step. Brazil thus submitted that, in the end, the tax burden of a product subject to the payment of a tax, which generates a credit, and a product that is subject to a suspension, but receives no credit, will be the same.

The Appellate Body noted that, on appeal, Brazil neither took issue with the Panel's understanding of the credit-debit system, nor did Brazil raise a claim under Article 11 of the DSU. That said, the Appellate Body recalled the Panel's explanation when comparing the situations concerning the sale of incentivized domestic intermediate ICT products, on the one hand, and imported intermediate ICT products, on the other hand. The Appellate Body considered that, while on the face of it, the tax system may appear to be neutral in terms of tax collection with respect to intermediate ICT products (whether domestic or imported), the Panel rightly stated that a thorough look into the operation of the tax holistically is necessary in order to determine the effective tax burden on the products at issue. The Appellate Body recalled that the Panel ultimately found that there is a different effective tax burden on imported ICT products vis-à-vis like domestic ICT products for two reasons: the availability of cash flow for those companies that benefit from the tax exemption or reduction, and the "time-value" of money.

The Appellate Body noted that, under the credit-debit system, purchases of non-incentivized imported intermediate ICT products involve the payment of a tax upfront that is not faced by companies that purchase incentivized like domestic intermediate ICT products, which are exempted from the relevant taxes. Even in the case of tax reductions, companies purchasing incentivized like domestic intermediate ICT products have to pay a lower tax as compared to companies purchasing non-incentivized imported intermediate ICT products. The Appellate Body explained that the fact that purchasers of imported intermediate ICT products have to pay the relevant taxes under the ICT programmes, irrespective of the point in time, compared to purchasers of incentivized like domestic intermediate ICT products, who do not have to pay the relevant tax or pay a reduced amount, limits the availability of cash flow, resulting in a higher effective tax burden on imported intermediate ICT products. The Appellate Body also found that the value of the tax credit that is generated upon the payment of the relevant tax on the sale of a non-incentivized imported

intermediate ICT product will depreciate over time until it is used or adjusted. The Appellate Body recalled that, in cases where the IPI tax debits are lower than the IPI tax credits, and the company buying a product cannot offset the credits with debits after a three-month period, it can request compensation of the credits with other taxes, or reimbursement from the Brazilian Government. The Appellate Body, however, noted that the reimbursement process may take from several months to years. Therefore, the Appellate Body considered that, to that extent there is a time lag between the accrual of the tax credit and the adjustment or use thereof, it necessarily results in the value of money (in the form of accrued tax credits) depreciating over time.

For these reasons, the Appellate Body upheld the Panel's findings that imported intermediate ICT products are taxed in excess of like domestic incentivized intermediate ICT products contrary to Article III:2, first sentence, of the GATT 1994.

3.5.1.1.2 Whether the Panel erred in finding that the accreditation requirements under the ICT programmes accord treatment less favourable to imported products than that accorded to like domestic products inconsistently with Article III:4 of the GATT 1994

On appeal, Brazil argued that the Panel's analysis with respect to the accreditation requirements under the ICT programmes conflates tax discrimination, which is under the purview of Article III:2 with regulatory discrimination, to which Article III:4 applies. Brazil contended that, in order to find an inconsistency with Article III:4 of the GATT 1994, the Panel was required to identify a regulatory discrimination other than the differences in tax treatment that may result in an inconsistency with Article III:2 of the GATT 1994.

The Appellate Body noted that the aspect of the ICT programmes challenged by the complaining parties as being inconsistent with Article III:4 concerned the accreditation requirements, the fulfilment of which enabled the obtaining of the relevant tax exemption, reduction, or suspension on the sales or purchases of ICT products. The Appellate Body recalled the Panel's recognition that the aspects challenged by the complaining parties under Article III:4 are different from, albeit related to, the differential tax treatment of like domestic and imported products that they challenge under Article III:2. The Appellate Body considered that the Panel was mindful of the fact that the ICT programmes included both fiscal and regulatory aspects that were applicable to the products at issue. While the accreditation requirements related to regulatory aspects, the tax exemptions or reductions under the ICT programmes related to fiscal aspects. The Appellate Body found this evident from the Panel's conclusion that the conditions for accreditation "modify the conditions of competition to the detriment of the imported products" by creating "a lower internal tax burden on domestic products than on like imported products".

The Appellate Body noted that it was undisputed that, in order to be eligible for the tax exemption, reduction, or suspension under the ICT programmes, companies must fulfil the accreditation requirements. The Appellate Body found that the accreditation requirements under the ICT programmes therefore result in less favourable treatment for imported ICT products in the form of the differential tax burden that imported ICT products are subjected to by virtue of the fact that foreign producers cannot be accredited under the ICT programmes. The consequence being, as the Panel also noted, imported ICT products can never qualify for the tax exemptions, reductions, or suspensions. The Appellate Body considered that the aspects of the ICT programmes found to be inconsistent with Article III:2, first sentence, and Article III:4 are distinct. In the case of Article III:2, first sentence, the aspect of the ICT programme found to be inconsistent is the differential tax treatment that results in a higher tax burden on imported ICT products, i.e. imported ICT products are taxed in excess of like domestic ICT products. For purposes of Article III:4, the aspect of the ICT programmes found to be inconsistent is the accreditation requirements that result in less favourable treatment in the form of the differential burden that imported ICT products are subjected to. The Appellate Body saw no reason why that cannot be the case since different aspects of the same measure may be found to be inconsistent with one or more paragraphs of Article III of the GATT 1994.

For these reasons, the Appellate Body upheld the Panel's findings that the accreditation requirements under the ICT programmes, by restricting access to the tax incentives only to domestic products, modify the conditions of competition to the detriment of imported products and result in less favourable treatment being accorded to imported ICT products than to like domestic ICT products inconsistently with Article III:4 of the GATT 1994.

3.5.1.1.3 Whether the Panel erred in finding that the ICT programmes are inconsistent with Article III:4 of the GATT 1994 by virtue of the lower administrative burden on companies purchasing incentivized domestic intermediate products

On appeal, Brazil argued that Panel's findings concerning the alleged lower administrative burden on companies purchasing domestic incentivized intermediate products has no grounds, either in law or in the facts of the present dispute. Brazil contended that the Panel misconstrued the functioning of the Brazilian tax system and found an administrative burden in the operation of the debit and credit tax system where there is none.

The Appellate Body observed that the Panel took into account the functioning of the credit-debit system. The Appellate Body noted that it was mindful of Brazil's contention that the credit-debit system operates as a ledger in which both purchases of inputs and intermediate goods and sales of final goods are recorded, and debits and credits are offset and that there is no change in the event of suspensions, reductions, or exemptions of indirect taxes. The Appellate Body, however, considered that Brazil's contention would not change the fact that purchasers of imported intermediate ICT products that are not incentivized under the ICT programmes will have to anticipate and pay the full amount of tax due on such imported intermediate ICT products. The Appellate Body noted that, although any such tax paid on the purchase of imported intermediate ICT products will generate a corresponding tax credit in favour of the purchaser, nonetheless, offsetting this tax credit entails an administrative burden that is not faced and/or faced to a lesser extent by a purchaser of domestic intermediate ICT products that are incentivized. The Appellate Body explained that this is the case because, under the credit-debit system, if the tax credit cannot be offset by debits after three taxation periods, the process of compensating the tax credit with other federal taxes, or reimbursement thereof can be burdensome for companies, and can take years.

For these reasons, the Appellate Body upheld the Panel's findings that the ICT programmes are inconsistent with Article III:4 of the GATT 1994, because they accord to imported intermediate ICT products treatment less favourable than that accorded to like domestic intermediate ICT products, due to the lower administrative burden imposed on firms purchasing incentivized domestic intermediate ICT products.

3.5.1.1.4 Whether the Panel erred in finding that the ICT programmes are inconsistent with Article 2.1 of the TRIMs Agreement

The Appellate Body noted that, on appeal, Brazil did not make any specific arguments in connection with the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather, the Appellate Body observed that Brazil's request for reversal of the Panel's finding under Article 2.1 of the TRIMs Agreement was premised on the Appellate Body reversing the Panel's findings under Article III:4 of the GATT 1994. The Appellate Body, however, recalled that for the reasons stated above, it had upheld the Panel's findings that certain aspects of the ICT programmes are inconsistent with Article III:4 of the GATT 1994. Consequently, the Appellate Body upheld the Panel's findings that those aspects of the ICT programmes found to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement.

3.5.1.2 The INOVAR-AUTO programme

3.5.1.2.1 Whether the Panel erred in finding that the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994 because they are more burdensome for companies seeking accreditation as importers/distributors as opposed to domestic manufacturers

On appeal, Brazil took issue with the Panel's finding that the accreditation requirements under the INOVAR-AUTO programme are discriminatory because they would be allegedly more burdensome to importers/distributors than to domestic manufacturers and therefore result in less favourable treatment being accorded to imported finished motor vehicles. Brazil argued that, in reaching its conclusions on the discriminatory impact of the types of accreditation provided under the INOVAR-AUTO programme, the Panel limited itself to conducting a *quantitative* analysis of the requirements provided under INOVAR-AUTO programme.

The Appellate Body recalled that the purpose of complying with the requirements for accreditation is to obtain presumed IPI tax credits on the sale of products. The Appellate Body noted that it was undisputed that, in order for companies to obtain any sort of accreditation that entitles them to accrue and use presumed IPI tax credits, they must either be located and operate in Brazil, in the case of domestic manufacturers and importers/distributors, or be in the process of establishing in the country as domestic manufacturers, in the case of investors. The Appellate Body found that the only viable way for foreign manufacturers to be able to enjoy the benefit of the presumed IPI tax credits in reducing their IPI tax liability is to become accredited as importers/distributors. However, in order to do so, the Appellate Body noted, foreign manufacturers must, first and foremost, be located and operate in Brazil, which, in the Appellate Body's view, indicated that foreign manufacturers seeking accreditation as importers/distributors face a corresponding burden that necessarily comes with having to operate in, or establish themselves in Brazil, unlike domestic manufacturers, who already operate or are established in Brazil.

The Appellate Body further recalled that, in order to become accredited as importers/distributors, a company shall comply with the following three specific requirements: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology, and capacity-building of suppliers in Brazil; and (iii) participation in the vehicle-labelling programme by INMETRO. The Appellate Body noted that a fourth requirement which calls for the performance in Brazil of certain manufacturing steps also exists. The Appellate Body, however, took the view that these activities are not typical for foreign manufacturers seeking to import motor vehicles into Brazil. According to the Appellate Body, the fact that foreign manufacturers have to undertake these activities to get accredited as importers/distributors implied that foreign manufacturers face a burden that domestic manufacturers do not face. The Appellate Body observed that, in order to be accredited, domestic manufacturers need to comply with three out of four specific requirements. The Appellate Body noted that one of these must be the performance of a minimum number of defined manufacturing and engineering infrastructure activities in Brazil. The other two requirements must be among the following three: (i) investments in R&D in Brazil; (ii) expenditure on engineering, basic industrial technology, and capacity-building of suppliers in Brazil; or (iii) participation in the vehicle-labelling programme by INMETRO. The Appellate Body considered that almost all of these requirements could be considered to be typical of the nature of activity carried out by a domestic manufacturer.

The Appellate Body found that the INOVAR-AUTO programme is thus designed in such a manner that the accreditation requirements thereunder adversely modify the equality of competitive conditions for imported products compared to like domestic products. The Appellate Body reasoned that this is so because, first, foreign manufacturers seeking accreditation as importers/distributors in order to enjoy a reduction on IPI tax liability have to operate or establish themselves in Brazil with the corresponding burden unlike domestic manufacturers, who already operate and are established in Brazil. Second, foreign manufacturers seeking accreditation as importers/distributors are required to comply with more accreditation requirements and

undertake certain activities prescribed under the INOVAR-AUTO programme, which are, in any event, not typical for foreign manufacturers seeking to import motor vehicles into Brazil. The Appellate Body further found that, contrary to Brazil's contention, the Panel sufficiently engaged in a qualitative analysis.

For these reasons, the Appellate Body upheld the Panel's findings that, under the INOVAR-AUTO programme, the conditions for accreditation, in order to receive presumed tax credits, accord less favourable treatment to imported products than that accorded to like domestic products inconsistently with Article III:4 of the GATT 1994.

3.5.1.2.2 Whether the Panel erred in finding that the INOVAR-AUTO programme is inconsistent with Article 2.1 of the TRIMs Agreement

The Appellate Body noted that, on appeal, Brazil did not make any specific arguments regarding the Panel's finding under Article 2.1 of the TRIMs Agreement. Rather, the Appellate Body observed, that Brazil's request for reversal of the Panel's finding under Article 2.1 of the TRIMs Agreement was premised on the Appellate Body reversing the Panel's findings under Article III:4 of the GATT 1994. The Appellate Body, however, recalled that for the reasons stated above, it had upheld the Panel's findings that certain aspects of the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994. Consequently, the Appellate Body upheld the Panel's findings that those aspects of the INOVAR-AUTO programme found to be inconsistent with Article III:4 of the GATT 1994 are also inconsistent with Article 2.1 of the TRIMs Agreement.

3.5.2 Article III:8(b) of the GATT 1994

On appeal, Brazil claimed that the Panel erred in its interpretation of Article III:8(b) in finding that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994." As a result of its erroneous interpretation, Brazil claimed that the Panel also erred in its application of Article III:8(b) in finding that: (i) the ICT programmes are inconsistent with Article III:2, first sentence, and Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement; and (ii) the accreditation requirements under the INOVAR-AUTO programme are inconsistent with Article III:4 of the GATT 1994 and Article 2.1 of the TRIMs Agreement.

Beginning with the legal standard under Article III:8(b), the Appellate Body noted the similarities between the opening clause of Article III:8(b) and the *chapeau* of Article XX, on the one hand, and the differently worded opening clauses of Article III:8(a) and (b), on the other hand. According to the Appellate Body, while Article III:8(a) *precludes* the application of the national treatment obligation in Article III to government procurement activities falling within its scope, Article III:8(b) provides a *justification* for measures that would otherwise be inconsistent with the national treatment obligation in Article III. Turning to the term "payment of subsidies" used in Article III:8(b), the Appellate Body considered that the interpretative issue at hand related not to the definition of "subsidies" under the GATT 1994 generally or under the SCM Agreement, but instead on the precise scope of the term "payment of subsidies" as used in Article III:8(b), in particular. Having examined the text and context of Article III:8(b), as supported by its negotiating history, the Appellate Body concluded that "payment of subsidies" in Article III:8(b) does not include within its scope the exemption or reduction of internal taxes applied, directly or indirectly, on domestic products. Instead, the Appellate Body recalled its finding in *Canada – Periodicals* that Article III:8(b) "was intended to exempt from the obligations of Article III only the payment of subsidies which involves the expenditure of revenue by a government". In reaching this conclusion, the Appellate Body placed particular emphasis on the examples of "payment of subsidies" set out in Article III:8(b) as well as the context provided by Article III:2. With respect to the latter, the Appellate Body observed that, if the scope of "payment of subsidies" is seen as encompassing an exemption or reduction of internal product taxes that are "otherwise due", it would allow WTO Members to circumvent Article III:2 and adopt discriminatory tax measures by disguising them in the form of a scheme of exemption or reduction of internal product taxes for domestic producers alone.

Regarding the phrase "exclusively to domestic producers" in Article III:8(b), the Appellate Body observed that, to the extent that the payment of subsidies exclusively to domestic producers of a given product affects the conditions of competition between such a product and the like imported product, resulting in an inconsistency with the national treatment obligation in Article III, such a payment would be justified under the exception contained in Article III:8(b), provided that the conditions thereunder are met. Moreover, according to the Appellate Body, insofar as Article III:8(b) justifies the payment by WTO Members of subsidies exclusively to domestic producers, conditions for eligibility that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets would be justified under Article III:8(b). By contrast, a requirement to use domestic over imported goods in order to have access to the subsidy may, however, not be covered by the exception in Article III:8(b) and would therefore continue to be subject to the national treatment obligation in Article III. Finally, with respect to the term "domestic producers" in Article III:8(b), the Appellate Body stated that the focus of inquiry ought to be on whether the domestic entity at issue is a *producer* of the product with respect to which a violation of the national treatment obligation arising from the "payment of subsidies" is alleged.

Turning to Brazil's claims of error on appeal, the Appellate Body agreed with the Panel's preliminary observations that discrimination resulting from the payment of subsidies exclusively to domestic producers and the market effects thereof may be justified under Article III:8(b). It, however, expressed several concerns about the Panel's subsequent analysis leading to the conclusion that "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)." In particular, the Appellate Body noted the Panel's unqualified reference to "aspects of a subsidy", as well as its use of the term "including", when referring to domestic content requirements in the above statement. According to the Appellate Body, the Panel's interpretation, taken to its logical conclusion, denies effect to the exception contained in Article III:8(b), because, following the Panel's logic, in order to justify discrimination inconsistent with the national treatment obligations in Article III pursuant to Article III:8(b), the "payment of subsidies exclusively to domestic producers" must not be discriminatory in the first place. The Appellate Body thus considered that the Panel's conclusion embodies a circular logic inasmuch as it delimits the scope of Article III:8(b) – an exception to the national treatment obligation for certain specific types of subsidies – on the basis of the discriminatory effects of the subsidies themselves. The Appellate Body clarified that, although the Panel correctly noted that discrimination resulting from requirements to use domestic over imported goods, as prohibited under Article 3.1(b) of the SCM Agreement, is not justified under Article III:8(b), the Panel's unqualified reference to "aspects of a subsidy resulting in product discrimination" not being exempted under Article III:8(b) is overly broad and deprives that provision of any effect because, as acknowledged by the Panel, the very act of subsidization will, in and of itself, often result in product discrimination. For these reasons, the Appellate Body reversed the Panel's overly broad and unqualified findings that "subsidies that are provided exclusively to domestic producers pursuant to Article III:8(b) of the GATT 1994 are not *per se* exempted from the disciplines of Article III of the GATT 1994" and that "aspects of a subsidy resulting in product discrimination (including requirements to use domestic goods, as prohibited by Article 3.1 of the SCM Agreement) are not exempted from the disciplines of Article III pursuant to Article III:8(b)".

Having reversed the Panel's findings under Article III:8(b), the Appellate Body addressed Brazil's argument that the term "subsidies" in Article III:8(b) encompasses all types of subsidies listed in Article 1.1 of the SCM Agreement. Recalling its discussion of the legal standard under Article III:8(b), the Appellate Body found that Article III:8(b) does not include within its scope the exemption or reduction of internal taxes affecting the conditions of competition between like products. Thus, for the Appellate Body, none of the measures at issue in this dispute is capable of being justified under that provision because they all involve the exemption or reduction of internal taxes affecting the conditions of competition between like products and therefore cannot constitute the "payment of subsidies" within the meaning of Article III:8(b).

One member of the Division disagreed with the majority's interpretation of the term "payment of subsidies" in Article III:8(b). In a separate opinion, that Division member noted that there are explicit textual linkages between the definition of a subsidy set out in Article 1 of the SCM Agreement and Article XVI of the GATT 1994 dealing with subsidies. Noting that the relevant provisions of the GATT 1994 and the SCM Agreement together define and reflect the whole package of rights and obligations of WTO Members with respect to subsidies, the member saw no reason why the term "subsidies" under the GATT 1994, including in Article III:8(b), should have a different meaning than the definition of a subsidy set out in Article 1.1 of the SCM Agreement. As to the use of the term "payment" in Article III:8(b), the member was of the view that "payments" involving the expenditure of revenue by a government may take various forms and are not necessarily limited to direct monetary transfers. Recalling the Appellate Body Report in *Canada – Dairy*, the member noted that the foregoing of revenue, such as through a reduction, exemption, or suspension of taxes "otherwise due", incurs a charge on the public account and therefore involves the expenditure of revenue by a government. The member was of the view that the restrictive interpretation of "payment of subsidies" as excluding "revenue foregone" arrived at by the majority denies effect to the key legal terms of the SCM Agreement. In this regard, the member noted that the focus on the trade effects of subsidization, including through revenue foregone, which pervades the SCM Agreement disciplines concerning the use of "actionable" subsidies is absent in the context of Article III:2 of the GATT 1994. For this reason, the member observed that the interpretation of "payment of subsidies" as excluding revenue foregone would undermine, inconsistently with Article 3.2 of the DSU as well as the fundamental principle of effectiveness in treaty interpretation, the careful balance of rights and obligations under the SCM Agreement with respect to an entire category of measures that are expressly included within the definition of a subsidy in Article 1.1, namely, the foregoing of government revenue that is otherwise due. Insofar as they constitute the "payment of subsidies exclusively to domestic producers", the member thus concluded that the measures at issue in these disputes, as well as any conditions for eligibility for the payment of subsidies that define the class of eligible "domestic producers" by reference to their activities in the subsidized products' markets, would be justified under Article III:8(b).

3.5.3 Article 3.1(a) of the SCM Agreement

On appeal, Brazil claimed that the Panel erred in finding that the tax suspensions granted under the PEC programme and the RECAP programme are subsidies within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement and are contingent upon export performance under Article 3.1(a) of the SCM Agreement. According to Brazil, the Panel erred in the application of Article 1.1(a)(1)(ii) of the SCM Agreement by failing to use the tax treatment of companies that are structural tax accumulators as the benchmark treatment. Brazil argued, in particular, that "[i]nstead of examining the principles and structure of Brazil's taxation regime and identifying what constitutes 'comparably situated taxpayers', the Panel erroneously focused on identifying a 'general rule of taxation' and its potential exemptions." In the event that the Appellate Body were to conclude that the Panel did not err in its identification of the relevant benchmark treatment, Brazil submitted three alternative claims of error. Brazil argued that the Panel: (i) erred in its comparison of the selected benchmark treatment with the challenged treatment under the PEC and RECAP programmes; (ii) erred in finding that the possible cash availability and implicit interest income constitute "government revenue that is otherwise due"; and (iii) failed to make an objective assessment of the matter before it pursuant to Article 11 of the DSU by disregarding certain evidence submitted by Brazil.

The Appellate Body started by addressing Brazil's claim that the Panel erred in determining the benchmark for comparison. The Appellate Body recalled that, before the Panel, as well as on appeal, Brazil argued that the appropriate benchmark for comparison with the tax suspensions and exemptions under the PEC and RECAP programmes is the treatment granted to companies that tend to structurally accumulate credits. In its analysis of the benchmark treatment with respect to the IPI tax suspensions, "[t]he Panel agree[d] with Brazil that there are other companies, in addition to the companies accredited or registered as predominantly exporting companies, which are entitled to the IPI tax suspension on the purchase of raw materials, intermediate goods and packaging materials." Specifically, the Panel noted that, pursuant

to Article 29 of Law 10,637/2002, the tax suspension also applies to: (i) establishments dedicated primarily to the manufacture of products classified in chapters 2, 3, 4, 7, 8, 9, 10, 11, 12, 15, 16, 17, 18, 19, 20, 23, 28, 29, 30, 31, and 64 (21 chapters in total) of the Industrial Goods Tax Classification Table, as well as under codes 2209.00.00 and 2501.00.00, and at positions 21.01 to 21.05.00 of the Industrial Goods Tax Classification Table; (ii) industrial establishments that primarily manufacture components, chassis, bodies, parts, and pieces of automotive products; (iii) industrial establishments that primarily manufacture parts and pieces intended for the aerospace industry; and (iv) industrial establishments that primarily manufacture the goods benefiting from the Informatics programme. Moreover, the Panel observed that "[t]he suspension also applies to companies qualified under the Special Regime for the Brazilian Aerospace Industry [(RETAERO)] and the Special Regime to Incentive Computers for Educational Use (REIMCOMP)."

The Appellate Body further recalled that the Panel, however, considered that the selection of companies entitled to the tax suspensions "d[id] not seem to be directly linked to the problem of credit-accumulation, so as to create a general rule for structurally or predominantly credit accumulating companies". In the Panel's view, the evidence on the record did not demonstrate that companies to which the suspension applied were structural credit accumulators. The Panel observed that, on the one hand, there are producers of low-taxed products, which are more likely to accumulate tax credits, that are not entitled to tax suspensions and, on the other hand, producers of higher taxed products, which are less likely to do so, that were entitled to the suspensions. The Panel was not convinced that the availability of suspensions for other companies, in addition to the predominantly exporting companies, was sufficient to prove the existence of a general rule for structurally or predominantly credit-accumulating companies. The Panel thus found that Brazil has not demonstrated that the tax suspensions were the benchmark treatment for structurally credit-accumulating companies and, instead, defined the benchmark as "the treatment applicable to purchases by non-accredited companies of raw materials, intermediate goods and packaging materials used in the manufacture of their products".

The Appellate Body recalled that a panel examining a claim under Article 1.1(a)(1)(ii) of the SCM Agreement must: (i) identify the tax treatment that applies to the income of the alleged subsidy recipients; (ii) identify a benchmark for comparison; and (iii) compare the challenged tax treatment and the reasons for it with the benchmark tax treatment. The Appellate Body expressed reservations about a panel seeking to identify a general rule and exception relationship in determining the existence of a revenue otherwise due that is foregone or not collected under Article 1.1(a)(1)(ii). The Appellate Body explained that, given the variety and complexity of domestic tax systems, it will usually be very difficult to isolate a general rule of taxation and exceptions to that general rule, and that an examination under Article 1.1(a)(1)(ii) "must be sufficiently flexible to adjust to the complexities of a Member's domestic rules of taxation". In seeking to identify a general rule and an exception, a panel might artificially create a rule and an exception where no such distinction exists. The Appellate Body observed that the determination of a benchmark for comparison entails, instead, identifying the tax treatment of comparable income of comparably situated taxpayers. This exercise involves an examination of the structure of the domestic tax regime and its organizing principles and requires the panel to develop an understanding of the tax structure and principles that best explains that Member's tax regime.

The Appellate Body noted that, in its analysis, the Panel sought to determine the existence of a "general rule" for companies that structurally accumulate credits. The Panel considered that such a general rule would exist if the tax suspensions were to apply to all the actual or potential credit accumulators and were not to apply to companies that do not or are unlikely to accumulate credits. The Panel rejected the tax suspensions as the benchmark treatment because it considered that some companies to which the tax suspensions applied were not actual or potential credit accumulators, and because some companies to which the suspensions did not apply were accumulating credits. As a result, the Panel could not establish the existence of a "general rule" of taxation.

The Appellate Body took the view, however, that, instead of seeking to determine the existence of a general rule whereby the tax suspensions would only apply to companies structurally accumulating credits, the Panel should have determined the tax treatment of comparably situated taxpayers. The Appellate Body noted that companies that are entitled, or potentially entitled, to the suspension of taxes fall into many categories, each covering a broad number of entities. In the Appellate Body's view, the Panel should have considered in detail the treatment of these categories of companies to determine whether they are comparably situated to the predominantly exporting companies rather than seeking to identify the existence of a general rule of taxation for structurally credit-accumulating companies.

The Appellate Body thus reversed the Panel's findings that Brazil has not demonstrated that the tax suspensions are the benchmark for comparison and that the appropriate benchmark is, instead, the treatment applicable to purchases by non-accredited companies of the relevant products. As a result, the Appellate Body also reversed the Panel's findings that the tax suspensions granted to registered or accredited companies under the PEC and RECAP programmes constitute financial contributions in the form of government revenue otherwise due that is foregone or not collected and are hence subsidies within the meaning of Article 1.1 of the SCM Agreement that are contingent upon export performance under Article 3.1(a) of the SCM Agreement. Having done so, the Appellate Body did not need to further address Brazil's alternative claims concerning the application of Article 1.1(a)(1)(ii) of the SCM Agreement and the Panel's assessment of evidence under Article 11 of the DSU. The Appellate Body could not complete the analysis to find whether the tax suspensions granted under the PEC and RECAP programmes constitute subsidies under Article 1.1 of the SCM Agreement.

3.5.4 Article 3.1(b) of the SCM Agreement

3.5.4.1 Article 1.1(a)(1)(ii) of the SCM Agreement

On appeal, Brazil claimed that the Panel erred in finding that the tax treatment of intermediate products and inputs under the ICT programmes constitutes a subsidy under Article 1.1 of the SCM Agreement. Brazil contended that the Panel erred in finding that the "implicit interest income" with respect to intermediate products and inputs constitutes government revenue otherwise due that is foregone under Article 1.1(a)(1)(ii) of the SCM Agreement for two reasons. First, Brazil claimed that the Panel failed to compare the treatment accorded to the group of taxpayers in the benchmark treatment with the group of taxpayers under the challenged treatment. Second, Brazil contended that the Panel erroneously found that the implicit interest income that Brazil purportedly foregoes in respect of intermediate products and inputs under the ICT programmes constitutes government revenue that is otherwise due under Article 1.1(a)(1)(ii) of the SCM Agreement. At the oral hearing, Brazil stated that it also took issue with the Panel's determination of the benchmark treatment for the comparison with the challenged treatment of intermediate products and inputs.

With respect to Brazil's claim, raised at the oral hearing, that the Panel erred in determining the benchmark for comparison, the Appellate Body first recalled that, in accordance with Rule 20(2)(d) of the Working Procedures, the Notice of Appeal "shall include" a brief statement of the nature of the appeal, comprising: (i) "identification of the alleged errors in the issues of law covered in the panel report and legal interpretations developed by the panel"; (ii) "a list of the legal provision(s) of the covered agreements that the panel is alleged to have erred in interpreting or applying"; and (iii) "an indicative list of the paragraphs of the panel report containing the alleged errors". The Appellate Body also noted that, if a particular claim of error is not raised by the appellant in the Notice of Appeal, then that claim is not properly within the scope of the appeal, and the Appellate Body will not make findings thereon.

Having examined Brazil's Notice of Appeal, the Appellate Body noted that Brazil framed its claim under Article 1.1(a)(1)(ii) of the SCM Agreement in broad terms. However, the Appellate Body also observed that that the indicative list of paragraphs in the Panel Reports containing the alleged errors provided by Brazil

did not refer to paragraphs in which the Panel addressed the benchmark determination. Moreover, the Appellate Body observed that, in its appellant's submission, Brazil stated, in several instances, that it agreed with the Panel's determination of the benchmark treatment.

The Appellate Body thus concluded that Brazil's Notice of Appeal, read together with Brazil's appellant's submission, demonstrated that, until the oral hearing, Brazil did not raise a claim regarding the Panel's benchmark determination as it related to its findings under Article 3.1(b) of the SCM Agreement. The Appellate Body considered that Brazil's claim that the Panel erred in its determination of the benchmark in the context of its analysis under the ICT programmes was not properly raised before it and hence was not within the scope of the appeal.

The Appellate Body then turned to Brazil's claim that the Panel erred in its comparison of the treatment of intermediate goods and inputs under the ICT programmes with the benchmark treatment by arbitrarily distinguishing between taxpayers situated within the benchmark. In this respect, Brazil argued that the Panel "dismissed as a mere 'best case scenario' the treatment" applicable to the companies offsetting the entire amount of taxes paid during the same taxation period and opted to compare the challenged treatment to a small group of taxpayers within the benchmark, i.e. those that are unable to offset the full amount of tax credits during the same taxation period.

The Appellate Body disagreed with Brazil's characterization of the Panel's approach to comparing the challenged treatment to the selected benchmark treatment. The Appellate Body considered that the Panel did not treat only one subset of taxpayers (i.e. those that are unable to offset the amount of the tax paid during the same taxation period) as the benchmark for the purposes of comparison. Rather, having explained in detail how the mechanism of credits and debits under the principle of non-accumulation works, the Panel concluded that, under the normal rule of general application of Brazil's tax system, there are two possible factual scenarios: one in which the buyer of non-incentivized products will be able to offset the amount of the tax paid during the same taxation period, and the other one when this would not be possible. The Panel then reached a conclusion as to whether the Brazilian Government overall foregoes revenue otherwise due based on both scenarios. The Appellate Body concluded that, in comparing the challenged tax treatment to the benchmark treatment, the Panel correctly examined both possible factual scenarios that result from the application of the normal rules of Brazil's tax system.

The Appellate Body next turned to examine Brazil's claim that the Panel erred in finding that the cash availability and implicit interest on unused credits that the Brazilian Government earns in the situations when tax credits were not offset within the same taxation period constitute government revenue otherwise due that is foregone or not collected under Article 1.1(a)(1)(ii) of the SCM Agreement.

The Appellate Body observed that, in the present dispute, when the tax exemptions and reductions apply, the Brazilian Government does not collect in full the tax revenue when it normally would, or collects it in part. The fact that, ultimately, the amount of the tax collected under the benchmark treatment and the challenged treatment may nominally be the same does not detract from the fact that, under the benchmark treatment, in the scenario when non-accredited companies are unable to offset their credits immediately, the Brazilian Government would collect and retain, for a certain period, the amount of tax payable to it. During this period of time, the Brazilian Government can enjoy the cash available to it and earn interest on it. By contrast, when tax exemptions and reductions are applied, the Brazilian Government collects the tax later in time and does not enjoy the availability of cash as it otherwise would under the benchmark treatment. Thus, under the challenged treatment, the Brazilian Government would not collect the tax at the time it normally would under the benchmark treatment. The Appellate Body considered that, by doing so, the Brazilian Government would not collect the revenue that would be otherwise due to it within the meaning of Article 1.1(a)(1)(ii) of the SCM Agreement.

In light of the above, the Appellate Body did not consider that the Panel erred in finding that the tax treatment of intermediate products and inputs under the ICT programmes constitutes a subsidy under Article 1.1 of the SCM Agreement. The Appellate Body thus upheld the Panel's findings that each of the challenged tax exemptions, reductions, and suspensions granted to accredited companies on (i) the sales of intermediate goods that they produce, and (ii) the purchases of raw materials, intermediate goods, and packaging materials (under the Informatics programme) and inputs, capital goods, and computational goods (under the PADIS and PATVD programmes) constitutes financial contributions where "government revenue that is otherwise due is foregone or not collected" under Article 1.1(a)(1)(ii) of the SCM Agreement.

3.5.4.2 Article 3.1(b) the SCM Agreement – import substitution

The Appellate Body then turned to consider Brazil's claim on appeal that the Panel erred in finding that the PPBs and other production-step requirements under the four ICT programmes (Informatics, PADIS, PATVD, and Digital Inclusion programmes) are contingent upon the use of domestic goods, inconsistently with Article III:4 of the GATT 1994, and that they also constitute a contingency on the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement. The PPBs were defined by the Panel as the minimum set of operations performed at a manufacturing facility that characterizes the actual industrialization of a given product.

Before turning to its analysis, the Appellate Body observed that the Panel addressed the question whether the ICT programmes contain a requirement to use domestic goods in the section of the Panel Reports addressing the complainants' claims under Article III:4 and subsequently referred to this analysis in its examination under Article 3.1(b). The Appellate Body considered that the legal standard under Article 3.1(b) of the SCM Agreement is not the same as that under Article III:4 of the GATT 1994. While establishing that a measure provides an incentive to producers to use domestic goods would be sufficient to find an inconsistency with Article III:4 of the GATT 1994, it would not suffice to also find that the same measure is contingent upon the use of domestic over imported goods under Article 3.1(b) of the SCM Agreement. The Appellate Body stated that, in its assessment, it would focus on whether the Panel was correct in finding that the PPBs and other production-step requirements of the four ICT programmes establish a requirement to use domestic over imported goods in the sense of Article 3.1(b) of the SCM Agreement. The Appellate Body considered that, to the extent that they do, this would also be inconsistent with Article III:4 of the GATT 1994. If, however, the Appellate Body were to establish that the Panel made a finding of inconsistency under Article 3.1(b) merely because it considered that the relevant measures provide an incentive to use domestic over imported goods, this would not be consistent with the legal standard under Article 3.1(b) of the SCM Agreement.

The Appellate Body also noted that, while the Panel did not expressly indicate whether it conducted a *de jure* or a *de facto* analysis of inconsistency with Article 3.1(b) of the SCM Agreement, it understood the Panel to have made a *de jure* finding of inconsistency. The Appellate Body recalled that, in order to find a *de jure* inconsistency with Article 3.1(b), a condition requiring the use of domestic over imported goods must be discerned from the terms of the measure itself, or by necessary implication therefrom.

3.5.4.2.1 Informatics programme

The Appellate Body then examined Brazil's claims of error concerning the Panel's findings under the Informatics programme. The Appellate Body recalled that, in its analysis in the context of the Informatics programme, the Panel separately addressed the case of the "main" PPBs that contain nested PPBs and the case of basic production-step requirements for all PPBs. The Panel started its analysis by examining the "nested" PPBs, i.e. those PPBs that contain an additional PPB within a main PPB. As the Panel observed, "the main PPBs that contain nested PPBs require that at least some minimum proportion of the components

and subassemblies of the type covered by the nested PPBs must have been produced in accordance with those nested PPBs." The Appellate Body understood the Panel to have seen "nested" PPBs as an explicit manifestation of the requirement to use domestic goods over imported products.

As an example of nested PPB, the Appellate Body referred to Article 2 of the PPB for Speed Alarms, Tracking and Control, which requires that "90% of the total number of Global System for Mobile Communications (GSM) communication modules used in the production of PRODUCTS FOR SPEED ALARMS, TRACKING AND CONTROL … shall be produced in accordance with their respective [PPB]." The Appellate Body explained that the PPB for GSM communication modules is "nested" into the main PPB for Speed Alarms, Tracking and Control. The Appellate Body considered that the main PPB mandates that 90% of the GSM communication modules used in the production of products for speed alarms, tracking and control be produced in accordance with their own (nested) PPB. The Appellate Body recalled that, pursuant to the Panel's findings that were not contested on appeal, goods produced in accordance with PPBs are Brazilian domestic goods. The GSM communication modules manufactured in line with their respective PPBs will thus be Brazilian domestic products. In the Appellate Body's view, it followed that 90% of the GSM communication modules used in the production of products for speed alarms, tracking and control "shall be" Brazilian domestic goods. Thus, the Appellate Body considered that, by requiring that 90% of the GSM communication modules used in the production of products for speed alarms, tracking, and control be produced in accordance with their respective PPBs, the PPB effectively requires that 90% of GSM communication modules used in the production of speed alarms, tracking, and control be of domestic origin.

The Appellate Body concluded that the nested PPBs within the main PPBs, by their very words, or at least by necessary implication therefrom, require that a certain percentage of inputs used in the production steps performed in accordance with the main PPB be sourced domestically. Thus, the use of domestic components and subassemblies, for which there is a nested PPB, in the production of the products covered by the main PPB will not be merely incidental. Rather, it is a condition that must be fulfilled in order for the relevant product to benefit from the tax incentives under the ICT programmes. On this basis, the Appellate Body found that the main PPBs, which incorporate a nested PPB, contain a condition requiring the use of domestic over imported goods in the sense of Article 3.1(b) of the SCM Agreement that stems from the very text of the nested PPBs, or at least by necessary implication therefrom. The Appellate Body also found that, as a consequence of that condition, the nested PPBs also provide less favourable treatment to imported goods than to like domestic products within the meaning of Article III:4 of the GATT 1994. The Appellate Body thus upheld the Panel's findings that the main PPBs that incorporate nested PPBs under the Informatics programme are inconsistent with Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994.

The Appellate Body next considered the main PPBs that do not contain nested PPBs. The Appellate Body recalled the Panel's finding that the possibility to outsource the production of components and subassemblies in Brazil under the PPBs "g[ave] rise to a requirement to use domestic goods" under Article 3.1(b). The Appellate Body, however, disagreed with the Panel that the mere possibility of outsourcing under PPBs of production steps to be performed by a third party in Brazil, in and of itself, gives rise to a requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement. Instead, the Panel should have explored, when establishing whether there was *de jure* inconsistency with Article 3.1(b), how the text of the PPBs gives rise to a requirement to use domestic over imported goods or how such a requirement can be derived from the text of the PPBs by necessary implication.

The Appellate Body was of the view that the PPBs set out a number of sequential production steps, starting from manufacturing of components and subassemblies and ending with the final assembly and testing of the product. The Appellate Body considered that the structure of the PPBs suggests that the subsidy recipients will likely "use" in a subsequent production step the domestic components and subassemblies that were manufactured in a previous production step. However, the Appellate Body observed that, while

such use of domestic goods may be a likely consequence of the eligibility requirements for the tax incentives under the Informatics programme, this does not, in and of itself, indicate the existence of a condition requiring the use of domestic over imported products under Article 3.1(b) of the SCM Agreement.

The Appellate Body further noted that, given that compliance with the PPBs is mandatory in order for a company to qualify for the tax incentives and that, in complying with the PPBs, the producers of an incentivized product will be likely to use domestic components and subassemblies, the main PPBs without nested PPBs provide an incentive to use domestic over imported goods. By doing so, in the Appellate Body's view, the main PPBs in the Informatics programme accord treatment less favourable to imported goods than that accorded to like domestic goods inconsistently with Article III:4 of the GATT 1994.

In light of the above, the Appellate Body reversed the Panel's findings that the main PPBs without nested PPBs under the Informatics programme are contingent upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement. However, the Appellate Body upheld the Panel's findings that the main PPBs that do not incorporate nested PPBs under the Informatics programme are inconsistent with Article III:4 of the GATT 1994.

3.5.4.2.2 PATVD, PADIS, and Digital Inclusion programmes

With respect to the PATVD programme, the Appellate Body observed that the PPBs under this programme follow the same structure and logic as those under the Informatics programme. The Appellate Body recalled that it had agreed with the Panel's conclusion that the main PPBs that incorporate nested PPBs contain "explicit requirements to use domestic goods", i.e. the components and subassemblies covered by the nested PPBs, under Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994. For the same reasons, to the extent the PPBs under the PATVD programme incorporate nested PPBs, the Appellate Body considered them to require *de jure* the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT 1994. With respect to the main PPBs that do not incorporate nested PPBs, however, the Appellate Body recalled that it had reversed the Panel's finding that they reflect a condition requiring the use of domestic over imported goods under Article 3.1(b). The Appellate Body thus upheld the Panel's findings of inconsistency under Article 3.1(b) of the SCM Agreement concerning the PATVD programme to the extent they relate to the main PPBs that contain nested PPBs, and reversed the Panel's findings to the extent they relate to the main PPBs that do not contain nested PPBs.

With respect to the PADIS programme, the Appellate Body observed that in contrast to some PPBs that require incorporation of components and subassemblies produced in accordance with the PPBs in the ensuing stage of production, this programme does not reflect such a requirement. The Appellate Body noted that it is possible that, in the scenario when a company seeking accreditation complies with all or several requirements under the PADIS programme, it would use the inputs produced in accordance with the PADIS programme in the ensuing stage of production. However, in the Appellate Body's view, this would be a result of the eligibility requirements under the PADIS programme rather than a condition requiring the use of domestic over imported goods. The Appellate Body thus reversed the Panel's findings that the PADIS programme requires the use of domestic over imported goods inconsistently with Article 3.1(b) of the SCM Agreement.

With respect to the Digital Inclusion programme, the Appellate Body recalled that this programme provides for zero rates with respect to PIS/PASEP and COFINS contributions for companies that sell in Brazil at retail level certain digital consumer goods produced in accordance with the relevant PPBs. The Appellate Body also recalled that the Panel made findings of inconsistency with Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT because it considered that the Digital Inclusion programme presented "a straightforward situation of incentives that are provided in respect of a preference (in this case by retailers) for domestic over imported goods". The Appellate Body agreed with the Panel that such an incentive results in the less favourable treatment under Article III:4 of the GATT 1994 for like imported digital consumer

products. However, it did not consider that the Panel had a proper basis to conclude that the Digital Inclusion programme contains a requirement to use domestic over imported goods under Article 3.1(b) of the SCM Agreement and reversed the Panel's findings of inconsistency under that provision.

The Appellate Body, however, agreed with the Panel that the PPBs and other production-step requirements under the PATVD, PADIS, and Digital Inclusion programmes provide an incentive to use domestic ICT products and upheld the Panel's findings that these programmes accord less favourable treatment to imported ICT products than that accorded to like domestic products, inconsistently with Article III:4 of the GATT 1994.

3.5.4.2.3 INOVAR-AUTO programme

On appeal, Brazil requested that, "[t]o the extent that the Panel's findings are based on the erroneous assumption that production step requirements are sufficient to establish a contingency upon the use of domestic over imported goods within the meaning of Article 3.1(b) of the SCM Agreement", that the Appellate Body reverses the Panel's findings that certain aspects of the INOVAR-AUTO programme constitute a prohibited import substitution subsidy under Articles 3.1(b) and 3.2 of the SCM Agreement.

The Appellate Body remarked that, in its reasoning concerning the accreditation requirement to perform a minimum number of manufacturing steps in Brazil, the Panel relied on its previous analysis with respect to the PPBs and other production-step requirements under the ICT programmes. The Appellate Body further observed that the requirement to perform a minimum number of manufacturing steps in Brazil operates in a way similar to the main PPBs that do not incorporate nested PPBs under the ICT programmes.

Therefore, having reversed the Panel's findings with respect to the main PPBs that do not incorporate nested PPBs under the ICT programmes, the Appellate Body also reversed the Panel's findings of inconsistency with Article 3.1(b) with respect to the requirement to perform a minimum number of manufacturing steps under the INOVAR-AUTO programme.

3.5.4.2.4 European Union's and Japan's appeal concerning the in-house scenario

On appeal, the European Union and Japan submitted a series of alternative claims the essence of which was that the Panel erred by not making findings on the in-house scenario because the complainants had challenged the production-step requirements of the ICT and INOVAR-AUTO programmes "as a whole", without distinguishing between the in-house and outsourcing scenarios. The European Union and Japan requested that the Appellate Body reverse the relevant Panel findings and complete the legal analysis to find that the production-step requirements in the ICT and INOVAR-AUTO programmes are inconsistent with Article III:4 of the GATT 1994, Article 2.1 of the TRIMs Agreement, and Article 3.1(b) of the SCM Agreement under both the in-house and outsourcing scenarios.

The Appellate Body understood that, at the heart of the European Union's and Japan's appeal was the concern that, due to an alleged lack of clarity in the Panel's findings concerning the in-house scenario, the implementation of the Panel's recommendations and rulings in this dispute may be compromised and certain issues may be left unresolved. The Appellate Body started its analysis by examining whether the Panel's findings cover the in-house scenario.

Having examined the relevant Panel's analysis and findings, the Appellate Body concluded that aspects of the Panel's reasoning and conclusions appeared to refer to the outsourcing scenario, while excluding the in-house scenario. Other aspects of the Panel's analysis, including the overall conclusions and recommendations, could be understood as covering measures as a whole and thus extending to the in-house scenario. The Appellate Body shared the concern of the European Union and Japan that the lack of

clarity with respect to the scope of the Panel's findings may compromise the effective implementation of the recommendations and rulings in this dispute. This would not contribute to achieving a positive solution to this dispute, as required under Article 3.7 of the DSU.

The Appellate Body recalled that the participants agreed that the Panel's finding of inconsistency with respect to the PPBs and other production-step requirements under the ICT programmes was of a *de jure* nature. The Appellate Body further recalled that the legal standard under Article 3.1(b) of the SCM Agreement and Article III:4 of the GATT is not the same. While an inquiry under Article 3.1(b) of the SCM Agreement focuses on whether there is a condition requiring the use of domestic over imported goods, an incentive to use domestic goods is sufficient to find an inconsistency with Article III:4 of the GATT 1994.

The Appellate Body considered that it did not matter, for purposes of the Panel's analysis, what factual scenarios were available for compliance with the requirements under the ICT and INOVAR-AUTO programmes. The Appellate Body expressed the view that the Panel's bifurcation of its analysis into the two possible factual scenarios was thus unnecessary. Moreover, the Appellate Body reiterated that, for purposes of establishing an inconsistency with Article 3.1(b) of the SCM Agreement, Article III:4 of the GATT 1994, and Article 2.1 of the TRIMs Agreement, the possible factual scenarios existing under the measure are not decisive. What matters, instead, is whether the respective legal standard has been met.

In light of the above, the Appellate Body reversed the Panel's findings, made in the context of its analysis under ICT programmes, to the extent that they could be understood as suggesting that the in-house scenario was not covered by the Panel's findings. It also reversed the Panel's findings, made in the context of INOVAR-AUTO programme and referring to the Panel's findings under the ICT programmes, to the extent that they could also be understood as suggesting that the in-house scenario was not covered by the Panel's findings. The Appellate Body considered that the relevant Panel's findings applied also in the in-house scenario.

3.5.5 Article I:1 of the GATT 1994 and the Enabling Clause

On appeal, Brazil contended that the Panel erred in finding that the claims raised by the European Union and Japan under Article I:1 of the GATT 1994 were within its terms of reference and that the differential and more favourable treatment in the form of internal tax reductions accorded to imports from Argentina, Mexico, and Uruguay under the INOVAR-AUTO programme was not justified under paragraphs 2(b) and 2(c) of the Enabling Clause.

3.5.5.1 Whether the Panel erred in finding that the claims raised by the European Union and Japan under Article I:1 of the GATT 1994 were within its terms of reference

The Panel found that a complaining party does not have the burden to invoke the Enabling Clause in its panel request, unless that complaining party is informed that the responding party considers the challenged measure to have been adopted pursuant to the Enabling Clause. In the present case, the Panel found that there was no notification made under paragraph 4(a) of the Enabling Clause to support a justification under paragraph 2(b) thereof. The Panel further found that Brazil had not demonstrated how the relevant tax reductions under the INOVAR-AUTO programme found to be inconsistent under Article I:1 of the GATT 1994 were related to the 1980 Treaty of Montevideo or the economic complementation agreements (ECAs) that were notified as having been adopted pursuant to paragraph 2(c). The Panel thus concluded that differential and more favourable treatment accorded to Argentina, Mexico, and Uruguay under the INOVAR-AUTO programme and its related justifications under the Enabling Clause (i.e. under paragraphs 2(b) and 2(c) thereof) were not notified to the WTO pursuant to paragraph 4(a) of the Enabling Clause, such that the complaining parties could be considered to have been on notice. Consequently, the Panel

found that there was no burden on the complaining parties to invoke paragraphs 2(b) and 2(c) of the Enabling Clause in their panel requests, and therefore their claims under Article I:1 of the GATT 1994 were within the Panel's terms of reference.

3.5.5.1.1 Whether the Panel erred in its interpretation of paragraph 4(a) of the Enabling Clause

On appeal, Brazil took issue with the Panel's finding that the obligation to invoke the Enabling Clause would only apply if the complaining party had been appropriately informed that the responding party considers the challenged measure to have been adopted pursuant to and justified under the Enabling Clause.

The Appellate Body first addressed the notification requirement in paragraph 4(a) of the Enabling Clause. The Appellate Body noted that paragraph 4(a) of the Enabling Clause deals with the requirement to notify any action by a Member seeking to introduce, modify, or withdraw differential and more favourable arrangements adopted pursuant to paragraphs 1 through 3 of the Enabling Clause. The use of the word "shall", according to the Appellate Body, indicated that paragraph 4(a) imposes an obligation on a Member according differential and more favourable treatment to notify the WTO of the arrangement it has adopted. The Appellate Body further observed that paragraph 4(a) provides that a Member adopting an arrangement according differential and more favourable treatment "furnish" Members "with all the information they may deem appropriate" relating to the introduction, modification, or withdrawal of the arrangements adopted. The Appellate Body considered that this requirement to furnish "all" the information suggests that a notification pursuant to paragraph 4(a) should be sufficiently detailed so as to put the Members on notice regarding any "action" taken pursuant to paragraphs 1 through 3 of the Enabling Clause. The Appellate Body thus found that a notification pursuant to paragraph 4(a) speaks to and has a direct bearing on a complaining party's knowledge and, consequently, on the question whether it is required to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request.

The Appellate Body next recalled its statement in *EC – Tariff Preferences* that it is insufficient in WTO dispute settlement for a complainant to allege inconsistency with Article I:1 of the GATT 1994 if the complainant seeks also to argue that the measure is not justified under the Enabling Clause. However, the Appellate Body considered that its statement concerning the burden on the complaining party to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request should be read in the context of the challenged measure at issue in that dispute, i.e. the tariff preference scheme, which as the Appellate Body had itself indicated, was plainly taken pursuant to the Enabling Clause.

The Appellate Body found that paragraph 4(a) of the Enabling Clause envisages a degree of specificity in the notification adopted thereunder. At a minimum, a notification pursuant to paragraph 4(a) should state under which provision of the Enabling Clause the differential and more favourable treatment has been adopted. Paragraph 4(a) indicates that arrangements or measures adopted under different subparagraphs of paragraph 2 would have to be notified to the WTO so as to put other Members on notice regarding the relevant differential and more favourable treatment sought to be accorded and justified under the Enabling Clause. The Appellate Body also found that paragraph 4(a) does not exclude the possibility that a single notification can state that the notifying Member considers an arrangement or a measure to have been adopted pursuant to one or more subparagraphs of paragraph 2 of the Enabling Clause. The Appellate Body, however, cautioned that, in the absence of any such indication in the notification issued under paragraph 4(a), it cannot be taken for granted that a complaining party is on notice of those subparagraphs of paragraph 2 that the notifying Member considers applicable. The Appellate Body concluded that a complaining party is therefore required to raise the Enabling Clause and identify the relevant provisions thereof in its panel request when a measure according differential and more favourable treatment is: (i) plainly taken pursuant to the Enabling Clause, or when it is clear from the face of the measure itself that it has been adopted pursuant to the Enabling Clause; and/or (ii) notified pursuant to paragraph 4(a) of the Enabling Clause. However, the Appellate Body cautioned that, while it is for the complaining party to raise the Enabling

Clause and identify the relevant provision(s) thereof in its panel request, the burden to prove that the measure satisfies the conditions set out in the Enabling Clause remains on the responding party relying upon the Enabling Clause as a defence.

For these reasons, the Appellate Body upheld the Panel's finding that a complaining party has to raise the Enabling Clause and identify the relevant provision(s) thereof in its panel request in situations where the complaining party is on notice that the challenged measure was adopted (and, in the view of the adopting Member, justified) under the Enabling Clause.

3.5.5.1.2 Whether the Panel erred in finding that the differential tax treatment under the INOVAR-AUTO programme was not notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(b) of the Enabling Clause

The Appellate Body began by noting that Brazil's case before the Panel rested on its contention that, since the 1980 Treaty of Montevideo and the relevant ECAs were notified to the WTO as having been adopted under paragraph 2(c), the notification requirement in paragraph 4(a) with respect to the differential tax treatment under the INOVAR-AUTO programme stood satisfied. However, the Appellate Body observed that, in its defence, Brazil contended that the differential tax treatment under the INOVAR-AUTO programme was justified not only under paragraph 2(c), but also under paragraph 2(b). The Appellate Body therefore understood, like the Panel, that Brazil contended that the differential tax treatment under the INOVAR-AUTO programme was adopted pursuant to both paragraphs 2(b) and 2(c) of the Enabling Clause and did not require additional notification, since the 1980 Treaty of Montevideo and the relevant ECAs were notified as adopted pursuant to paragraph 2(c).

The Appellate Body noted that it was undisputed that the differential tax treatment under the INOVAR-AUTO programme was not specifically notified to the WTO pursuant to paragraph 4(a) as having been adopted under paragraph 2(b). The Appellate Body recalled that the Panel considered that its task was to determine whether a notification of an arrangement adopted pursuant to paragraph 2(c) could also serve as a notification of an arrangement adopted pursuant to paragraph 2(b). The Appellate Body therefore considered that the Panel's enquiry focused on whether or not the complaining parties could be considered to have been on notice that the differential tax treatment under the INOVAR-AUTO programme was notified as having been adopted pursuant to paragraph 2(b) by virtue of the notification under paragraph 2(c). The Appellate Body found that the analysis of whether or not an arrangement or a measure alleged to be adopted under paragraph 2(b) was notified pursuant to paragraph 4(a) was necessary in determining the complaining parties' burden to raise the Enabling Clause and identify paragraph 2(b) in their panel requests.

The Appellate Body recalled that paragraph 4(a) does not exclude the possibility that a single notification can state that the notifying Member considers an arrangement or a measure to have been adopted pursuant to one or more subparagraphs of paragraph 2. However, the Appellate Body also recalled that in the absence of any such indication, it cannot be taken for granted that a complaining party is on notice that the notifying Member considers the notified arrangement or measure to have been adopted pursuant to one or more subparagraphs of paragraph 2. The Appellate Body therefore agreed with the Panel's finding that paragraph 4(a) does not permit notification of a measure adopted under one provision of the Enabling Clause to serve equally as a notification of that measure being adopted under another provision of the Enabling Clause, unless indicated in the notification itself.

Brazil contended that in the case of developing country Members, paragraphs 2(a) and 2(b) of the Enabling Clause are both contained in paragraph 2(c). Accordingly, Brazil argued that the fact that a given agreement has been notified under paragraph 2(c), as was the case in the present dispute, sufficed for the complaining parties to have been on notice that the measures at issue fell under the Enabling Clause.

The Appellate Body noted that subparagraphs (a) to (c) of paragraph 2 of the Enabling Clause provide for differential and more favourable treatment with respect to which the authorization of paragraph 1 of the Enabling Clause applies. Paragraph 2(a) provides for differential and more favourable treatment in the form of preferential tariff treatment accorded by developed country Members to products originating from developing countries. Paragraph 2(b) provides for differential and more favourable treatment concerning non-tariff measures. Unlike paragraph 2(a), which specifically speaks of "[p]referential tariff treatment accorded by developed country Members to … developing countries", paragraph 2(b) does not define either the grantor or the beneficiary of the differential and more favourable treatment. Paragraph 2(c), unlike both paragraphs 2(a) and 2(b), provides for differential and more favourable treatment concerning tariff and non-tariff measures between developing country Members pursuant to "[r]egional or global arrangements". The Appellate Body considered that, even assuming Brazil's argument to be correct, it does not necessarily follow that the notification of a measure as having been adopted under paragraph 2(c) would suffice for the purposes of paragraph 2(b) insofar as the complaining party's burden to raise and identify paragraph 2(b) of the Enabling Clause in its panel request is concerned. The Appellate Body explained that this would be the case in circumstances where, as it had explained and as the Panel also noted, it is indicated in the notification itself.

For these reasons, the Appellate Body upheld the Panel's findings that Brazil has not demonstrated that the differential tax treatment under the INOVAR-AUTO programme was notified to the WTO as adopted pursuant to paragraph 2(b), and therefore, in the circumstances of this case, the complaining parties were not required to raise and identify paragraph 2(b) of the Enabling Clause in their panel requests.

3.5.5.1.3 Whether the Panel erred in finding that the differential tax treatment under the INOVAR-AUTO programme was not notified pursuant to paragraph 4(a) as having been adopted under paragraph 2(c) of the Enabling Clause

The Appellate Body observed that the differential tax treatment under the INOVAR-AUTO programme was not specifically notified to the WTO pursuant to paragraph 4(a) of the Enabling Clause as having been adopted under paragraph 2(c) thereof. Rather, the Appellate Body noted that, before the Panel, Brazil contended that the complainants were sufficiently on notice that the challenged measure was adopted and justified under the Enabling Clause because the 1980 Treaty of Montevideo was notified to the WTO under paragraph 2(c) of the Enabling Clause. Brazil further submitted that the differential and more favourable treatment granted to Argentina, Mexico, and Uruguay (in the form of internal tax reductions) is based on ECAs that were negotiated under the auspices of the 1980 Treaty of Montevideo and that in turn were also notified to the WTO and that the differential tax treatment at issue under the INOVAR-AUTO programme was a corollary of these ECAs, and thus did not require additional notification. The Appellate Body considered that in order to determine that the complaining parties could be considered to have been on notice that the differential tax treatment under the INOVAR-AUTO programme was taken pursuant to arrangements adopted under paragraph 2(c), the Panel needed to determine whether the notification of the 1980 Treaty of Montevideo and the ECAs could substantively serve as a notification of the adoption under paragraph 2(c) of the differential tax treatment under the INOVAR-AUTO programme found to be inconsistent with Article I:1 of the GATT 1994. The Appellate Body therefore found that the Panel rightly considered the question to be whether Brazil had demonstrated that the RTA notified to the WTO put the WTO Membership on notice as to the adoption of the particular differential and more favourable treatment sought to be justified under paragraph 2(c).

The Appellate Body recalled that Decree No. 7,819/2012 is the instrument that provides for the differential tax treatment under the INOVAR-AUTO programme and Articles 21 and 22(I) thereof provide for a 30-percentage-point reduction of the IPI tax rates on certain categories of motor vehicles if: (i) under Article 21, those motor vehicles are imported into Brazil by companies accredited as "domestic manufacturers" or "investors" under the INOVAR-AUTO programme, and the motor vehicles are imported from countries that are signatories to the agreements established by Legislative Decree 350 of 21 November 1991,

Decree 4,458 of 5 November 2002, and Decree 6,500 of 2 July 2008; or (ii) under Article 22(I), those motor vehicles are imported into Brazil by any company (whether accredited or unaccredited) under the INOVAR-AUTO programme, and the motor vehicles are imported under the agreement established by Decree 6,518 of 30 July 2008 and Decree 7,658 of 23 December 2011.

Brazil argued that the 1980 Treaty of Montevideo and the ECAs have an ample scope comprising internal tax reduction measures. Brazil asserted that Article 21 of Decree 7,819/2012 makes an explicit reference to these legal instruments, and therefore the tax treatment at issue under the INOVAR-AUTO programme was a corollary of these ECAs, and thus did not require additional notification.

The Appellate Body noted that Articles 21 and 22(I) of Decree 7,819/2012 do not refer to the 1980 Treaty of Montevideo. The Appellate Body also noted that the 1980 Treaty of Montevideo does not itself specify any rules regarding internal tax reductions. The Appellate Body thus saw no reason to disagree with the Panel's finding that none of the provisions cited in the 1980 Treaty of Montevideo have any relation, in and of themselves, to the differential tax treatment under the INOVAR-AUTO programme. The Appellate Body also observed that Articles 21 and 22(I) of Decree 7,819/2012 fall under Chapter VII thereof, entitled "Tax Rates and Suspension of IPI". The Appellate Body recalled that Articles 21 and 22(I) of Decree 7,819/2012 provide for a reduction of the IPI tax rates on motor vehicles when they are imported from the countries that are signatories to the ECAs mentioned therein. However, the Appellate Body considered that the reference to the ECAs is limited to identifying the countries, imports from which benefit from the IPI tax reduction. According to the Appellate Body, the ECAs did not, in and of themselves, refer to internal taxation. The Appellate Body noted that Brazil has not identified any provisions of the ECAs that would support its contention that the differential tax treatment under the INOVAR-AUTO programme is a corollary of the ECAs. Neither did the Appellate Body find Brazil to have demonstrated that there is a rational connection between the IPI tax reduction provided under the INOVAR-AUTO programme and the referenced ECAs. To the contrary, the Appellate Body found that the referenced ECAs provide for the adoption of tariff preferences in the automotive sector and do not refer to internal taxation. Thus, the Appellate Body found that the ECAs have no genuine link to the differential tax treatment under the INOVAR-AUTO programme. Accordingly, the Appellate Body failed to see how the INOVAR-AUTO programme that accorded the differential and more favourable treatment at issue could be considered to have been notified as having been adopted under paragraph 2(c) of the Enabling Clause. The Appellate Body therefore agreed with the Panel that Brazil has not demonstrated how the tax reductions found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA that Brazil has notified to the WTO (the 1980 Treaty of Montevideo) or the ECAs allegedly implementing that RTA.

For these reasons, the Appellate Body upheld the Panel's findings that the differential and favourable treatment (i.e. the differential tax treatment in the form of internal tax reductions) under the INOVAR-AUTO programme was not notified as adopted under paragraph 2(c) of the Enabling Clause, as required pursuant to paragraph 4(a). Consequently, the Appellate Body also upheld the Panel's finding that, in the circumstances of this case, there was no burden on the complaining parties to raise and identify paragraph 2(c) of the Enabling Clause in their panel requests.

3.5.5.2 Whether the Panel erred in its interpretation of paragraph 2(b) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision

On appeal, Brazil disagreed with the Panel's finding that instruments multilaterally negotiated under the auspices of the GATT must be distinct from the provisions of the GATT 1994 incorporating the GATT 1947 because the GATT 1994 itself is an instrument that was multilaterally negotiated under the auspices of the GATT, as an institution. Brazil argued that the GATT 1994 is the covered agreement that governs internal taxation, in Article III and the Enabling Clause itself, as it was incorporated to the WTO as part of the GATT 1994, is, therefore, an instrument multilaterally negotiated under the auspices of the GATT. Brazil therefore asserted that the Panel's interpretation renders the text of paragraph 2(b) of the Enabling Clause *inutile*.

The Appellate Body recalled that paragraph 2(b) of the Enabling Clause provides that paragraph 1 of the Enabling Clause applies to "[d]ifferential and more favourable treatment with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT". The Appellate Body first analysed the scope of the phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" as it appears in paragraph 2(b). The Appellate Body found that paragraph 2(b) provides for the adoption of a limited category of differential and more favourable treatment, namely treatment that concerns "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT", as an institution. The Appellate Body considered that the text of paragraph 2(b) does not, however, support a reading of that provision as extending to the adoption of differential and more favourable treatment concerning non-tariff measures governed by "provisions of the General Agreement" itself. The Appellate Body reasoned that, had it been so, the latter part of paragraph 2(b) in referring to "provisions of instruments multilaterally negotiated under the auspices of the GATT" would be deprived of any meaning.

The Appellate Body found support from the contextual history surrounding the adoption of the Enabling Clause. The Appellate Body recalled that the Enabling Clause was adopted in 1979 during the Tokyo Round of multilateral trade negotiations, which also witnessed the conclusion of a number of plurilateral agreements governing various non-tariff measures, i.e. the Tokyo Round Codes. The Appellate Body noted that the Tokyo Round Codes were negotiated under the auspices of the GATT, as an institution. The Appellate Body observed that a number of these plurilateral agreements sought to further the objectives of and/or build upon existing provisions of the GATT 1947, and contained provisions on S&D treatment for developing countries. The reference in paragraph 2(b) to differential and more favourable treatment "with respect to the provisions of the General Agreement concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" was in relation to these plurilateral agreements that were negotiated under the auspices of the GATT, as an institution, and furthered the objectives of and/or built upon existing provisions of the GATT 1947. Moreover, the Appellate Body found that in using the phrase "*provisions* of instruments multilaterally negotiated under the auspices of the GATT", as opposed to "instruments multilaterally negotiated under the auspices of the GATT", paragraph 2(b) referred to specific provisions of these plurilateral agreements, in particular, the S&D treatment provisions, and not the entire agreements themselves. The Appellate Body found additional support from contemporaneous decisions adopted during the Tokyo Round of multilateral trade negotiations. In particular, the Appellate Body recalled the decision entitled "Action by the CONTRACTING PARTIES on the Multilateral Trade Negotiations". The Appellate Body noted that paragraph 3 of that decision stated that "[t]he CONTRACTING PARTIES also note that existing rights and benefits under the GATT of contracting parties not being parties to these Agreements, including those derived from Article I, are not affected by these Agreements." The Appellate Body observed that the GATT CONTRACTING PARTIES expressly confirmed that the benefits of the Tokyo Round plurilateral agreements were to accrue to all the contracting parties to the GATT, even those that were not parties to the plurilateral agreements, insofar as the subject matter of those agreements were covered by Article I of the GATT 1947. Therefore, absent the Enabling Clause, a Contracting Party who was not a party to a Tokyo Round plurilateral agreement could have challenged a measure taken by a party to that plurilateral agreement pursuant to a S&D treatment provision thereof as being inconsistent with Article I of the GATT 1947. The Appellate Body found that the adoption of the Enabling Clause, particularly paragraph 2(b), addressed this situation. Paragraph 2(b) provided an umbrella by excepting differential and more favourable treatment concerning non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT, i.e. differential and more favourable treatment accorded pursuant to the S&D treatment provisions of the Tokyo Round Codes, from challenge under Article I of the GATT 1947.

The Appellate Body therefore found that the phrase "non-tariff measures governed by the provisions of instruments multilaterally negotiated under the auspices of the GATT" in paragraph 2(b), at the time of the adoption of the Enabling Clause, concerned non-tariff measures taken pursuant to the S&D treatment provisions of the Tokyo Round Codes and not the provisions of the GATT 1947 itself.

The Appellate Body noted that with the entry into effect of the WTO Agreement, the Tokyo Round Codes are no longer in force. The Enabling Clause, however, stood incorporated as an integral part of the GATT 1994. The Appellate Body recalled that the Uruguay Round of multilateral trade negotiations culminated in the establishment of the WTO, and that the GATT as an institution was replaced by the WTO. Recalling that Article II:1 of the WTO Agreement expressly recognizes that "[t]he WTO shall provide the common institutional framework for the conduct of trade relations among its Members in matters related to the agreements and associated legal instruments included in the Annexes to [the WTO] Agreement", the Appellate Body considered that the Enabling Clause as an integral part of the GATT 1994 falls within the scope of Article II:1 of the WTO Agreement. The Appellate Body found that, while at the time of its adoption, paragraph 2(b) of the Enabling Clause spoke of "instruments multilaterally negotiated under the auspices of the GATT" as an institution, following the entry into force of the WTO Agreement, paragraph 2(b) refers to "instruments multilaterally negotiated under the auspices of the [WTO]" as an institution. The Appellate Body held that paragraph 2(b), following the entry into force of the WTO Agreement, thus covers a limited category of differential and more favourable treatment, namely treatment that concerns non-tariff measures governed by provisions of instruments multilaterally negotiated under the auspices of the WTO. The Appellate Body noted that the GATT 1994, while an integral part of the WTO Agreement, was not negotiated under the auspices of the WTO as an institution. According to the Appellate Body, these considerations, read in light of the text, context, and circumstances surrounding the adoption of the Enabling Clause, and thereafter the establishment of the WTO, indicated that paragraph 2(b) does not concern non-tariff measures governed by the provisions of the GATT 1994 itself. Instead, paragraph 2(b) speaks to non-tariff measures taken pursuant to S&D treatment provisions of "instruments multilaterally negotiated under the auspices of the [WTO]".

For these reasons, the Appellate Body upheld the Panel's finding that a non-tariff measure falling within the scope of paragraph 2(b) must be governed by specific provisions on special and differential treatment, that are distinct from the provisions of the GATT 1994 incorporating the GATT 1947.

Turning to the Panel's application of paragraph 2(b) of the Enabling Clause, the Appellate Body recalled its finding that paragraph 2(b) did not apply, at the time of its adoption, with respect to Articles III:2 and III:4 of the GATT 1947, and following the entry into force of the WTO Agreement, does not apply with respect to Articles III:2 and III:4 of the GATT 1994. Therefore, the Appellate Body considered that subjecting like products of different WTO Members to different internal taxes inconsistently with Article I:1 of the GATT 1994 cannot be justified under paragraph 2(b).

For these reasons, the Appellate Body upheld the Panel's finding that the internal tax reductions under the INOVAR-AUTO programme accorded to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(b) of the Enabling Clause.

3.5.5.3 Whether the Panel erred in its interpretation of paragraph 2(c) of the Enabling Clause and in finding that the differential tax treatment under the INOVAR-AUTO programme was not justified under that provision

On appeal, Brazil contended that the Panel's substantive evaluation of paragraph 2(c) is essentially indistinguishable from its evaluation of whether the notification was sufficient under paragraph 4(a). Brazil argued that the Panel rested its finding on its flawed conclusion that because the 1980 Treaty of Montevideo and the provisions of the relevant ECAs do not expressly make reference to internal taxation, they did not

have a genuine link with paragraph 2(c) and therefore WTO Members could not have been expected to be informed that Brazil intended to accord internal tax reductions to motor vehicles from Argentina, Mexico, and Uruguay.

The Appellate Body recalled that paragraph 2(c) provides that the provisions of paragraph 1 of the Enabling Clause apply to "[r]egional or global arrangements entered into amongst developing country Members for the mutual reduction or elimination of tariffs and, in accordance with criteria or conditions which may be prescribed by the [WTO Members], for the mutual reduction or elimination of non-tariff measures, on products imported from one another". The Appellate Body considered that paragraph 2(c) does not exclude the possibility that developing country Members that are parties to regional or global arrangements may adopt such instruments that they deem appropriate for the mutual reduction or elimination of tariffs and non-tariff measures. However, the Appellate Body found that it suffices that the instrument adopted that way, to be justified under paragraph 2(c) for the differential and more favourable treatment it accords, has a "genuine" link or a rational connection with the regional or global arrangement adopted and notified to the WTO. Therefore, the Appellate Body disagreed with the Panel to the extent it considered that, in order for any differential and more favourable treatment to be justified under paragraph 2(c), there must exist both a "close" and "genuine" link to a "regional arrangement entered into amongst" developing country Members.

The Appellate Body considered that the Panel did not find, as Brazil contended, that the 1980 Treaty of Montevideo and the relevant ECAs do not bear a genuine link with the requirements of paragraph 2(c). Instead, the Panel found that Brazil had not demonstrated how the relevant tax reductions under the INOVAR-AUTO programme found to be inconsistent under Article I:1 of the GATT 1994 are related to the RTA that Brazil has notified to the WTO (the Treaty of Montevideo) or the ECAs allegedly implementing that RTA. The Appellate Body recalled that it has considered the question of whether or not the differential tax treatment under the INOVAR-AUTO programme was notified pursuant to paragraph 4(a) of the Enabling Clause as having been adopted under paragraph 2(c) by virtue of the notification of the 1980 Treaty of Montevideo and the relevant ECAs under paragraph 2(c). The Appellate Body also recalled its finding that neither the 1980 Treaty of Montevideo nor the relevant ECAs refer to internal taxation. Accordingly, the Appellate Body noted that, in the absence of a genuine link between the differential tax treatment under the INOVAR-AUTO programme, on the one hand, and the 1980 Treaty of Montevideo and the relevant ECAs, on the other hand, it had agreed with the Panel's finding that Brazil had not demonstrated how the tax reductions found to be inconsistent under Article I:1 of the GATT 1994 are related to the arrangements that Brazil has notified to the WTO under paragraph 2(c) of the Enabling Clause. Therefore, to the extent that the Panel relied upon its earlier analysis concerning whether or not the INOVAR-AUTO programme had a genuine link to the arrangements notified to the WTO in determining if the differential and more favourable tax treatment thereunder was substantively justified under paragraph 2(c), the Appellate Body saw no error in the Panel's approach. The Appellate Body explained that if there is no genuine link between the measure at issue according the differential and more favourable treatment and the arrangements notified to the WTO, it is difficult to see how the measure at issue could be substantively justified under paragraph 2(c).

For these reasons, the Appellate Body upheld the Panel's finding to the extent it found that Brazil has not identified any arrangement with a genuine link to the differential tax treatment envisaged under the INOVAR-AUTO programme. Consequently, the Appellate Body upheld the Panel's finding that the internal tax reductions accorded under the INOVAR-AUTO programme to imported products from Argentina, Mexico, and Uruguay and found to be inconsistent under Article I:1 of the GATT 1994 are not justified under paragraph 2(c) of the Enabling Clause

3.5.6 Articles 11 and 12.7 of the DSU and 4.7 of the SCM Agreement

On appeal, Brazil claimed that the Panel acted inconsistently with Articles 11 and 12.7 of the DSU in recommending, pursuant to Article 4.7 of the SCM Agreement, that Brazil withdraw the prohibited subsidies

identified by the Panel within 90 days. According to Brazil, the Panel failed to engage with the arguments put forward by the parties and to provide a "reasoned and adequate explanation" or a "basic rationale" for its conclusion that the prohibited subsidies at issue be withdrawn within 90 days.

Beginning with the legal standard under Article 4.7 of the SCM Agreement, the Appellate Body noted that the remedy under Article 4.7 to withdraw prohibited subsidies "without delay" is distinct from the remedy contemplated under Article 21 of the DSU. Having examined the text and the context of Article 4.7, the Appellate Body stated that term "without delay" in that provision is not used in the sense of requiring *immediate* compliance, nor does the use of that term, combined with the requirement that the panel specify a time period, impose a single standard or time period applicable in all cases. Instead, for the Appellate Body, Article 4.7 requires a panel to specify a time period that constitutes "without delay" within the realm of possibilities in a given case and considering the domestic legal system of the implementing Member. The Appellate Body explained that, in determining the time period that constitutes "without delay", a panel should typically take into account the nature of the measure(s) to be revoked or modified and the domestic procedures available for such revocation or modification, including any extraordinary procedures that may be available within the legal system of a WTO Member.

The Appellate Body next turned to ascertain whether the Panel provided a "reasoned and adequate explanation" or "basic rationale", in accordance with Articles 11 and 12.7 of the DSU, for its recommendation that Brazil withdraw the prohibited subsidies found to exist within 90 days. The Appellate Body noted that, in specifying the time period, the Panel referred to prior panel reports specifying 90 days as the time period under Article 4.7 as well as the Appellate Body Reports in *Canada – Renewable Energy / Canada – Feed-in Tariff Program*. The Appellate Body found no support for the Panel's conclusion in this case in the Appellate Body Reports addressing the *Canada – Renewable Energy / Canada – Feed-in Tariff Program* dispute. The Appellate Body further noted that, while many panels have tended to specify 90 days as the time period for withdrawal of prohibited subsidies "without delay", other panels have specified longer periods under Article 4.7. The Appellate Body considered this to be in line with its view that the use of the term "without delay" in Article 4.7 does not establish a bright-line standard of 90 days to be specified in all cases. Finally, the Appellate Body noted that the Panel's indication in a single statement that it had taken into account "the procedures that may be required to implement [its] recommendation on the one hand, and the requirement that Brazil withdraw its subsidies 'without delay' on the other", did not allow the Appellate Body to ascertain whether the Panel's findings and recommendations were based on a sufficient evidentiary basis on the record and an adequate engagement with the arguments presented by the parties, and whether its recommendation was based on a reasoned and adequate explanation, in accordance with Article 11 of the DSU. For the Appellate Body, as a result of the Panel's failure to engage with the participants' arguments on the relevant procedures necessary to implement its recommendation, the Panel's analysis did not "reveal how and why the law applies" to the facts, in accordance with Article 12.7 of the DSU. Noting therefore that the Panel did not provide reasoning establishing a sufficient link between the time period of 90 days specified by it for the withdrawal of the subsidies at issue and the domestic procedure within Brazil for such withdrawal, the Appellate Body reversed the Panel's conclusions that Brazil withdraw the prohibited subsidies at issue within 90 days.

Having reversed the Panel, the Appellate Body was unable to complete the legal analysis and specify a time period under Article 4.7 of the SCM Agreement, as requested by Brazil, because there were no factual findings by the Panel nor any undisputed facts on the record concerning the time periods under, and the nature of, the legislative process in Brazil. The Appellate Body clarified, however, that the Panel's recommendations that Brazil withdraw the prohibited subsidies at issue "without delay" stand undisturbed.

3.6 Appellate Body Report, *United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Recourse to Article 21.5 of the DSU by the United States / United States – Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products – Second Recourse to Article 21.5 of the DSU by Mexico*, WT/DS381/AB/RW/USA, WT/DS381/AB/RW2

These compliance proceedings concerned the United States' labelling regime for dolphin-safe tuna products and the implementation by the United States of the DSB's recommendations and rulings in *US – Tuna II (Mexico)* and *US – Tuna II (Mexico) (Article 21.5 – Mexico)*.

Commercial tuna fishing can have harmful effects on marine mammals, including dolphins, and these effects may vary depending on factors such as the method of fishing used, the size of the fishing vessel, and the area of the ocean in which the vessel engages in tuna fishing. The United States has undertaken certain domestic measures, and participated in certain multilateral initiatives, aimed at reducing the adverse effects on dolphins associated with commercial fishing operations. In 1990, the United States put in place a domestic regime for labelling tuna products as "dolphin-safe" through the enactment of the Dolphin Protection Consumer Information Act (DPCIA) in order to: (i) ensure that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) contribute to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins.

At the international level, the United States and Mexico are parties to the 1999 Agreement on the International Dolphin Conservation Program (AIDCP). The AIDCP, together with the instruments adopted thereunder, addresses a particular tuna-fishing method (purse seine fishing) in a specific area of the ocean, namely, the Eastern Tropical Pacific Ocean (ETP). Within the ETP, there is a regular association between tuna and dolphins, in that schools of tuna tend to swim beneath dolphins. Certain vessels operating in this area thus employ the fishing technique known as "setting on" dolphins, which involves chasing and encircling the dolphins with a purse seine net in order to catch the tuna swimming beneath them. The AIDCP rules do not prohibit setting on dolphins, but permit only large purse seine vessels to set on dolphins, only within certain dolphin mortality limits, and only subject to a number of requirements in respect of the fishing gear that they must carry and the procedures that they must perform, so as to reduce the risk of harm to dolphins. Mexico's tuna-fishing fleet consists primarily of large purse seine vessels operating in the ETP using the method of setting on dolphins.

In the original proceedings, the measure at issue consisted of the following legal instruments: DPCIA, codified in *United States Code*, Title 16, Section 1385; the regulations implementing the DPCIA, in particular, *United States Code of Federal Regulations* (CFR), Title 50, Sections 216.91 and 216.92 (original implementing regulations); and a ruling by a US Federal Appeals Court in *Earth Island Institute v. Hogarth* relating to the application of the DPCIA (*Hogarth* ruling). These instruments, taken together, set out the conditions under which tuna products sold in the United States may be labelled "dolphin-safe" or make similar claims on their labels. The original tuna measure did not make the use of a dolphin-safe label obligatory for the importation or sale of tuna products in the United States. However, the preferences of retailers and consumers are such that the dolphin-safe label has significant commercial value, and access to that label constitutes an advantage on the US market for tuna products.

The Appellate Body found that, by excluding most Mexican tuna products from access to the dolphin-safe label while granting access to most US tuna products and tuna products from other countries, the original tuna measure modified the conditions of competition in the US market to the detriment of Mexican tuna products. Next, the Appellate Body scrutinized whether the detrimental impact from the measure stemmed exclusively from a legitimate regulatory distinction. In particular, the Appellate Body examined whether the different conditions for access to the dolphin-safe label were "calibrated" to the risks to dolphins arising from different fishing methods in different areas of the oceans, as the United States had claimed.

The Appellate Body noted the original panel's finding that the fishing technique of setting on dolphins is particularly harmful to dolphins and that this fishing method has the capacity of resulting in observed and unobserved adverse effects on dolphins. The Appellate Body also noted that, at the same time, the original panel was not persuaded that the risks to dolphins from other fishing methods are insignificant and do not under some circumstances rise to the same level as the risks from setting on dolphins. The Appellate Body further noted the original panel's finding that, while the US measure fully addressed the adverse effects on dolphins resulting from setting on dolphins in the ETP, it did not address dolphin mortality and serious injury arising from fishing methods other than setting on dolphins in other areas of the oceans. Thus, the Appellate Body found that the original tuna measure was not even-handed in the manner in which it addressed the risks to dolphins arising from different fishing methods in different areas of the oceans. The Appellate Body therefore reversed the original panel's finding that the US dolphin-safe labelling provisions were not inconsistent with Article 2.1 of the TBT Agreement, and found, instead, that the US measure was inconsistent with that provision.

In the first compliance proceedings, the measure at issue, i.e. the 2013 Tuna Measure, consisted of the DPCIA, Subpart H of Part 216 of CFR Title 50 as amended by the 2013 Rule (2013 implementing regulations), and the *Hogarth* ruling. The DPCIA and the *Hogarth* ruling remained unchanged, and the amendments introduced by the 2013 Tuna Measure concerned only the 2013 implementing regulations. The Appellate Body found that the first compliance panel made a number of errors in its application of the relevant legal provisions, including by undertaking isolated analyses and making separate findings regarding the three discrete elements of the measure, and by failing to consider whether differences in the relative risks of harm to dolphins in different fisheries explain or justify the differences in the certification requirements and the tracking and verification requirements applied inside and outside the ETP large purse seine fishery. The Appellate Body therefore reversed the first compliance panel's finding that the eligibility criteria were consistent with Article 2.1 of the TBT Agreement, as well as the Panel's separate findings that the different certification requirements and the different tracking and verification requirements were each inconsistent with that provision. For similar reasons, the Appellate Body reversed the panel's findings under the GATT 1994. Specifically, the Appellate Body reversed the finding that the eligibility criteria, the certification requirements, and the tracking and verification requirements were each inconsistent with Articles I:1 and III:4 of the GATT 1994. The Appellate Body also reversed the finding that the eligibility criteria were consistent with the *chapeau* of Article XX, while the certification requirements and tracking and verification requirements were each inconsistent with the *chapeau*.

In completing the analysis, the Appellate Body found that, by excluding most Mexican tuna products from access to the dolphin-safe label, while granting conditional access to such label to like products from the United States and other countries, the 2013 Tuna Measure modified the conditions of competition to the detriment of Mexican tuna products in the US market. In the absence of a proper assessment by the first compliance panel of the risks posed to dolphins inside and outside the ETP large purse seine fishery, the Appellate Body was unable to assess fully whether all of the regulatory distinctions drawn under the 2013 Tuna Measure can be explained and justified in light of differences in the relative risks associated with different methods of fishing for tuna in different areas of the oceans. Nevertheless, the Appellate Body was able to find that, by virtue of the determination provisions, the 2013 Tuna Measure did not provide for the same certification requirements in all circumstances of comparably high risks. Thus, it was not demonstrated that the differences in the dolphin-safe labelling conditions under the 2013 Tuna Measure were calibrated to, or commensurate with, the risks to dolphins arising from different fishing methods in different areas of the oceans. Therefore, the detrimental impact of the amended tuna measure could not be said to stem exclusively from a legitimate regulatory distinction, and the Appellate Body found the 2013 Tuna Measure to be inconsistent with Article 2.1 of the TBT Agreement. Relying on a similar analysis, the Appellate Body found that the 2013 Tuna Measure was inconsistent with Articles I:1 and III:4 of the GATT 1994 and that, although the measure was provisionally justified under Article XX(g), it had not been demonstrated that the measure was applied in a manner that does not constitute arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX of the GATT 1994.

Against the backdrop of the first compliance proceedings, on 22 March 2016, the United States published, in its *Federal Register*, a legal instrument entitled "Enhanced Document Requirements and Captain Training Requirements to Support Use of the Dolphin Safe Label on Tuna Products" (2016 Rule). The 2016 Rule made certain changes to Sections 216.91 and 216.93 of CFR Title 50. The Panels described the measure at issue in these compliance proceedings, i.e. the 2016 Tuna Measure, as consisting of the following three elements: (i) the DPCIA; (ii) Subpart H of Part 216 of CFR Title 50 (Dolphin Safe Tuna Labelling), as amended by the 2013 Rule and the 2016 Rule (collectively, the 2016 implementing regulations); and (iii) the *Hogarth* ruling. Like its predecessors, the 2016 Tuna Measure prohibits the use of the dolphin-safe label on a tuna product sold in the US market unless the conditions specified in the measure are met. The 2016 Tuna Measure broadly places three types of conditions on the use of the dolphin-safe label for tuna products exported from or offered for sale in the United States: (i) conditions relating to the automatic disqualification of certain tuna products (eligibility criteria); (ii) conditions relating to certifications (certification requirements); and (iii) conditions relating to record keeping and the segregation of dolphin-safe and non-dolphin-safe tuna (tracking and verification requirements).

The 2016 Tuna Measure makes no changes to the eligibility criteria set out in the DPCIA and the *Hogarth* ruling. Thus, under the 2016 Tuna Measure, the following tuna products are automatically ineligible for the dolphin-safe label: (i) tuna harvested using large-scale driftnets on the high seas; and (ii) tuna products containing tuna harvested by setting on dolphins anywhere in the world. All other tuna products may be labelled "dolphin-safe" *only if* no dolphins were killed or seriously injured in the gear deployments in which the tuna was caught. To this end, these tuna products must satisfy the certification requirements and tracking and verification requirements of the 2016 Tuna Measure.

Apart from large-scale driftnet fishing on the high seas, the certification requirements under the 2016 Tuna Measure make a distinction between the ETP large purse seine fishery, on the one hand, and all other fisheries, on the other hand. For tuna caught in the ETP large purse seine fishery, the 2016 Tuna Measure, like the 2013 Tuna Measure, mandates that certification must be provided by the captain of the vessel *and* an International Dolphin Conservation Program (IDCP)-approved observer, indicating that: (i) none of the tuna was caught on a trip using a purse seine net intentionally deployed on or used to encircle (i.e. set on) dolphins; and (ii) no dolphins were killed or seriously injured during the sets in which the tuna was caught.

As for all fisheries other than the ETP large purse seine fishery, for fishing trips that began on or after 21 May 2016, captains of all vessels must certify that: (i) no purse seine net or other fishing gear was intentionally deployed on or used to encircle (i.e. set on) dolphins during the fishing trip in which the tuna was caught; and (ii) no dolphins were killed or seriously injured in the sets or other gear deployments in which the tuna was caught. In certain circumstances, the same certifications from an observer participating in a national or international programme acceptable to the US Assistant Administrator for Fisheries will be required pursuant to the following two elements of the 2016 Tuna Measure.

The first element concerns seven US domestic fisheries for which the Assistant Administrator has determined that observers are qualified and authorized to make the relevant certifications. In these fisheries, certification by such an observer is required when the observer is already on board the fishing vessel for other reasons (i.e. reasons unrelated to the dolphin-safe labelling regime). The second element concerns what the first compliance panel described as the "determination provisions". The determination provisions have been modified under the 2016 Tuna Measure, such that tuna caught in all fisheries other than the ETP large purse seine fishery may require observer certifications, in addition to the captain certifications, where the Assistant Administrator has determined that in such a fishery: (i) there is a regular and significant association between dolphins and tuna (similar to the association between dolphins and tuna in the ETP); or (ii) a regular and significant mortality or serious injury of dolphins is occurring.

Additionally, the 2016 Tuna Measure contains a new requirement whereby the captains of the vessels in all fisheries other than the ETP large purse seine fishery must certify that they have completed the National Marine Fisheries Service (NMFS) Tuna Tracking and Verification Program dolphin-safe training course (Captain Training Course).

The tracking and verification requirements under the 2016 Tuna Measure concern the physical segregation of dolphin-safe tuna from non-dolphin-safe tuna, from the moment of harvest and throughout the processing chain. Like its predecessor, the 2016 Tuna Measure prescribes the documentation requirements for recording and verifying segregation and the corresponding regulatory oversight. These requirements distinguish between: (i) the ETP large purse seine fishery, which must comply with the AIDCP Tracking and Verification System; and (ii) all other fisheries, which must comply with the requirements prescribed in the 2016 implementing regulations that the United States refers to as the "NOAA regime", i.e. the regime administered by the United States National Oceanic and Atmospheric Administration.

Under the AIDCP regime, tuna caught by large purse seine vessels in the ETP must be accompanied by Tuna Tracking Forms (TTFs), used to separately record dolphin-safe and non-dolphin-safe sets on a particular fishing trip. The relevant TTF number must accompany the tuna from the moment of unloading and through every subsequent processing step of the relevant catch. The AIDCP Tracking and Verification System also provides that the national programs established by the parties to the AIDCP should include periodic audits and spot checks for tuna products, as well as mechanisms for cooperation among national authorities. In addition, all tuna products imported into the United States, regardless of where the tuna was caught and whether the dolphin-safe label is used, must be accompanied by NOAA Form 370, which designates, *inter alia*, whether the tuna is dolphin-safe. This means that, for imported tuna caught in the ETP large purse seine fishery, both TTFs and Form 370 are required. By contrast, for imported tuna caught in all other fisheries, only Form 370 is required.

As regards all other fisheries, the NOAA regime requires US tuna processors to submit monthly reports to the US Tuna Tracking and Verification Program for all tuna received at their processing facilities. Furthermore, under the NOAA regime, the US NMFS is empowered to undertake verification activities, including dockside inspections of vessels, monitoring of Form 370s, monitoring of cannery reports, audits of US canneries, and retail market spot checks. In addition, the 2016 Tuna Measure introduced new chain-of-custody record-keeping requirements for tuna products harvested from all other fisheries, whereby the US processors and importers of such tuna products must collect and retain, for two years, information on each point in the chain of custody of the tuna or tuna products. This information must be provided to the NMFS upon request, and must be sufficient for the NMFS to conduct a trace-back of any tuna product marketed as dolphin-safe to verify that the tuna product in fact meets the dolphin-safe labelling requirements. Breach of these new chain-of-custody record-keeping requirements may lead to the imposition of sanctions under US law. Finally, tuna caught in fisheries designated under the determination provisions must be accompanied by valid documentation signed by a representative of the vessel flag nation or the processing nation certifying that the relevant tracking and verification requirements described above are met.

The United States requested the Panels to find that the 2016 Tuna Measure brings the United States into compliance with its WTO obligations, including Article 2.1 of the TBT Agreement. Mexico, however, asked the Panels to find that the 2016 Tuna Measure is WTO-inconsistent, including under Article 2.1 of the TBT Agreement.

The Panels recalled that a finding of inconsistency with Article 2.1 of the TBT Agreement must be based on the following three elements: (i) the measure at issue is a technical regulation within the meaning of Annex 1.1 to the TBT Agreement; (ii) the relevant products are "like" products; and (iii) the measure at issue accords less favourable treatment to imported products than to the relevant group of like products.

Noting the similarity in the factual circumstances underlying the first two elements in the first compliance proceedings, the Panels in these compliance proceedings agreed with the parties that the 2016 Tuna Measure is a technical regulation and that the relevant products are like.

Regarding the third element, the Panels recalled the Appellate Body's finding that assessing whether the measure accords less favourable treatment under Article 2.1 requires two distinct steps: (i) determining whether the challenged measure modifies the conditions of competition to the detriment of the relevant imported products vis-à-vis like products of domestic origin and/or like products originating in any other country; and, if the panel makes such a finding, (ii) determining whether the detrimental impact on imports stems exclusively from a legitimate regulatory distinction rather than reflecting discrimination against the group of imported products. Noting that the 2016 Tuna Measure maintains the overall architecture and structure of the original and 2013 Tuna Measures, as well as the parties' agreement in this regard, the Panels thus found that the 2016 Tuna Measure modifies the conditions of competition to the detriment of Mexican tuna products in the US market.

The Panels therefore noted that the parties' disagreement on the consistency of the 2016 Tuna Measure with Article 2.1 of the TBT Agreement centred on the question whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction. The Panels considered that, while there may in theory be a number of ways to assess whether the measure satisfies the second step of the analysis under Article 2.1, in this dispute it was appropriate to assess whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction through the lens of calibration. Specifically, the Panels considered their task in examining the parties' respective claims under Article 2.1 was to ascertain whether the relevant regulatory distinctions are appropriately calibrated to, or commensurate with, the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean. The Panels rejected Mexico's argument that the calibration analysis must be constrained by a distinct analysis of the relationship between the detrimental impact and the objectives of the Measure. Rather, the Panels considered that the objectives of the Measure would be taken into account in the calibration analysis under Article 2.1.

The Panels also rejected Mexico's argument that the 2016 Tuna Measure is incompatible with the principle of sustainable development, and therefore with Article 2.1, because it encourages the use of fishing methods as alternatives to setting on dolphins, which cause grievous harm to fisheries and to the overall marine ecosystem. The Panels considered this argument to have elevated the preambular language to the level of substantive obligation, and emphasized that the 2016 Tuna Measure is not concerned with sustainable development, but rather with the protection and wellbeing of dolphins. In any event, to the Panels, the WTO Agreement does not obligate a Member to regulate only for the objective of sustainable development.

The Panels proceeded to examine whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction. The Panels began by assessing the evidence before them concerning the use of all relevant fishing methods in different areas of the ocean (i.e. fisheries) before arriving at an overall conclusion regarding the risk profile of each fishing method. In making this assessment, the Panels considered it appropriate to rely to the greatest extent possible on a quantitative analysis, and recur to a qualitative assessment in cases where this seemed to be the most reasonable avenue to properly gauge and describe the risks at issue. The Panels also highlighted the importance of a standardized benchmark or metric when determining and comparing the different risk profiles. The Panels considered several different possible standardized metrics and ultimately adopted a "per set" methodology that entailed averaging the total number of a particular indicator of adverse effects by the number of operations of a particular fishing gear used in a particular fishery in a given time period. The Panels found that relevant indicators included observed mortalities, serious injuries, and tuna-dolphin interactions. The Panels also distinguished between observable harm and unobservable harm, observed harm and unobserved harm, as well as direct harm and indirect harm.

The Panels conducted their analysis of risk profiles by distinguishing between seven different fishing methods, namely: purse seine fishing by setting on dolphins; purse seine fishing without setting on dolphins; gillnet fishing; longline fishing; trawl fishing; tuna handlining; and pole and line fishing. The Panels found that purse seine fishing by setting on dolphins causes serious injuries to dolphins. In particular, the Panels found that, in the ETP, while the evidence suggested that setting on dolphins does not pose a very high risk of observable serious injury, such serious injury is less frequent than mortality. Moreover, the likelihood of unobserved mortality or serious injury is present in every set, as a consequence of the tuna-dolphin association in that ocean area. The Panels also found that setting on dolphins causes unobservable harms as a result of the chase and encirclement process itself, including cow-calf separation; potential muscle injury resulting from the chase; immune and reproductive systems failures; and other adverse health consequences for dolphins, such as continuous acute stress.

Regarding purse seine fishing without setting on dolphins, the Panels considered that this fishing method has a relatively low risk profile in terms of both observed and unobserved mortality and serious injury. As regards longline and handline fishing, the Panels found that the risk profiles of these methods were low in terms of observable harms. With regard to trawl fishing, the Panels found that this method is a low-to-moderate-risk fishing method in terms of observed mortalities and observable harm, as it entails very little, if any, interaction with dolphins. The Panels also found that none of the above fishing methods causes the kinds of unobservable harms caused by purse seine fishing by setting on dolphins in the ETP. With respect to gillnet fishing, the Panels found that this fishing method poses high levels of observable harm to dolphins in certain areas of the ocean, but does not pose the same level of harm in other areas. The Panels further noted that the evidence presented in relation to ghost fishing – i.e. when fishing gear (such as gillnets) continue to cause harm to marine life after being lost or discarded – indicated that ghost fishing does give rise to unobserved harms, but that such harms were not like the kinds of unobservable harm that are caused by setting on dolphins. Finally, regarding pole and line fishing, the Panels noted the lack of evidence regarding adverse effects caused by this method and concluded that the risk profile of this fishing method is very low.

Having set forth their analysis of the seven fishing methods, the Panels conducted an overall relative assessment, in which they provided a comparative assessment of method-specific findings, and concluded that, given the differences between setting on dolphins and each of the other six methods with respect to observable harm to dolphins, and taking into account that none of the other methods causes the kinds of unobservable harm caused by setting on dolphins, overall, the risk profile of setting on dolphins is much higher than that of each of the other six fishing methods used to catch tuna.

Having examined the relevant risk profiles, the Panels assessed whether the 2016 Tuna Measure is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean, such that the detrimental impact caused by the measure can be said to stem exclusively from a legitimate regulatory distinction and therefore not inconsistent with Article 2.1 of the TBT Agreement. In making this assessment, the Panels examined whether (i) the eligibility criteria; (ii) the certification requirements; (iii) the tracking and verification requirements; (iv) the determination provisions; as well as (v) the 2016 Tuna Measure as a whole, are calibrated to the difference in the overall risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

With respect to the eligibility criteria, the United States claimed that the eligibility criteria are evenhanded because they address the risks of both setting on dolphins and other fishing methods, commensurately with the risks that the different methods pose to dolphins. Mexico disagreed, arguing that the difference in treatment between ineligible and eligible fishing methods is not evenhanded.

The Panels recalled that they had examined the evidence on the record concerning the existence and extent of observable harms, unobservable harms, and interaction with dolphins, with respect to the use of different fishing methods. The Panels recalled that their examination had revealed that setting on dolphins

is significantly more dangerous to dolphins than are other fishing methods. Based on this consideration, the Panels considered that the eligibility criteria in the 2016 Tuna Measure, which distinguish between setting on dolphins and other fishing methods, are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

As regards the certification requirements, the United States argued that, given the special risk profile of the ETP large purse seine fishery, the differences in the certification requirements are commensurate with the different risk profiles of the ETP large purse seine fishery, on the one hand, and other fisheries, on the other hand. For Mexico, the certification requirements are being applied in a manner that is not even-handed.

The Panels noted that, unlike the eligibility requirements, the certification requirements (and the tracking and verification requirements) draw distinctions on the basis of different fisheries, rather than different fishing methods. Thus, the Panels considered the question before them to be whether the distinction that the certification requirements draw between the ETP large purse seine fishery, on the one hand, and all other fisheries, on the other hand, is calibrated. The Panels recalled their conclusion that setting on dolphins is a particularly dangerous fishing method that is liable to cause observable and unobservable harms to dolphins at rates significantly in excess of those caused by other fishing methods. The Panels recognized that not all large purse seine vessels in the ETP actually set on dolphins, at least in every set or on every voyage. However, the Panels noted that in the ETP, unlike in other areas of the ocean, large purse seine vessels are permitted to and actually can set on dolphins in a consistent and systematic manner. Thus, for the Panels, it is both the technical and legal possibilities of setting on dolphins and the fact that dolphin sets occur in a consistent and systematic manner in the ETP large purse seine fishery that give this fishery its special risk profile. Given the special risk profile of the ETP, the Panels found that the certification requirements in the 2016 Tuna Measure address the relative risks posed to dolphins in the ETP large purse seine fishery and other fisheries in a way that is calibrated to the risk profiles of those fisheries. Accordingly, the Panels considered that the different certification requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

The United States claimed that, similar to the certification requirements, the difference in the tracking and verification requirements for tuna products produced from the ETP large purse seine fishery and from other fisheries able to produce dolphin-safe tuna products is commensurate with the different risk profiles of these fisheries. Mexico contended that, under the 2016 Tuna Measure, dramatic differences remain between the tracking and verification requirements for tuna caught by large purse seine vessels in the ETP and tuna caught elsewhere. Mexico added that any difference in the relevant regulatory distinctions that result in the provision of inaccurate information to consumers would be contrary to the objectives of the 2016 Tuna Measure.

The Panels observed that, under the 2016 Tuna Measure, the tracking and verification of tuna from the ETP large purse seine fishery must be conducted consistently with the AIDCP regime. The tracking and verification of tuna from other fisheries must be conducted according to the NOAA regime. The Panels found that although there remain differences between the NOAA and AIDCP regimes with respect to tracking and verification, such differences have been considerably narrowed in the 2016 Tuna Measure. The Panels also found that the remaining differences are calibrated to the differences in the risk profile of the ETP large purse seine fishery compared to other fisheries.

In respect of the determination provisions, the United States claimed that the 2016 Tuna Measure eliminates the gaps in the coverage of the determination provisions, identified in the first compliance proceedings. Mexico accepted that the revised determination provisions eliminate the differences created by the statute with respect to purse seine fishing and other fishing methods. However, Mexico questioned the practicability of the additional tracking and verification requirements that apply to a fishery that has been designated

under the determination provisions. In Mexico's view, the failure to evaluate whether or not there is regular and significant harm to dolphins occurring in fisheries outside the ETP, or the decision not to do so under the provisions of the 2016 Tuna Measure is an indication of arbitrariness.

The Panels rejected Mexico's argument that the determination provisions are applied in an arbitrary or uneven-handed manner. Instead, the Panels found that the 2016 Tuna Measure fills the gaps in the coverage of the determination provisions identified in the first compliance proceedings. The Panels also found that the determination provisions have been applied in a reasonable way that helps to ensure that the 2016 Tuna Measure is calibrated to the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

After concluding their intermediate analyses of these component elements of the 2016 Tuna Measure, the Panels synthesized their analysis in order to reach their conclusion as to the consistency of the 2016 Tuna Measure with the TBT Agreement. The Panels concluded that the 2016 Tuna Measure, as a whole, is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Consequently, the Panels concluded that the 2016 Tuna Measure accords to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries, and therefore is consistent with Article 2.1 of the TBT Agreement.

In light of the parties' agreement in this regard, the Panels found that the 2016 Tuna Measure is inconsistent with Articles I:1 and III:4 of the GATT 1994, but is provisionally justified under subparagraph (g) of Article XX of the GATT 1994. The only disagreement remaining between the parties was whether the 2016 Tuna Measure meets the requirement of the *chapeau* of Article XX.

The Panels recalled that three analytical elements must be demonstrated with respect to arbitrary or unjustifiable discrimination under the *chapeau* of Article XX, namely: (i) the application of the measure results in discrimination; (ii) the conditions prevailing between countries are the same; and (iii) the discrimination is arbitrary or unjustifiable. With respect to the existence of discrimination, since the 2016 Tuna Measure maintains the overall architecture and structure of the original and 2013 Tuna Measures, the Panels found that the 2016 Tuna Measure continues to cause the same detrimental impact resulting from the discriminatory treatment between tuna products containing tuna caught in the ETP large purse seine fishery and those containing tuna caught in other fisheries. With respect to the second element, the Panels found that the conditions prevailing between countries are the same, namely, the risks of adverse effects on dolphins arising from tuna-fishing practices, and that neither party had argued otherwise.

With respect to the third element, the Panels recalled that, so long as the similarities and differences between Article 2.1 of the TBT Agreement and Article XX of the GATT 1994 are taken into account, it may be permissible to rely on reasoning developed in the context of one agreement for purposes of conducting an analysis under the other. The Panels then recalled their finding under Article 2.1 of the TBT Agreement that the 2016 Tuna Measure is calibrated to different risks to dolphins arising from the use of different fishing methods in different areas of the ocean and that, consequently, the detrimental impact caused by the 2016 Tuna Measure stems exclusively from legitimate regulatory distinctions.

The Panels found that, in the circumstances of this dispute, it was appropriate to use their factual and legal findings under Article 2.1 in their assessment of whether the 2016 Tuna Measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX. In this regard, the Panels did not consider that the 2016 Tuna Measure, which is tailored to and commensurate with the relevant risks, can be said to be applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination within the meaning of Article XX of the GATT 1994. Therefore, in light of their finding under Article 2.1, the Panels concluded that the 2016 Tuna Measure is not applied in a manner that constitutes a means of arbitrary or unjustifiable discrimination within the meaning of the *chapeau* and is therefore justified under Article XX of the GATT 1994.

At the organizational meetings of the Panels in these proceedings, held in early July 2016, the United States proposed a change to the Panels' working procedures to allow the Panels' substantive meeting to be publicly observed. Alternatively, if Mexico did not agree to this, the United States requested the Panels to allow a party to request a partially open meeting, whereby that party's statements during the Panel's meeting with the parties could be viewed by the public, either simultaneously or through a delayed broadcast. The statements of a party that wished to maintain the confidentiality of its statements could not be so viewed. Mexico opposed the United States' request that the Panels conduct an open meeting either fully or partially. Mexico argued that the Panels could only open their substantive meetings with the parties to public viewing with the consent of both parties.

On 29 July 2016, the Panels informed the parties that they considered themselves to have the authority to authorize the United States to lift the confidentiality of its statements at the substantive meeting with the parties. Subsequently, in response to a formal request by the United States, and following their consultation with the parties, the Panels adopted their Additional Working Procedures on Partially Open Meetings (Additional Working Procedures). Pursuant to these procedures, the Panels permitted the United States' request to disclose, through public viewing, the statements of its own positions made during the Panels' substantive meeting with the parties. The Panels also permitted any third parties that so requested to disclose, through public viewing, the statements of their own positions made during the Panels' session with the third parties. The Panels granted these permissions on condition that the public viewing take the form of delayed viewing. The Panels also required that any parts of the meeting, including the third-party session, opened for partial public observation should not disclose statements of Mexico's positions or the positions of non-disclosing third parties. To this end, these parts of the meeting that were eventually opened for partial public observation were subjected to redaction prior to the public viewing.

3.6.1 Article 2.1 of the TBT Agreement

Mexico requested the Appellate Body to reverse the Panels' findings and conclusions with respect to the interpretation and application of Article 2.1 of the TBT Agreement. Specifically, Mexico claimed that the Panels erred in their legal analysis relating to the assessment of whether the 2016 Tuna Measure accords "treatment no less favourable" to Mexican tuna products within the meaning of Article 2.1 of the TBT Agreement.

3.6.1.1 "Treatment no less favourable" under Article 2.1 of the TBT Agreement

Mexico argued on appeal that the Panels erred in their interpretation and application of Article 2.1 of the TBT Agreement in finding that the 2016 Tuna Measure is not inconsistent with that provision. In particular, Mexico contended that the Panels relied on a legal standard that fails to take into account whether the regulatory distinctions of the 2016 Tuna Measure are rationally related to its objectives.

The Appellate Body recalled that it had identified a two-step analysis for examining whether a technical regulation accords less favourable treatment to imported products under Article 2.1 of the TBT Agreement, which consists in determining whether: (i) the technical regulation modifies the conditions of competition to the detriment of such imported products vis-à-vis like products of domestic origin and/or like products originating in any other country; and (ii) the detrimental impact on imports stems exclusively from a legitimate regulatory distinction. The Appellate Body explained in this regard that, where the detrimental impact caused by a technical regulation is found to stem exclusively from a legitimate regulatory distinction, such a technical regulation does not accord less favourable treatment to imported products and is therefore consistent with Article 2.1 of the TBT Agreement.

The Appellate Body then indicated that, to determine whether the detrimental impact stems exclusively from a legitimate regulatory distinction, a panel must carefully scrutinize whether the technical regulation at issue is even-handed in light of the particular circumstances of the case. The Appellate Body explained that there

may be different ways to demonstrate that a measure does not stem exclusively from a legitimate regulatory distinction. One of the ways to do so includes, for example, showing that the measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination. The Appellate Body further indicated that, in examining whether a technical regulation constitutes a means of arbitrary or unjustifiable discrimination, it is likely that this assessment will involve consideration of the nexus between the regulatory distinctions found in the measure and the measure's policy objectives.

However, the Appellate Body recalled that, in the original proceedings, the United States contended that the regulatory distinctions drawn under the original Tuna Measure between different tuna-fishing methods and different areas of the oceans could be explained or justified by differences in the risks associated with such fishing methods and areas of the oceans. This led the Appellate Body to examine the legitimacy of the original Tuna Measure's regulatory distinctions through the lens of calibration. According to the Appellate Body, calibration is thus the means to assess whether the detrimental impact of the measure at issue in this dispute stems exclusively from a legitimate regulatory distinction in the particular circumstances of this dispute. If done properly, the calibration analysis should encompass consideration of the rational relationship between the regulatory distinctions and the objectives of the 2016 Tuna Measure, such that the regulatory distinctions of the technical regulation will not amount to arbitrary or unjustifiable discrimination. The Appellate Body considered that the Panels' articulation of the applicable legal standard comported with the findings from the original and first compliance proceedings, and that Mexico's challenge of the Panels' findings related primarily to how the Panels applied the legal standard in the circumstances of this dispute.

Furthermore, the Appellate Body disagreed with Mexico that the Panels erred in rejecting Mexico's argument concerning the relevance of the sustainability of tuna stocks and the marine ecosystem. Mexico argued that, where the obligations at issue in a dispute relate to sustainable development, they must be interpreted consistently with the objective of sustainable development. For Mexico, this requirement arises under Article 2.1 in determining whether the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction. In Mexico's view, applying a technical regulation that is inconsistent with or undermines the objective of sustainable development results in unjustifiable discrimination, and the regulatory distinctions of the measure can therefore not be "legitimate" for the purpose of the second step of the "less favourable treatment" analysis under Article 2.1.

The Appellate Body considered that, while the preamble of the WTO Agreement does not itself create substantive obligations, it can provide important context for the interpretation of the covered agreements, for example, by shedding light on the kinds of policy objectives a Member may pursue. However, the Appellate Body indicated that Mexico's argument appeared to be premised on the view that Article 2.1 is an obligation that *relates* to sustainable development. The Appellate Body stated that, contrary to Mexico's contention, Article 2.1 is concerned with ensuring that technical regulations are designed and applied in a manner that affords "treatment no less favourable" to like imported products. Thus, to the Appellate Body, Mexico seemed to conflate the nature of the obligation in Article 2.1 with the nature of the technical regulations that Members may choose to adopt. The Appellate Body noted that, while a Member's technical regulation may, depending on the circumstances, relate to sustainable development, the nature and scope of the obligation in Article 2.1 remain unchanged. The Appellate Body further considered that, in any event, the objectives of the 2016 Tuna Measure are: (i) to ensure that consumers are not misled or deceived about whether tuna products contain tuna caught in a manner that adversely affects dolphins; and (ii) to contribute to the protection of dolphins by ensuring that the US market is not used to encourage fishing fleets to catch tuna in a manner that adversely affects dolphins. Given that the legitimacy of the objectives of the 2016 Tuna Measure was not at issue in these compliance proceedings, the Appellate Body reiterated that the question before it was whether the detrimental impact caused by the 2016 Tuna Measure stems exclusively from a legitimate regulatory distinction in light of the objectives the United States had chosen to pursue through the measure.

3.6.1.2 What the legal standard under Article 2.1 entails in this dispute

Mexico claimed on appeal that, in assessing the consistency of the 2016 Tuna Measure with Article 2.1 of the TBT Agreement, the Panels erred in determining that the measure is calibrated to the risks to dolphins arising from different fishing methods in different areas of the oceans, without at the same time considering whether the regulatory distinctions that the measure draws are rationally related to its objectives. In particular, Mexico contended that the Panels failed to consider risks relating to inaccurate labelling in examining the risk profiles of relevant fishing methods and ocean areas for the purpose of the calibration analysis. In Mexico's view, because the 2016 Tuna Measure cannot achieve its objectives without label accuracy, a proper calibration analysis should have included considerations of such risks of inaccurate labelling.

The Appellate Body recalled that, under the calibration analysis set in the original and first compliance proceedings, the risks to which the regulatory distinctions should be calibrated were risks to dolphins from the use of different fishing methods in different areas of the ocean. In particular, the Appellate Body highlighted its finding in the first compliance proceedings that the panel's inquiry should have encompassed (i) an assessment of the overall relative risks or levels of harm to dolphins arising from different fishing methods in different ocean areas; and (ii) an assessment as to whether the differences in the dolphin-safe labelling conditions under the measure are appropriately tailored to, or commensurate with, those respective risks. In light of these findings, therefore, the Panels correctly considered that the relevant inquiry is one that focuses on the risks that dolphins face as a result of the use, in different areas of the ocean, of different fishing methods.

The Appellate Body emphasized that the examination of whether the regulatory distinctions are commensurate with different risks to dolphins must be conducted taking account of the objectives of the measure. The Appellate Body considered that its findings in the first compliance proceedings indicated that considerations regarding label accuracy should have informed the calibration analysis, precisely because the accuracy of the dolphin-safe label was directly related to the objectives of the 2013 Tuna Measure. To the Appellate Body, therefore, considerations of the nexus between the regulatory distinctions and the measure's objectives, rather than being a separate inquiry, are encompassed in a proper calibration analysis.

Furthermore, while accuracy of the information conveyed to consumers through the dolphin-safe label is a consideration that should inform the calibration analysis, the Appellate Body emphasized that this was different from saying that the Panels were required to determine whether the 2016 Tuna Measure is calibrated, *inter alia*, to the risk of inaccurate dolphin-safe information being passed to consumers. In any event, the Appellate Body indicated that Mexico had not substantiated its assertion that tuna fishing in ocean areas with less reliable regulatory systems (that is, ocean areas that are unregulated or that have insufficient regulatory oversight, resulting in unreliable reporting, significant IUU fishing, and/or significant trans-shipment at sea) is more likely to lead to actual, physical harm to dolphins.

Finally, the Appellate Body rejected Mexico's argument that, by referring to the term "margin of error", the Panels erroneously took the position that allowing inaccurate labels is consistent with the objectives of the measure. Instead, the Appellate Body considered that the Panels utilized this term to refer to the different degrees of strictness of the relevant certification and tracking and verification requirements, such that the less strict they are, the more likely that adverse effects on dolphins might go undetected and unreported. This, however, does not automatically translate into inaccuracy of the ultimate dolphin-safe label. Rather, the ultimate accuracy of the label depends not only on the different degrees of the strictness of the relevant requirements, but also on the level of risks to dolphins in a given fishery to which these requirements apply. Where such risks are higher, the corresponding labelling conditions may need to be more sensitive, or strict, to ensure the accuracy of the label in conveying the information regarding the dolphin-safe nature of the tuna products. Conversely, where such risks are lower, less sensitive labelling conditions may be sufficient to ensure accuracy. The Appellate Body therefore understood the Panels to have focused correctly on the

question whether the sensitivity of the labelling conditions corresponds, or is calibrated, to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean, so as to ensure accurate labelling.

Mexico also argued that the Panels erred in assessing and comparing the risk profiles of different fishing methods without distinguishing between different ocean areas. Mexico considered that, in order to assess whether the measure is properly calibrated to the risks to dolphins, the Panels were required to examine whether the 2016 Tuna Measure makes all relevant regulatory distinctions on the basis of both fishing methods and ocean areas. Mexico considered this view to be supported by the Appellate Body's articulation of the calibration analysis in previous proceedings in this dispute, as well as the design of the measure.

In the Appellate Body's view, its statement in the first compliance proceedings that the dolphin-safe labelling regime would not violate Article 2.1 if it was properly calibrated to the risks to dolphins arising from different fishing methods *in different areas of the oceans* does not prescribe that the regulatory distinctions under the 2016 Tuna Measure must be drawn on the basis of different ocean areas in order for the measure to be consistent with Article 2.1. Rather, such statement indicates that, in conducting an assessment of risks to dolphins for the purpose of assessing whether the regulatory distinctions under the measure are indeed calibrated to different risks to dolphins, it is necessary to assess the risks across all relevant ocean areas in which a particular fishing method is practised (i.e. individual fisheries).

The Appellate Body considered the essential question before the Panels to be whether the regulatory distinctions under the measure are calibrated to different risks to dolphins. The Appellate Body explained that the nature of this assessment (i.e. how the Panels were required to apply the calibration analysis) is informed by the nature of the regulatory distinctions drawn by the measure itself, and that the 2016 Tuna Measure makes several sets of distinctions. The Appellate Body highlighted that, at the level of the eligibility criteria, the 2016 Tuna Measure draws a distinction on the basis of *fishing methods*, while at the level of the certification and tracking and verification requirements, the 2016 Tuna Measure makes a distinction on the basis of different *fisheries* (i.e. the use of a particular fishing method in a particular ocean area).

The Appellate Body observed that since, in Mexico's view, the calibration analysis should be on the basis of individual fisheries, and not fishing methods, the Panels' examination of the *certification* and *tracking and verification* requirements appeared consistent with Mexico's preferred approach. As to the *eligibility* criteria, the Appellate Body noted that the distinction under the eligibility criteria between driftnet fishing on the high seas and other fisheries is indeed on the basis of both fishing method *and* ocean area. However, the Appellate Body recalled that the second step of the "less favourable treatment" analysis under Article 2.1 should focus on the regulatory distinction(s) causing the detrimental impact on imported products, and the relevant regulatory distinctions giving rise to the detrimental impact in this dispute do not concern driftnet fishing on the high seas. Since one of the regulatory distinctions causing the detrimental impact on Mexican tuna products is that tuna products containing tuna caught by *setting on dolphins* are ineligible for the dolphin-safe label while tuna products containing tuna caught by *other fishing methods* are provisionally eligible for the label, the Appellate Body considered that the treatment of tuna caught by driftnet fishing on the high seas did not undermine the Panels' approach in assessing whether the distinction between setting on dolphins and other fishing methods is calibrated to different risks to dolphins.

The Appellate Body also considered that, to the extent that Mexico's argument suggested that the distinction between the methods of setting on dolphins and other fishing methods is not even-handed simply because it is drawn on the basis of fishing methods alone, Mexico's approach was not consistent with the Appellate Body's findings from the original and first compliance proceedings. Rather, whether the distinction is legitimate for the purpose of Article 2.1 must be assessed through a comparison of the risk profiles of these different fishing methods. The Appellate Body also considered that Mexico did not demonstrate why a distinction on the basis of fishing methods alone would undermine the objective of protecting dolphins, and that, contrary to Mexico's arguments, the 2016 Tuna Measure does not draw a

regulatory distinction between the ETP setting-on-dolphins-fishery and other fisheries. To the extent that Mexico was asserting that the Panels' analysis of risk profiles should have addressed all ocean areas because risks differ across different ocean areas, the Appellate Body agreed that information pertaining to the risks to dolphins in individual fisheries should be taken into account. The Appellate Body went on to address, *inter alia*, the question of whether the Panels failed to assess adequately relevant evidence regarding the risk profiles of different fisheries.

3.6.1.3 The Panel's assessment of relevant risk profiles

Mexico argued that the Panels erred in their assessment of the different risks to dolphins from the use of different fishing methods in different ocean areas, by: (i) failing to adequately evaluate the risk profiles of different fisheries; (ii) using the risk profile of setting on dolphins in the ETP as the benchmark for assessing the risk profiles of other fisheries; and (iii) relying predominantly on per set evidence for measuring the level of risks to dolphins, and ignoring other relevant evidence in their evaluation of different risk profiles.

3.6.1.3.1 The Panels' evaluation of different fisheries

Mexico argued that the Panels erroneously limited their assessment of risk profiles to the seven tuna-fishing methods, without assessing the risk profiles for individual ocean areas. Mexico acknowledged that the Panels did address evidence with respect to ocean areas for certain fishing methods but erred by forming conclusions on the fishing methods as a whole. Mexico also contended that the Panels disregarded that, in certain ocean areas, there are very high risks to dolphins from gillnet fishing, longline fishing, and trawl fishing, and erred by failing to address the risk profile of purse seine fishing by setting on dolphins in ocean areas other than the ETP.

The Appellate Body recalled that, in assessing the eligibility criteria, the Panels were required to compare the risk profile of setting on dolphins with the risk profiles of other individual fishing methods, and consequently it was appropriate for the Panels to have formed a conclusion for each individual fishing method, for the purposes of conducting the calibration analysis. The Appellate Body highlighted that, in conducting this assessment, the Panels were required to take into account all evidence provided to them with respect to each ocean area in which each fishing method is used, and were also required to examine the risks to dolphins in each individual fishery. The Appellate Body noted, however, that Mexico had not raised any claims under Article 11 of the DSU alleging that the Panels failed to assess any individual fishery for which evidence was placed before them, or that the Panels incorrectly weighed and balanced the risk profiles of each individual fishery in drawing generalized conclusions on each fishing method as a whole. The Appellate Body concluded that Mexico had not demonstrated that the Panels failed to assess the risk profiles of individual fisheries or that the Panels erred in drawing conclusions on the risk profile of each fishing method on the basis of their examination of the evidence before them (including evidence pertaining to each individual fishery).

3.6.1.3.2 The Panels' use of "setting on dolphins in the ETP" as a benchmark

Mexico argued that the Panels erred by using the risk profile of setting on dolphins in the ETP as a benchmark for assessing the risk profiles of other fisheries. According to Mexico, the Panels should have relied on an independent and objective standard or point of reference against which the overall relative risks in each fishery could be assessed. Mexico also argued that the mere fact that the risk profiles of other fisheries may be different from or comparatively lower than the risk profile of setting on dolphins in the ETP does not mean that the regulatory distinctions are calibrated to the different overall relative risks in different fisheries. Mexico further argued that the Panels' reliance on the risk profile of setting on dolphins in the ETP as a benchmark resulted in the Panels focusing their analysis on qualitative attributes that are unique to the ETP setting-on-dolphins fishery. Consequently, the Panels disregarded the Appellate Body's instruction to take into account the overall effects of each fishing method.

The Appellate Body observed that the Panels did not use setting on dolphins in the ETP as a benchmark, but used the expression "ETP benchmark" solely in the context of describing the United States' explanation of the determination provisions under the 2016 Tuna Measure. Furthermore, the fact that certain aspects of the Panels' assessment of the risk profile of setting on dolphins were limited to the use of this fishing method in the ETP is because the only fishery-specific evidence provided to the Panels concerning the use of setting on dolphins pertained to the use of this method in the ETP. Other aspects of the Panels' examination of the risks associated with setting on dolphins were not limited to the ETP, but pertained more broadly to setting on dolphins anywhere in the world.

The Appellate Body considered moot Mexico's argument that, by distinguishing setting on dolphins in the ETP from all other fishing methods, the Panels did not assess whether tuna caught by other fishing methods in other ocean areas should also be excluded from access to the label. The Appellate Body explained that the Panels did not compare the risk profile of setting on dolphins in the ETP with the risk profiles of all other individual fisheries. Instead, the Panels compared the risk profile of setting on dolphins as a fishing method (used anywhere in the world) with the risk profiles of other fishing methods (also used anywhere in the world), in the context of examining the eligibility criteria, and compared the risk profile of the ETP large purse seine fishery with other individual fisheries in the context of examining the certification and tracking and verification requirements.

The Appellate Body also disagreed with Mexico that the Panels erred by focusing their analysis on qualitative attributes that are unique to setting on dolphins, finding, instead, that the Panels' analysis was consistent with the requirement that they assess the "overall relative risks" to dolphins from different fishing methods as used in different ocean areas. The Appellate Body considered that the Panels relied on all relevant information when comparing the risk profiles of setting on dolphins with other fishing methods, and consequently took into account all relevant types of harm in conducting an assessment of the overall relative risks from different fishing methods, as used in different fisheries, before reaching an overall conclusion regarding the risk profile of each fishing method.

3.6.1.3.3 The Panels' reliance on per set data and exclusion of other factors

Mexico argued that all factors that have a bearing on the measure achieving its objectives must be included in order to properly assess the risks to dolphins. Mexico asserted that the Panels incorrectly omitted the following factors from their assessment: (i) the impact of tuna-fishing methods on the sustainability of dolphin stocks through Potential Biological Removal (PBR) data; (ii) data with respect to absolute dolphin mortalities and serious injuries in ocean areas; and (iii) data concerning the risks created in certain ocean areas through insufficient regulatory oversight, unreliable reporting, IUU fishing, and/or trans-shipment at sea.

Mexico first argued that the Panels erred by failing to take into account PBR evidence that shows high risks to dolphin populations in certain ocean areas, because, in Mexico's view, such risks to dolphin populations are relevant to an assessment of the overall relative risk profiles of certain fisheries. Mexico considered its view to be supported by the findings of the original panel concerning adverse effects to dolphins and findings by the first compliance panel concerning the objective of the measure, as well as by the design and structure of the 2016 Tuna Measure itself.

Based on the design and structure of the measure, the Appellate Body agreed with the Panels that the dolphin-safe label is mainly concerned with the well-being of individual dolphins, and that the relevant risks to dolphins, for the purpose of the calibration analysis, are the risks of individual dolphins being killed or seriously injured in the fishing process. The Appellate Body considered that the Panels' understanding of the measure as being mainly concerned with the risks facing dolphins at an individual level did not suggest that risks to dolphin populations are irrelevant, or that the 2016 Tuna Measure is not at least indirectly concerned with protecting dolphin populations. The Appellate Body further considered that Mexico had not explained how reliance on PBR evidence relates to, or reveals, the actual risks that dolphins were killed

or seriously injured in the fishing process. The Appellate Body therefore agreed with the Panels that the PBR methodology prioritizes the sustainability of the population in a way that would have prevented the Panels from adequately assessing whether the measure is calibrated to different risks that a dolphin was harmed or killed in the fishing process.

Second, Mexico argued that the Panels erred by failing to compare the absolute levels of mortalities and serious injuries to dolphins in different fisheries, because in fisheries with many sets, the absolute levels of adverse effects will be masked by the per set data. To Mexico, these absolute levels of adverse effects constitute overall adverse effects on dolphins for the fishing method/area. Mexico argued that fishing practices in ocean areas where tuna fishing is causing tens of thousands of deaths per year should be discouraged, and that the omission of these overall adverse effects contradicts the two objectives of the measure.

The Appellate Body emphasized that the assessment of whether the 2016 Tuna Measure is consistent with Article 2.1 of the TBT Agreement called for an analysis of the overall relative risks to dolphins. The Panels were therefore required to use a methodology that allowed for a proper comparison of risks to dolphins across fisheries. The Appellate Body further considered that, based on the Panels' findings, a per set methodology is well suited to the kind of comparative analysis that Article 2.1 required the Panels to perform and a comparison of absolute levels of mortalities or serious injuries would be less likely to reveal the relative likelihood of a dolphin being killed or injured in the fishing process than a comparison of per set data. The Appellate Body therefore concluded that Mexico had not demonstrated that the Panels erred by relying primarily on a per set methodology.

Third, Mexico argued that the Panels erred by omitting evidence of insufficient regulatory oversight in certain ocean areas, including unreliable reporting, significant IUU fishing, and/or significant transhipment at sea, because dolphins will be at a greater relative risk of harms from fishing methods used in ocean areas that have insufficient regulatory oversight.

The Appellate Body recalled that, while accuracy of the information conveyed to consumers through the dolphin-safe label is a consideration that should inform the calibration analysis, this is different from saying that the applicable legal standard requires the Panels to determine whether the 2016 Tuna Measure is calibrated, *inter alia*, to the risk of inaccurate dolphin-safe information being passed to consumers. The Appellate Body also recalled that Mexico had not substantiated its assertion that tuna fishing in ocean areas with less reliable regulatory systems is more likely to lead to harm to dolphins, and consequently the Appellate Body saw no reason to disagree with the Panels' statement that the risks of inaccurate certification, reporting, and/or record keeping are not risks that affect dolphins themselves. The Appellate Body noted that the Panels did not exclude the possibility that factors such as a lack of regulatory oversight may affect the accuracy of the label. The Appellate Body explained that it would address the question of whether Mexico had substantiated its assertion that a lack of regulatory oversight in a fishery will increase the risk of inaccurate labelling in the next section of its analysis.

In conclusion, the Appellate Body found no error in the Panels' assessment of the risks to dolphins arising from the use of different fishing methods in different ocean areas or in their conclusions regarding the risk profiles of relevant fishing methods on the basis of that assessment.

3.6.1.4 The Panels' assessment of whether the 2016 Tuna Measure is calibrated to the risks to dolphins

Mexico challenged several of the Panels' intermediate findings that led to their ultimate conclusion that the 2016 Tuna Measure accords to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries, and therefore is consistent with Article 2.1 of the TBT Agreement. Specifically, Mexico claimed that the Panels erred in their assessment of: (i) the eligibility

criteria; (ii) the certification requirements; (iii) the tracking and verification requirements; and (iv) the 2016 Tuna Measure as a whole. In its Notice of Appeal, Mexico did not separately challenge the Panels' findings regarding the determination provisions.

With respect to the eligibility criteria, the Appellate Body considered that the Panels did not err in finding that setting on dolphins is significantly more dangerous to dolphins than other fishing methods. This finding implies that the distinction in the eligibility criteria between setting on dolphins, on the one hand, and other fishing methods, on the other hand, is, as the Panels found, appropriately calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Accordingly, the Appellate Body found that Mexico had not demonstrated that the Panels erred in reaching the intermediate finding that the eligibility criteria embodied in the 2016 Tuna Measure are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

With respect to the certification requirements, the Appellate Body found that the Panels adopted the correct approach in comparing the risk profiles of individual fisheries, because the certification requirements make a distinction on the basis of both fishing method and ocean area. Having found no legal error in the Panels' assessment of risk profiles, the Appellate Body considered that the Panels did not err in finding that the ETP large purse seine fishery has a special risk profile that distinguishes it from other fisheries. The Appellate Body also addressed and rejected all of Mexico's arguments challenging the Panels' assessment of the certification requirements. In particular, the Appellate Body highlighted the Panels' statements that accuracy is a function of potentially many variables, including not only the labelling requirements in place but also the different levels of risk to dolphins in different fisheries, and that less strict certification requirements do not necessarily mean less label accuracy. The Appellate Body agreed with the Panels that the pertinent question is whether the strictness of the relevant requirements is commensurate with the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean. In the Appellate Body's view, the Panels took account of risks of inaccuracy when finding that the Captain Training Course incorporated in the 2016 Tuna Measure: (i) contains meaningful information that would assist captains to carry out their certification responsibility properly; and (ii) is embedded within a sufficiently enforceable regulatory framework. Furthermore, the Appellate Body agreed with the Panels that the determination provisions create flexibility that helps to ensure that the 2016 Tuna Measure is calibrated to the different risks to dolphins arising from the use of different fishing methods in different areas of the ocean. In sum, the Appellate Body found that Mexico had not demonstrated that the Panels erred in arriving at the intermediate finding that the different certification requirements are calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

In respect of the tracking and verification requirements, the Appellate Body found that the Panels adopted the correct approach in comparing the risk profiles of individual fisheries for the purposes of assessing the tracking and verification requirements, because these requirements make a distinction on the basis of both fishing method and ocean area. Having found no legal error in the Panels' assessment of risk profiles, the Appellate Body considered that the Panels did not err in finding that it is both the technical and legal possibilities of setting on dolphins and the fact that dolphin sets occur in a consistent and systematic manner in the ETP large purse seine fishery that give this fishery its special risk profile. Moreover, the Appellate Body addressed and rejected all of Mexico's arguments challenging the Panels' assessment of the tracking and verification requirements.

In particular, the Appellate Body disagreed with Mexico's contention that the Panels completely omitted from their analysis certain factors that allegedly affect the risk of inaccurate labelling. With regard to regulatory oversight, the Appellate Body noted the Panels' finding that the new chain-of-custody requirement for tuna products harvested outside ETP large purse seine fisheries addresses the previous inability of the US government under the NOAA regime to go behind the documents. Concerning the existence of IUU fishing, the Appellate Body noted the Panels' finding that the 2016 Tuna Measure contains the necessary tools to induce compliance of US processors and importers. Furthermore, the Appellate Body noted that

Mexico had pointed to no evidence on the Panel record regarding the risk of inaccurate labelling owing to insufficient regulatory oversight, unreliable reporting, and the existence of IUU fishing and trans-shipment at sea. The Appellate Body also shared the Panels' view that the amendments introduced in the 2016 Tuna Measure narrowed the differences between the AIDCP and NOAA regimes. Consequently, the Appellate Body found that Mexico had not demonstrated that the Panels erred in arriving at the intermediate finding that differences between the NOAA and AIDCP regimes with respect to tracking and verification have been considerably narrowed in the 2016 Tuna Measure, and the remaining differences are calibrated to the differences in the risk profile of the ETP large purse seine fishery compared to other fisheries.

Finally, the Appellate Body considered that the Panels' analyses of each of the elements of the 2016 Tuna Measure, as well as their examination of the measure as a whole, were properly informed by the interlinkages between these elements and the fact that they operate together to regulate access to the dolphin-safe label. Furthermore, the Appellate Body recalled that Mexico's claim that the Panels erred in their assessment of the 2016 Tuna Measure as a whole was consequential upon its challenge of the Panels' assessment of the eligibility criteria, certification requirements, and tracking and verification requirements. Having reviewed and rejected Mexico's arguments against the Panels' assessment of each of these elements of the 2016 Tuna Measure, the Appellate Body found that Mexico had not demonstrated that the Panels erred in their assessment of the 2016 Tuna Measure, as a whole, or in finding that the 2016 Tuna Measure, as a whole, is calibrated to the risks to dolphins arising from the use of different fishing methods in different areas of the ocean.

3.6.1.5 Conclusion under Article 2.1 of the TBT Agreement

Based on the findings summarized above, the Appellate Body upheld the Panels' conclusion that the 2016 Tuna Measure accords to Mexican tuna products treatment no less favourable than that accorded to like products from the United States and other countries and therefore is consistent with Article 2.1 of the TBT Agreement.

3.6.2 Article XX of the GATT 1994

Mexico argued that the Panels erred in relying on their analysis under Article 2.1 of the TBT Agreement to conclude that the 2016 Tuna Measure is not inconsistent with the requirements of the *chapeau* of Article XX of the GATT 1994. Mexico submitted that, to examine whether a measure is applied in a manner that constitutes arbitrary or unjustifiable discrimination under the *chapeau*, a panel must consider whether the detrimental impact caused by the measure can be reconciled with, or rationally connected to, the policy objective that was provisionally found to justify the measure under one of the subparagraphs of Article XX. To Mexico, since the Panels made no substantive findings under Article 2.1 with respect to arbitrary or unjustifiable discrimination, by relying on their analysis under Article 2.1 for the purpose of the *chapeau* of Article XX, the Panels did not properly take into account the differences between the legal analyses required under these provisions.

The Appellate Body recalled that there are important parallels between the analyses under the *chapeau* of Article XX and Article 2.1, in particular because the concept of arbitrary or unjustifiable discrimination between countries where the same conditions prevail is found both in the *chapeau* of Article XX and in the sixth recital of the preamble of the TBT Agreement. The Appellate Body further recalled that in the circumstances of this dispute, it was appropriate in principle for the first compliance panel to rely on a similar analytical process under both Article 2.1 and the *chapeau* of Article XX. However, the Appellate Body noted that, because the first compliance panel had failed to conduct a proper calibration analysis under Article 2.1, and had analysed each of the relevant components of the measure in isolation, the panel had also failed to examine properly the rational relationship between the measure's objectives and the regulatory distinctions

giving rise to the discrimination. Thus, it was inappropriate for the first compliance panel to have relied on the same reasoning and analysis developed under Article 2.1 in making findings regarding arbitrary or unjustifiable discrimination under the *chapeau* of Article XX.

In contrast, the Appellate Body found that the Panels in the present proceedings conducted a proper calibration analysis of the 2016 Tuna Measure by assessing whether the regulatory distinctions of the 2016 Tuna Measure are calibrated to different risks to dolphins arising from the use of different fishing methods in different areas of the ocean. Therefore, unlike the first compliance panel's assessment of the 2013 Tuna Measure, the Panels' calibration analysis under Article 2.1 encompassed consideration of the rational relationship between the regulatory distinctions of the 2016 Tuna Measure and its objectives. This means that the Panels' analysis under Article 2.1 also demonstrated that the 2016 Tuna Measure is not designed or applied in a manner that constitutes arbitrary or unjustifiable discrimination within the meaning of the *chapeau* of Article XX, such that it was appropriate for the Panels to rely on their reasoning developed under Article 2.1 for assessing whether the 2016 Tuna Measure complies with the requirements of the *chapeau* of Article XX.

Finally, the Appellate Body rejected Mexico's argument that there is an apparent conflict in the Panels' reasoning. According to Mexico, this conflict arose because, on the one hand, the 2016 Tuna Measure is provisionally justified as relating to "conservation of exhaustible natural resources" under Article XX(g) while, on the other hand, the Panels refused to consider, in their calibration analysis under Article 2.1, PBR data and evidence demonstrating that certain fishing methods in certain areas of the oceans are causing adverse effects that threaten the collapse of dolphin populations. The Appellate Body highlighted the findings by the original and first compliance panels, as well as the Panels, that by seeking to ensure that individual dolphins are not being harmed in the fishing process, the 2016 Tuna Measure is also related to the conservation of these populations. To the Appellate Body, the fact that the Panels sought to examine whether the measure is calibrated to risks to individual dolphins by relying on per set, rather than PBR, evidence does not mean that their calibration analysis failed to take into account the rational connection between the regulatory distinctions and the goal of conserving exhaustible natural resources.

3.6.3 The Panels' decision to conduct a partially open meeting with the parties

Mexico appealed the findings and conclusion of the Panels that they had the authority to conduct a partially open meeting of the parties without the consent of both parties. It is noted that, while previous panels and the Appellate Body have held meetings and hearings that were open to public observation, this is the first time that a WTO adjudicator had authorized such a meeting without the express consent of both parties to the dispute. In response to Mexico's appeal, the United States contended that Mexico's appeal was not properly raised due to deficiencies in Mexico's Notice of Appeal in light of Article 17.6 of the DSU and Rule 20(2)(d) of the Working Procedures.

As regards the United States' contention, the Appellate Body found that Mexico's Notice of Appeal sufficiently identified an alleged error in the issues of law covered in the Panel Reports, as required by Rule 20(2)(d)(i) of the Working Procedures and Article 17.6 of the DSU. In particular, the Appellate Body considered that Mexico's Notice of Appeal identified, as an issue of law, the question whether the Panels had the authority to conduct a meeting with the parties that was partially open to public observation without the consent of both parties. The Appellate Body also found that the formal defects in Mexico's Notice of Appeal, owing to Mexico's failure to comply with the requirements in Rule 20(2)(d)(ii) and (iii) of the Working Procedures, did not, by themselves, warrant the dismissal of Mexico's appeal. Therefore, the Appellate Body found that Mexico's claim that the Panels erred in finding that they had the authority to conduct a partially open meeting without the consent of both parties was properly within the scope of this appeal.

The Appellate Body then addressed the question whether it should rule on this issue. It noted that, while the Appellate Body is required to address each issue on appeal, it has the discretion not to rule on an issue

when doing so is not necessary to resolve the dispute, but the Appellate Body may rule on such an issue in light of the specific circumstances of a given dispute. Competing considerations were relevant to its decision on whether ruling on Mexico's claim of error is necessary. First, the issue raised by Mexico's appeal does not directly relate to the "matter [at] issue in the dispute", that is, whether the 2016 Tuna Measure is consistent with the TBT Agreement and the GATT 1994. At the same time, the manner in which a panel adopts procedures and conducts its proceedings when it addresses the matter referred to it by the DSB may give rise to issues of law and legal interpretation, which would be subject to the scope of appellate review within the meaning of Article 17.6 of the DSU. Second, Mexico considered that the Panels were not authorized to partially open their meeting with the parties to public observation without the consent of Mexico. However, Mexico's arguments on appeal did not elaborate on the manner in which the Panels' decision is inconsistent with the DSU. Third, in addition to Mexico's request for a finding of error, Mexico requested that the Appellate Body clarify that, *in the future*, panels should not open a hearing even partially without the agreement of all disputing parties. Mexico suggested that, by ruling on this issue, the Appellate Body would be providing clarification on a concern that impacts not only panels but also arbitrators. The fact that Mexico's request concerned the proceedings of other panels and arbitrators under Article 22.6 of the DSU, in the Appellate Body's view, cast doubt on whether ruling on this issue was necessary to resolve the present dispute.

In light of the specific circumstances of these proceedings, the Appellate Body found it unnecessary to rule on whether the Panels erred in finding that they had the authority to conduct a partially open meeting of the parties without the consent of both parties. The Appellate Body emphasized that their finding should not be construed as an endorsement of the Panels' decision to conduct a partially open meeting of the parties without the consent of both parties.

4. PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS

A total of 25 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 2018. Ten Members participated at least once as the main participant, and 22 Members participated, at least once, as third participant.

As of the end of 2018, 77 of the 164 WTO Members had participated in appeals in which Appellate Body reports were circulated between 1996 and 2018. Further information on the participation of WTO Members in appeals is provided in Annex 10.

5. PROCEDURAL ISSUES ARISING IN APPEALS

This section summarizes the procedural issues that were addressed in the Appellate Body reports circulated in 2018. The Appellate Body addressed procedural issues concerning: (i) treatment of and access to confidential information; (ii) modification of the time limits for the filing of written submissions; (iii) conduct of oral hearings; (iv) modification of the working schedule of an appeal; (v) harmonization of appeal schedules; and (vi) the expiry of the terms of office of Appellate Body members assigned to appeals.

5.1 Treatment of confidential information

In *Russia – Commercial Vehicles*[38], Russia and the European Union jointly requested the Division hearing the appeal to adopt additional procedures for the protection of BCI in the appellate proceedings. The Division invited the third participants to comment on the joint request. Only the United States provided comments. The Division issued a Procedural Ruling according additional protection, on specified terms, to the information that the Panel treated as BCI in its Report and in the Panel record.

In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*[39], the European Union and the United States jointly requested the Division hearing the appeal to adopt additional procedures to protect BCI and HSBI in the appellate proceedings. The European Union and the United States argued, *inter alia*, that disclosure of certain sensitive information on the Panel record would be severely prejudicial to the large civil aircraft manufacturers concerned and possibly to their customers and suppliers. The participants suggested that the additional procedures adopted by the Appellate Body in the appeal in *US – Large Civil Aircraft (2nd complaint)*, with certain modifications, form the basis for any procedural ruling on confidentiality in these appellate proceedings.

On the same day, the Chair of the Appellate Body sent a letter to the participants and third parties indicating that the Division had decided, pursuant to Rule 16(1) of the Working Procedures, to suspend the deadlines for the filing of written submissions and other documents in this appeal. The third parties were invited to comment in writing on the participants' joint request. Comments were received from Australia, Brazil, and Canada. While none of the third parties objected to the adoption of additional procedures for the protection of BCI and HSBI, Canada suggested that the additional procedures provide for a designated reading room at the embassy and/or other diplomatic mission of the European Union and the United States in each of the third participants' capitals. Australia, the European Union, and the United States each commented on Canada's proposal. Australia supported Canada's request. The European Union and the United States opposed it, noting that it would require a total of 12 designated reading rooms in the third participants' respective capitals, in addition to the designated reading room on the WTO premises, and emphasized that this would impose a significant burden on the participants. The United States also considered that there would be little benefit to third participants, because the only difference under the proposed adjustment would be to shift the burden of reviewing BCI from Geneva-based officials to capital-based officials.

The Division issued a Procedural Ruling adopting additional procedures to protect the confidentiality of BCI and HSBI in these appellate proceedings. The Division did not adopt the adjustment proposed by Canada, noting the burden it would involve and that the interests of third participants mainly concerned the correct legal interpretation of relevant provisions of the covered agreements, rather than factual questions. The Division also noted that third participants' rights would be taken into account in these appellate proceedings, including in setting the Working Schedule for this appeal.

[38] The procedural rulings in *Russia – Commercial Vehicles* were issued to the participants in 2017. However, as the Appellate Body report was circulated on 22 March 2018, these procedural rulings were subject to confidentiality until then.

[39] The procedural rulings in *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* were issued to the participants in 2016 and 2017. However, as the Appellate Body report was circulated on 15 May 2018, these procedural rulings were subject to confidentiality until then.

The European Union further requested that certain text in the United States' other appellant's submission be designated as BCI. The United States responded indicating that it did not object to some of the BCI designations proposed by the European Union. The United States, however, did object to other proposed BCI designations because the information at issue could already be derived from information on the Panel record that was not designated as BCI or HSBI. The Division reviewed the changes proposed, taking into account the risks associated with the disclosure of the relevant information and the rights and duties established in the DSU and the other covered agreements. Based on these considerations, the Division decided to proceed on the basis of the BCI designations proposed by the European Union and requested the United States to submit revised copies of the BCI and non-BCI versions of its other appellant's submission.

In *EU – PET (Pakistan)*[40], Pakistan and the European Union jointly requested the Appellate Body Division hearing the appeal to adopt additional procedures for the protection of BCI in the appellate proceedings. In their joint request, the participants sought protection for any information that was submitted by the participants as BCI in the context of the Panel proceedings, including any information that was treated as such by the Panel. The Division invited the third participants to comment in writing on the joint request. Only the United States provided comments. The Division issued a Procedural Ruling informing the participants of its decision to accord additional protection to the information that the Panel had treated as BCI in its Report and on the Panel record.

5.2 Persons approved to access confidential information

In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the United States objected to the inclusion of one of the European Union's BCI- and HSBI-Approved Persons, and requested further information on this individual. The European Union provided additional information on the individual concerned, and confirmed that he had been retained by an outside advisor who was subject to an enforceable code of professional ethics and assumed responsibility for compliance with the additional BCI/HSBI procedures adopted by the Appellate Body in these proceedings. The Division issued a Procedural Ruling recalling that it would reject a request for designation of an outside advisor as a BCI- or HSBI-Approved Person only upon a showing of compelling reasons. In the circumstances of this case, the Division considered it appropriate for the European Union to keep the individual concerned on its BCI- and HSBI-Approved Persons list.

5.3 Time limits for the filing of written submissions

In *Russia – Commercial Vehicles*, the Appellate Body received a communication from the United States requesting an extension of the deadline for filing third participants' submissions. Subsequently, the Appellate Body received a communication from Russia and the European Union, each requesting an extension of the deadline for filing appellees' submissions. After providing an opportunity for the participants and third participants to comment on these requests, the Division issued a Procedural Ruling extending the deadline for filing appellees' submissions and the deadline for filing third participants' submissions and notifications under Rule 24(1) and (2) of the Working Procedures.

In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the European Union requested the Division hearing the appeal to modify the deadline for the filing of the appellees' submissions. The Division invited the United States and the third parties to comment on the European Union's request. Written comments were received from the United States, Australia, and Canada. The United States opposed the request for an extension. While Australia and Canada did not object to the extension, they requested that the Division also extend the deadline for the filing of the third participants' submissions if it were to decide to grant the European Union's request. Taking into account the length of the United States' other

[40] The procedural rulings in *EU – PET (Pakistan)* were issued to the participants in 2017. However, as the Appellate Body report was circulated on 16 May 2018, these procedural rulings were subject to confidentiality until then.

appellant's submission and the extended Working Schedule adopted for these appellate proceedings, the Division took the view that declining the extension would not result in manifest unfairness and thus rejected the European Union's request.

In *Brazil – Taxation*[41], the Division hearing the appeals received a joint letter from Argentina, Australia, Canada, and the United States requesting an extension of the deadline for the filing of their third participants' submissions in these proceedings. The Division invited the participants and the other third participants to comment on the joint request. No objections were received. The Division issued a Procedural Ruling, in accordance with Rule 16(2) of the Working Procedures, extending the deadline for the filing of third participants' submissions.

In *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)*[42], the Division hearing the appeal received a communication from Japan requesting an extension to the deadline for filing the third participants' submissions and executive summaries. The Division received no objections to the request. The Division issued a Procedural Ruling, in accordance with Rule 16 of the Working Procedures, extending the deadline for the filing of third participants' submissions.

5.4 Requests regarding the conduct of the oral hearing

In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the European Union and the United States jointly requested that the oral hearing in the appeal be open to public observation, subject to proposed additional procedures for the protection of BCI and HSBI similar to those in *US – Large Civil Aircraft (2nd complaint)*. Regarding the segments of the oral hearing that would be open to public observation, the participants suggested that the opening and closing statements of the participants and third participants (that agreed to public observation) be videotaped, reviewed by the participants for any inadvertent inclusion of BCI/HSBI, and transmitted to the public at a later date. Canada and China submitted comments on the participants' joint request. Canada supported the joint proposal. While recognizing the need for the protection of BCI/HSBI in these proceedings, China queried whether a complete exclusion of third participants' non-BCI-Approved Persons from segments of the oral hearing dedicated to questions and answers was required. Instead, China suggested that sessions dedicated to legal interpretative issues be open to all third participants and that they be kept separate from sessions requiring reference to BCI/HSBI.

The Division issued a Procedural Ruling authorizing the participants' request to open the sessions dedicated to the delivery of opening and closing statements to public observation, subject to additional procedures for the conduct of all sessions of the oral hearing. The Division considered that China's request would be difficult to accommodate given the amount of BCI/HSBI involved in this dispute. The Division also recalled in this regard that third participants were allowed to designate up to eight individuals as BCI-Approved Persons, and considered this sufficient to allow the third participants to be meaningfully represented at the oral hearing.

5.5 Request to modify the date of the oral hearing

In *Russia – Commercial Vehicles*, Russia requested the Division hearing the appeal to delay the oral hearing. The European Union objected to Russia's request to delay the hearing. The Division informed the participants and third participants that it was not in a position to accommodate Russia's request.

[41] The procedural rulings in *Brazil – Taxation* were issued to the participants in 2017. However, as the Appellate Body report was circulated on 13 December 2018, these procedural rulings were subject to confidentiality until then.

[42] The procedural rulings in *US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II)* were issued to the participants in 2017. However, as the Appellate Body report was circulated on 14 December 2018, these procedural rulings were subject to confidentiality until then.

In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Division hearing the appeal informed the participants and third participants that the second session of the hearing would have to take place one week earlier than initially planned, because no meeting room would be available at the WTO due to the WTO Public Forum. The United States objected to this scheduling change due to, *inter alia*, conflict with religious holidays and emphasized that, from its perspective, the WTO's organization of a public forum could not supersede the WTO's timely administration of its dispute settlement system, a core function of the organization. The United States suggested that the second session of the oral hearing take place on the initially scheduled week in an alternative venue if no meeting room could be made available at the WTO. The European Union also stated its preference for the second session of the oral hearing to take place on the initially planned dates in premises outside the WTO if necessary, due to, *inter alia*, the professional and personal commitments of members of the European Union's delegation. Both the United States and the European Union proposed their respective alternative scheduling preference in the event that it is impossible to maintain the dates initially planned. No comments were received from the third participants.

Following confirmation by the WTO Administration that there would be no room available to the Appellate Body during the week of the WTO Public Forum, and taking into account the participants' preference for the initially planned dates, the Division explored alternative venues and made arrangements for the second session of the oral hearing to take place on the initially planned dates at the premises of the World Meteorological Organization.

In *EU – PET (Pakistan)*, Pakistan and the European Union jointly requested the Division to reschedule the date of the hearing. The Division invited the third participants to comment on the request by the participants. None of the third participants commented on the request. The Division issued a Procedural Ruling under Rule 16 of the Working Procedures, informing the participants and third participants of its decision to reschedule the date of the hearing.

5.6 Request for harmonization of appeals schedules

In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the Appellate Body received a letter from the European Union referring to this appeal, and to the then anticipated appeals in *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)* (DS353) and *US – Tax Incentives* (DS487). Referring to Rules 16(1) and 16(2) of the Working Procedures and Article 9 of the DSU, the European Union requested that the schedules for these three appeals be harmonized to the greatest extent possible and that the hearings be sufficiently proximate in time, so that a particular matter would not be effectively disposed of in one appeal before the related matter is heard in one of the other appeals. The Chair of the Appellate Body invited the United States and the third parties to comment on the European Union's request. The United States argued that the European Union's request was not supported by the DSU or the Working Procedures and would result in delays in the proceedings. The United States stated that it remained open to proposals to set deadlines for written submissions and dates for oral hearings in a way that would allow the participants and third participants in each dispute to advocate effectively their positions on appeal and for the Appellate Body to consider fully the issues raised. The participants and third parties were invited to submit additional comments. The European Union reiterated its request that any oral hearings in these appeals be sufficiently proximate in time, but noted that it was content to leave it to the Appellate Body to determine what that would mean in practice. The Appellate Body indicated that it would bear in mind the European Union's request, as well as the comments received, during the appellate proceedings in these three disputes.

5.7 Transition

In *Russia – Commercial Vehicles*, the Chair of the Appellate Body notified the participants and third participants that Mr Hyun Chong Kim, a member of the Division selected to hear this appeal, had, pursuant to Rule 14 of the Working Procedures, resigned on 1 August 2017 with immediate effect. The Chair indicated that, pursuant to Rules 6(2) and 13 of the Working Procedures, Mr Shree Baboo Chekitan Servansing had replaced Mr Kim on the Division hearing this appeal.

In *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Chair of the Appellate Body had notified the Chair of the DSB of the Appellate Body's decision to authorize Messrs Ricardo Ramírez-Hernández and Peter Van den Bossche to complete the disposition of this appeal, even though their respective second terms of office were due to expire before the completion of these appellate proceedings.

In *EU – PET (Pakistan)*, *Indonesia – Iron or Steel Products*[43], and *Brazil – Taxation*, the participants and third participants were informed that, in accordance with Rule 15 of the Working Procedures, the Appellate Body had notified the Chair of the DSB of its decision to authorize Mr Peter Van den Bossche to complete the disposition of this appeal, even though his second term of office was due to expire before the completion of the appellate proceedings.

5.8 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 2018. For each appellate proceeding, the Appellate Body communicated to the DSB Chair the reasons why it was not possible to circulate the Appellate Body report within the 90-day period.

These reasons included the substantial workload of the Appellate Body, issues arising from overlap in the composition of the Divisions hearing different appeals owing to the vacancies on the Appellate Body, appellate proceedings running in parallel, the number and complexity of the issues raised in appellate proceedings, together with the demands that these appellate proceedings place on the WTO Secretariat's translation services, and the shortage of staff in the Appellate Body Secretariat.

[43] This notification in *Indonesia – Iron or Steel Products* was made in 2017. However, since the Appellate Body report was circulated on 15 August 2018, this notification was subject to confidentiality until then.

6. ARBITRATIONS 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 three arbitration proceedings, all those who have served as arbitrators pursuant to Article 21.3(c) have been current or former Appellate Body Members.[44] In carrying out arbitrations under Article 21.3(c), Appellate Body Members act in an individual capacity.

6.1 United States – *Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, WT/DS471/RPT

On 22 May 2017, the DSB adopted the Appellate Body Report and the Panel Report in *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*. This dispute concerned China's challenge of certain methodologies and their use by the United States in a number of anti-dumping proceedings. The Panel found: (i) the "Single Rate Presumption" (SRP) to be inconsistent "as such" with Article 6.10 and Article 9.2 of the Anti-Dumping Agreement; (ii) the United States to have acted inconsistently with Article 6.10 and Article 9.2 of the Anti-Dumping Agreement because the United States Department of Commerce (USDOC) applied the SRP in the 38 anti-dumping determinations challenged by China; (iii) the United States to have acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement because of certain steps taken by the USDOC in relation to the weighted-average to transaction (WT) methodology and its use of zeroing under the W-T methodology in three original anti-dumping investigations; and (iv) the United States to have acted inconsistently with Article 2.4.2 of the Anti-Dumping Agreement and Article VI:2 of the GATT 1994 because of the USDOC's use of zeroing under the W-T methodology in one administrative review. These Panel findings were not appealed by the United States and, in ruling on China's appeal, the Appellate Body did not make any additional findings of inconsistency with the covered agreements.

At the meeting of the DSB held on 19 June 2017, the United States indicated 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. By letter dated 17 October 2017, China informed the DSB that it had engaged in consultations with the United States on the reasonable period of time for implementation pursuant to Article 21.3(b) of the DSU, but that those consultations had not resulted in an agreement. China therefore requested that the reasonable period of time be determined through binding arbitration pursuant to Article 21.3(c) of the DSU.

By letter dated 30 October 2017, China informed the Director-General of the WTO that it had engaged in consultations with the United States regarding the appointment of an arbitrator but that those consultations had not led to an agreement. China therefore requested the Director-General to appoint an arbitrator pursuant to footnote 12 to Article 21.3(c) of the DSU. After consulting with the parties, the Director-General appointed Mr Simon Farbenbloom as the Arbitrator on 7 November 2017.

In the arbitration, the United States requested the Arbitrator to determine that 24 months is a reasonable period of time to implement the DSB's recommendations and rulings in this dispute due to the number and magnitude of modifications to the challenged measures, the procedural requirements under US law, the complexity of the issues involved, the workload of the USDOC, and other resource constraints due to the

[44] 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 chair of the Panel in the underlying dispute. Ms Claudia Orozco served as the Arbitrator in *United States – Anti-Dumping and Countervailing Measures on Large Residential Washers from Korea.* Ms Orozco had previously served as chair of the Panel in the underlying dispute. Mr Farbenbloom was also appointed as the Arbitrator in *United States – Certain Methodologies and Their Application to Anti-Dumping Proceedings Involving China*, initiated 17 October 2017, and circulated 19 January 2018.

recent change in the US administration. According to the United States, the implementation process would comprise two distinct sets of actions: (i) one proceeding pursuant to Section 123(g) of the Uruguay Round Agreements Act (URAA) to address the "as such" recommendations and rulings of the DSB pertaining to the SRP; and (ii) 38 separate proceedings pursuant to Section 129(b) of the URAA to address the DSB's "as applied" recommendations and rulings relating to the USDOC's use of the SRP in 38 anti-dumping determinations, as well as its use of the W-T methodology, and zeroing under that methodology, in certain of those determinations. The United States explained that, while these two sets of proceedings must be undertaken sequentially, there can be "a small degree of overlap" between them. In particular, the United States proposed to commence the Section 129 proceedings once the preliminary determination in the Section 123 proceeding has been issued. The United States proposed to stagger the Section 129 proceedings in several tranches in lieu of the administrative burden on the USDOC.

China did not question the USDOC's recourse to two sets of proceedings under Section 123 and Section 129 of the URAA for purposes of implementation in this dispute. Nor did China object to the degree of overlap between these proceedings that the United States indicated would occur. China nevertheless argued that the amount of time sought by the United States, both for its Section 123 proceeding and for the multiple Section 129 proceedings, is "unreasonably long", and that not all steps under these sets of proceedings are required, considering the circumstances of this case. China also contested the staggered approach proposed by the United States for the Section 129 proceedings, and contended that these proceedings can be conducted concurrently. In China's view, the United States could implement all of the DSB's recommendations and rulings in six months.

As an initial matter, the Arbitrator recalled that both China and the United States agreed that Sections 123 and 129 of the URAA are appropriate means to address the DSB's "as such" and "as applied" recommendations and rulings respectively. Then, the Arbitrator addressed the parties' disagreements regarding the time necessary to complete the processes under Sections 123 and 129 of the URAA.

With respect to the United States' proposed means of implementing the DSB's "as such" recommendations and rulings under Section 123 of the URAA, the United States argued that 15 months are required due to the complexity of the issue at hand, allocated as follows: (i) approximately seven months from the adoption of the Panel and Appellate Body Reports to conduct inter-agency consultations and related activity prior to commencing a Section 123 proceeding; (ii) approximately four months to issue the preliminary determination once the proceeding under Section 123 has commenced; and (iii) approximately four months to issue the final determination.

China argued that no time after the DSB's adoption of the Panel and Appellate Body Reports should be awarded for inter-agency consultations and related activity because, according to China, the United States had ample time to conduct inter-agency consultations and analysis preparation prior to the adoption of these reports. According to China, the United States was aware of the WTO-inconsistency of the SRP prior to the adoption of the Panel and Appellate Body Reports. China further submitted that 15 days would be sufficient to issue the preliminary determination and that the additional time allocated for the United States to issue the final determination should be brief.

The Arbitrator first noted that consultations within government agencies are a typical aspect of "law-making", and that, regardless of whether they are mandated by law, the time needed to undertake such consultations should be taken into account in determining a reasonable period of time for implementation. With respect to the relevance of the United States' awareness of the WTO-inconsistency of the SRP prior to the adoption of the Panel and Appellate Body Reports, the Arbitrator considered that formal implementation steps need only be taken after the adoption of the relevant panel and Appellate Body reports. However, the Arbitrator also considered that circumstances predating the adoption of the relevant panel and Appellate Body reports may in some instances bear on the determination of the reasonable period of time. In this case, the Arbitrator noted that the United States had not appealed the Panel's finding of "as such" inconsistency pertaining

to the SRP. Therefore, the Arbitrator considered that the United States was, at least to a certain extent, in a position to begin considering its options for implementation prior to the adoption of the Panel and Appellate Body Reports. The Arbitrator was also not persuaded that the implementation options available to the United States are especially numerous or complex. For these considerations, the Arbitrator did not consider that as many months are needed for these initial steps as the United States contended.

Regarding the United States' argument that implementing the DSB's "as such" recommendations and rulings in this dispute is particularly complex, the Arbitrator considered that implementation will not necessarily be as complicated as the United States suggested, but more complex than what China suggested. The Arbitrator considered that the United States could reasonably conduct the necessary preparatory work and issue the preliminary determination under Section 123 in respect of the DSB's "as such" recommendations and rulings in significantly less time than the United States' proposal, but in more time than China's proposal. Given the overlap between the Section 123 and Section 129 proceedings, the Arbitrator did not consider it necessary to address how much time should reasonably be allocated for the USDOC to issue the final determination in the Section 123 proceeding.

With respect to the United States' proposed means of implementing the DSB's "as applied" recommendations and rulings under Section 129 of the URAA, the parties agreed that redeterminations under Section 129 should commence once the preliminary determination in the Section 123 proceeding is issued. The parties, however, disagreed on the extent to which the multiple redeterminations that are needed can be conducted concurrently, and on the time required for the various steps of a Section 129 proceeding. The United States claimed that it needed 13 months to complete the Section 129 proceedings whereas China claimed that 5 and a half months would be sufficient.

Specifically, the United States argued that the various Section 129 proceedings need to be staggered in tranches due the large number of redeterminations needed, as well as the associated administrative workload and due process considerations. The Arbitrator recalled that, in principle, the workload of the implementing authority is not relevant to the determination of the reasonable period of time for implementation of the DSB's recommendations and rulings. The Arbitrator further considered that the United States' proposed approach of addressing the redeterminations in tranches is a matter for the US authorities. The Arbitrator, however, noted that the commonality in the issues to be considered and the relationship between a number of redeterminations under Section 129 are such that it may be possible for the USDOC to expedite its work for many of the redeterminations.

The Arbitrator then considered China's argument that Section 129(b)(2) of the URAA imposes a 180-day limit within which the redeterminations must be made, thereby rendering the United States' proposal for a longer period of time for the Section 129 process inconsistent with its own statute. The Arbitrator accepted the United States' explanations regarding the scope of this provision that the 180-day limit is not a limit on the length of time that may be used to complete all the steps involved in a redetermination. In reaching this conclusion, the Arbitrator observed that the 180-day period is triggered not when the USDOC begins its work pursuant to Section 129, but only when the USTR makes a written request to the USDOC relating to the redetermination, which request could, in principle, be received before or after the USDOC begins its work on the redetermination.

Next, the Arbitrator turned to the question of the relevance, for the reasonable period of time for implementation, of the relative scope of original investigations and administrative reviews, on the one hand, and redeterminations, on the other hand. In this regard, the Arbitrator accepted the logic of the proposition put forward by China that redeterminations may require less time than the original proceedings since the scope of redeterminations is more limited. However, the Arbitrator also considered that the fact that implementation might entail a move from a presumption to a factbased, case-by-case analysis makes it less likely that the USDOC will be able to make all of the required redeterminations without re-opening its factual record in at least some of the relevant proceedings.

Lastly, the Arbitrator noted that there is no provision of US law that mandates that all steps taken in original investigations must also be taken in Section 129 redeterminations. However, the Arbitrator was reluctant to determine any period of time for implementation that would foreclose the possibility that certain procedural steps could be taken if and when warranted, such as hearings and verifications.

For these reasons, the Arbitrator considered that the United States could reasonably complete the Section 129 redeterminations in respect of the DSB's "as applied" recommendations and rulings in significantly less time than the United States' proposal, but in more time than China's proposal.

Finally, the Arbitrator turned to the "particular circumstances" of this dispute identified as relevant in the determination of the reasonable period of time for implementation by the United States and China. To the extent that such "particular circumstances" were not already taken into account in the context of the Arbitrator's findings so far, the Arbitrator found them not to be relevant. In particular, the Arbitrator did not consider the USDOC's workload or the continuing formation of the US administration and the fact that certain key positions at the USDOC remain vacant to be relevant to its determination of the reasonable period of time for implementation in this dispute. In the same vein, the Arbitrator did not consider the United States' alleged record of failing to comply within applicable reasonable periods of time in previous disputes, as argued by China, to be relevant to its determination of the reasonable period of time.

Based on all of the foregoing considerations, the Arbitrator determined that the reasonable period of time for the United States to implement the recommendations and rulings of the DSB in this dispute is 15 months from the adoption of the Panel and Appellate Body Reports, expiring on 22 August 2018.

7. OTHER ACTIVITIES

7.1 Digital Dispute Settlement Registry

The WTO Digital Dispute Settlement Registry (DDSR) 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 DDSR 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 DDSR 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 DDSR 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 2018, the Appellate Body continued to develop and test the DDSR application, help train WTO delegates on its various functions, and compile dispute information for uploading into the database.

The DDSR's electronic filing function has been tested as part of a pilot phase since July 2015. During this pilot phase, parties, third parties, and panelists volunteer to use the DDSR in parallel with the existing paper filing procedures for written submissions and other dispute correspondence. In 2018, the e-filing function of the DDSR was tested at the panel stage in several disputes, with some disputes using the DDSR for the official filing of all communications between the panel and the parties. Participants in certain appellate proceedings tested the DDSR as part of an appeal pilot phase. The testing of the DDSR in the pilot phase shall continue until the DDSR is fully launched and e-filing is considered as the official filing for all disputes.

7.2 The John H. Jackson Moot Court Competition on WTO Law

2018 marked the 16th year of the John H. Jackson Moot Court Competition on WTO Law, previously known as the European Law Students' Association (ELSA) Moot Court Competition on WTO Law. The WTO has supported this competition, since its inception, as a technical sponsor. The competition has proven to be a useful tool in promoting development of international trade law and WTO-related studies. In the course of the competition, each participating student team represents both the complainant and the respondent in the fictional case and prepares both written and oral submissions.

The competition continues to grow, with more than 90 universities from all over the globe participating in 2018. In the 16th edition, students grappled with a hypothetical WTO dispute regarding measures taken to incentivize the use of handicraft technologies in textiles manufacturing. Students addressed legal questions regarding the TBT Agreement, the GATT 1994, and the SCM Agreement. The case was written by James Nedumpara of Jindal Global Law School in India. Five regional rounds took place in Naples (Italy), Wroclaw (Poland), Washington D.C. (United States), Bangkok (Thailand), and Nairobi (Kenya). In each of these rounds, WTO staff members, including staff of the Appellate Body Secretariat, served as panelists. In addition, staff

from the WTO and Appellate Body Secretariats provided support to the competition through technical advice on the subject matter and assistance with organizational issues, including hosting the Final Round in Geneva, Switzerland.

The Final Round was hosted jointly by the WTO and the Graduate Institute on 19-23 June 2018. Students had the opportunity to plead their case before the WTO Secretariat, current and former Appellate Body Members, leading academics, private practitioners, and delegates who served as panelists in the mock dispute. Students also had the opportunity to explore opportunities for careers in international trade law with the sponsors of the competition during the sponsor fair. Prizes included scholarships to study at the World Trade Institute in Bern as well as membership to the Society of International Economic Law. The winning team was from the Graduate Institute of International and Development Studies in Geneva, Switzerland, while the National Law School of India University placed as runner-up.

7.3 Technical assistance activities

The Appellate Body Secretariat staff participates in trade-related technical assistance activities, organized by the WTO, aimed at helping developing countries build their trade capacity, so that they can participate more effectively in global trade. A summary of these activities by Appellate Body Secretariat staff during the course of 2018 can be found in the table below.

APPELLATE BODY SECRETARIAT PARTICIPATION IN TECHNICAL ASSISTANCE ACTIVITIES IN 2018

Course / Seminar	Location	Dates
French-speaking Africa Regional Trade Policy Course – Dispute Settlement Module	Abidjan, Côte d'Ivoire	26-28 March 2018
CEECAC Regional Trade Policy Course – Dispute Settlement Module	Almaty, Kazakhstan	12-15 June 2018
English-speaking Africa Regional Trade Policy Course – Dispute Settlement Module	Port Louis, Mauritius	27-29 June 2018
National Activity on WTO Dispute Settlement	Astana, Kazakhstan	1-4 October 2018
Regional Trade Policy Course for Latin American Countries – Dispute Settlement Module	Montevideo, Uruguay	13-17 November 2018
Regional Trade Policy Course for Asia Pacific Countries – Dispute Settlement Module	Bangkok, Thailand	5-7 December 2018

ANNEX 1

FAREWELL SPEECH

28 MAY 2018

APPELLATE BODY MEMBER RICARDO RAMÍREZ-HERNÁNDEZ

The day I was sworn in was the 40th anniversary of a man landing on the moon. On that day, my older sister drew an analogy from that historic event and told me that she was very proud and happy that I had reached my "moon". So here I am, back on Planet Earth after a wonderful journey of almost nine years. I am an international trade lawyer whose ultimate professional wish was to be part of this institution.

I was part of a jewel in the crown created by you, the Membership. A sophisticated international adjudicatory system for solving disputes. A mechanism that has always privileged substance over form. One that follows a method of interpretation and where parties' due process rights are fully respected. An institution that strives to find, as Professor Howse puts it, the "equilibrium between domestic regulatory autonomy and trade liberalization", as agreed by WTO Members in the treaty text.

I want to start this address by thanking all of the participants involved in the dispute settlement process.

First, the delegates and litigants, who, with great advocacy skills and sophisticated arguments made every deliberation challenging. My respect and recognition go out to all of them. I know that AB deadlines are often challenging to meet and that answering our questions in hearings can be exhausting. I have always appreciated your tireless cooperation in our efforts to explore fully all issues raised on appeal.

Second, I shall recognize a group of young, and not that young, lawyers and professionals in the Appellate Body Secretariat. They challenged me to the limit and, with every interaction, made me a better professional. It was an amazing experience witnessing how each of them grew professionally and personally during these years. I've never seen any institution work with this level of quality, commitment, and expertise. The ABS and the other Dispute Settlement Divisions not only administer disputes but are also an essential element in the process of solving them. They perform a unique task with the highest degree of expertise, and this organization should, especially in these times of uncertainty, recognize and act upon this fact. Finally, it is a good opportunity to set the record straight. Our Secretariat is not the 8th ABM. It is the engine that helps us reach our destiny. But we, the ABMs, are in the driver's seat.

Finally, my colleagues, I have always said that the greatest strength of the AB is the diversity – both cultural and professional – of its Members. During my time as an ABM, I had the pleasure of working with 13 extraordinary individuals, all of whom with every chat and discussion gave me infinite lessons not only about international trade, law, economy, and politics but also, and most importantly, about life. And if all their teaching and shared wisdom were not enough, the most important gift I got from them was their friendship. A bond enhanced because I shared with each and every one of them a keen sense of commitment to this institution and a belief that the Appellate Body is an important part of the WTO's rules-based multilateral trading system. The Membership could question many things about ABMs, but never their full commitment to this institution, sometimes at a great personal cost.

Now I'm going to share with you some thoughts about the serious crisis that the dispute settlement mechanism and, in particular, the AB are currently facing. I will try to lay out some considerations to help the Membership address some of the problems raised, trying always to keep in mind that, in the end, as an adjudicator, you speak through your decisions and work with the body of law you are provided with.

Let me start with a personal reflection. It seems to me that the crisis we now face could have been avoided if it had been addressed head-on, as it began to escalate. The WTO is a consensus-based collective. This means that this crisis should not be attributed to one Member. The Membership must recognize the need for leadership within and outside this house. A need to recognize that there must be genuine engagement when one Member is raising problems. The signals have been there for some time. No matter how difficult or insurmountable the issues may seem, all those who are part of the WTO community must be willing to engage and must refrain from putting personal or national trade interests ahead of attempting to come up with a solution. The first question is whether the Membership still wants to have an instance to review panel reports.

If the answer is affirmative, then we have to face the conceptual differences among the Membership as to the nature of the WTO. That is, is the WTO a contract or a constitution? And, following immediately from that question, what is the nature of the AB? Is it or should it be an International Court? Many of the issues identified in the lead-up to the current state of affairs go to the core and the nature of what the AB is or should not be. If Members want to make progress and solve the current deadlock, maybe this is a good place to start. Or, alternatively, maybe there needs to be a pragmatic discussion that leaves these conceptual notions aside and goes to the very basic or minimal elements all Members can live with to have a fully functioning AB. But it is undeniable that there needs to be a discussion. With this in mind, I will now address each of the issues that have been identified:

Rule 15

Rule 15 is an operational rule. It was designed to expedite the dispute settlement process by avoiding a "reset" of a dispute if an ABM's term ended before a dispute was finalized. Nothing more. Perhaps objective criteria as to the circumstances in which such a "reset" would be appropriate would help. But in my view, a rule that leaves discretion to the Membership whether or not to extend an ABM's term after it has expired would not only create uncertainty but also jeopardize an expedited solution to a dispute.

90 days

The 90-day rule is a great rule. It was for a long time a unique feature of the AB process. Nevertheless, the growing complexity of WTO disputes, the high rate of appeal of panel reports and the number of issues appealed, the amount of jurisprudence, and the size of the submissions, among other things, turned out to make the 90-day deadline unrealistic.

On top of that, as my colleague and friend Peter used to say, brevity requires time. So, if the Membership wants to keep the 90-day rule, it may require some sacrifices. Attempts to address some elements that will help expedite the process have been made. For example, not long ago the AB put forward the idea of reducing the length of the submissions. The idea was rejected by most of the Membership. If you want to preserve the 90-day rule, the praxis needs to change. For instance, by introducing summary judgments.

Reappointment

This is an issue in which I believe the text is crystal clear. Reappointment is an option, not a right. Upon reflection, this is an issue that is within the realm of only the Membership. Again, however, engagement is needed. The Membership has adopted a process for the initial appointment of ABMs. WTO Members together need to agree on whether a process is needed for reappointment and, if so, what form it should take.

Advisory opinion

There is much scope for differences of opinion, in good faith, as to which rulings are necessary to resolve a dispute, and the extent to which rulings should be supported by reasoning. Moreover, all active users have

at some point or in some instance requested a finding of the AB that is not necessary to solve a dispute. I've seen Members seek an AB interpretation of a covered agreement despite the fact that such clarification was not necessary to solve the dispute. I've seen Members ask the Appellate Body to disapprove unappealed panel statements and to set aside portions of panel reports, not to mention the frequent invitations to revisit the factual findings of panels. In this regard, the Membership needs to solve the tension between the principle that the aim of the dispute settlement mechanism "is to secure a positive solution" to a dispute and the obligation of the AB to "address each of the issues raised" on appeal.

Gap filling

No adjudicative entity is infallible, and I believe this is also true of the AB. No system can exclude that some interpretations may diverge from expectations or be unacceptable to large parts of a constituency. Such risk needs to be mitigated through an operational negotiating branch that can adjust or realign the rules when this occurs. In addition, I haven't seen a WTO dispute in which all parties involved agree that there were mistakes made in the interpretation or that gap filling occurred. Maybe a serious discussion needs to take place about the method used for interpreting the covered agreements, for example, the Vienna Convention. Members might decide that the significance to be attributed to negotiating history should be elevated beyond the role attributed to it in Article 32 of the Vienna Convention. Finally, let me express my concern that whilst trade evolves and becomes more and more sophisticated, WTO disciplines are at risk of remaining static. It adds an extra hurdle when the Membership wants to fix current problems with old rules. The Membership needs to engage in a serious update of its current disciplines and clarify or correct those that it considers have not worked.

Reliance upon previous cases

I've never seen a Member who has not argued its case based on previous case law. This type of reliance upon *de facto* precedent seems to be one that Members themselves value and attach importance to – it is, after all, closely linked to the idea of security and predictability of trading relations. The Membership could very well stop doing this and ban the cogent reasons approach. I would just caution that this is precisely why many countries are complaining in the context of investor-state dispute settlement (ISDS), that is, fragmentation and lack of cohesiveness in the ISDS jurisprudence.

Independence and impartiality

In my view, this is the only non-negotiable aspect of our process if the Members decide to preserve the AB. As my former colleague David Unterhalter used to say, "the virtue of independence may seem self-evident, but it is not to be taken for granted".

The AB now has only four Members. The AB is on the verge of becoming non-operational. Before some Members decide to take other routes such as Article 25 or plurilateral agreements, it is essential, as the AB Chair said recently, that the Membership truly engages in a constructive dialogue and tries to come up with a compromise. You, the Members, need to ask yourselves, what is the contribution of the AB to the international rule of law? What does this paralysis do to the WTO dispute settlement system as a whole? This institution does not deserve to die through asphyxiation. You have an obligation to decide whether you want to kill it or keep it alive. The Membership may want to reflect on certain topics under the current system.

Transparency

The Membership has been pretending to be transparent, and the AB has been an accomplice to it. WTO hearings are not public. The fact that a few of them are broadcast, sometimes even days after the actual

hearing takes place, in a room at the WTO headquarters is just simulating transparency. To truly achieve transparency, all WTO dispute settlement hearings should be broadcast live, of course, always addressing any confidentiality consideration.

Damages

The great limitations or defects of the current prospective remedies system are well known. Back in 2002, Mexico, among other Members, made a first attempt to address one of the major defects of the DSU, the prospective nature of the remedies. The best deterrent for unilateral actions is that they are not free of consequences.

Remand

Remand is a tool that would greatly facilitate the work and streamline the dispute settlement process. It would be worthwhile to explore proposals that have already been tabled by some Members.

WTO and RTAs

Maybe the Membership could revive the discussion about the interactions between the WTO and regional agreements dispute settlement. Given the amount of expertise and knowledge developed over the past decades, the WTO could become the dispute settlement centre for all RTAs. We need to brand the name.

Spanish

Aunque algunos países de habla hispana presentan sus casos en español, no todos lo hacen o en algunos casos lo hacen de manera parcial. De alguna forma hemos sucumbido a que los procedimientos de solución de controversias se ventilen en inglés. Si este es el caso, dejemos de pretender y ahorremos dinero y recursos a la Organización. Si, por el contrario, queremos preservar el idioma español, debemos de hacerlo relevante. Cela s'applique aussi en français. Aprovecho esta oportunidad para agradecer la valiosa labor de los intérpretes y traductores, quienes realizan un trabajo espléndido que a veces no se valora lo suficiente. Confieso que soy su admirador.

Although I've seen countries argue their cases in Spanish, not all Spanish-speaking countries plead in Spanish. In many ways, we have surrendered dispute settlement to English. If that is what you decide, then let's stop the pretending game and accept that all disputes be adjudicated in English. We will save a lot of money and resources if we do so. If, on the other hand, you want to preserve the Spanish language, you have to make it relevant. The same applies to French. I take this opportunity to give special thanks to our interpreters and translators who do a splendid job that sometimes is not valued enough. I am your fan.

Very often you hear from developing countries, and now more often from developed countries, that international trade, globalization, and liberalism are to blame for poverty, loss of jobs, and lack of development. They are easy targets. They are faceless causes that can't defend themselves. Faulty internal industrial and agricultural policies, lack of rule of law, and corruption are hardly mentioned. The rules-based international trading system that I was mandated to protect contributes to global prosperity. The Membership should address how to spread across the populations of all its Membership the benefits of trade instead of finding ways to concentrate it. This organization needs to stop talking about barriers and start building bridges for a better distribution of the benefits of international trade. It's time to address the new challenges that world international trade faces. I truly believe that the rules I contributed to uphold are helping the more than 50 million Mexicans who today live in extreme poverty, but much more needs to be done.

Globalization is a reality. Global value chains and global warming are just two examples to illustrate the fact that we are facing global challenges that can be addressed only with global solutions. Have no doubt, with or without the WTO, trade will continue, and globalization, and the technology that bolsters it, can't be stopped. But without a framework of binding and updated rules, anarchy and powerful actors, private and public, will take over. This will not be good, especially for those developing and least developed countries that require a system in which, to the eyes of the law, every country is equal.

My father and mother are two schoolteachers who, with honest and hard work, managed to raise a family. My brother has dedicated his life to helping the communities in one of the poorest districts in Mexico City. My older sister is a human rights advocate, and my other sister is a hardworking and honest public servant. They are the ones who should be honoured today; I would not be here if it weren't for their love, example, and guidance. For the past years, one of my main goals was to show you that, despite what you hear in the news, Mexicans, like my family and many millions, are hardworking, honest, and decent people.

I have been to the moon. I have walked on it and can confirm that it was everything I expected and much more. I also realized how fragile it is. I hope you, the Membership, soon understand the importance of what you created and the value of its existence. As for me, few people can say they lived a dream. You made a dream come true and, for that, I will be eternally grateful.

Ricardo OUT!

ANNEX 2

11TH ANNUAL UPDATE ON WTO DISPUTE SETTLEMENT

GRADUATE INSTITUTE, GENEVA
3 MAY 2018
ADDRESS OF MR UJAL SINGH BHATIA, CHAIR OF THE APPELLATE BODY

2017 will be remembered as an extraordinarily strenuous year for the Appellate Body and the WTO dispute settlement system as a whole. The unprecedented challenges that confront us today stem from two interrelated factors. On the one hand, the high number and complexity of appeals currently before us is stretching our ability to staff cases and complete our work in a timely fashion; on the other hand, the composition of the Appellate Body is currently down to only four members due to the DSB's inability to fill three outstanding vacancies.

The Appellate Body was engaged in appellate proceedings throughout the year. It circulated five reports[1] touching, among other things, on Members' terms of accession to the WTO, the SPS Agreement, the Anti-Dumping Agreement, the SCM Agreement, the Import Licensing Agreement, the GATT 1994, and the DSU. The exceptionally large appeals in the Article 21.5 *Airbus* and *Boeing* proceedings[2], filed in 2016 and July 2017, respectively, occupied a significant portion of Appellate Body staff resources throughout the year. The Secretariat also assisted an Arbitrator in issuing her award concerning the reasonable period of time for implementation of Panel and Appellate Body reports in an anti-dumping and subsidy case.[3] Eight new appeals were filed in 2017[4], followed by another two in the first months of 2018.[5] Such a heavy workload, coupled with our chronic resource constraints, caused some of these appeals to be staffed and hearings to be scheduled with delays of several months.

We expect more disputes, including the complex *Plain Packaging* case[6], to be appealed soon. Overall, the Secretariat divisions that assist panels have estimated that over ten panel reports could be issued to the parties during the course of this year. By all indicators, the Appellate Body will remain busy in the foreseeable future.

While these figures and prospects confirm WTO Members' commitment to a robust and effective appellate system, they also stand in stark contrast to the political crisis we are currently facing. The second terms of office of my distinguished colleagues Ricardo Ramírez-Hernández and Peter Van den Bossche expired in June and December 2017, respectively. Furthermore, Hyun Chong Kim resigned from the Appellate Body effective on 1 August 2017. As a result, three Appellate Body seats were left vacant and should have been filled "as [vacancies] arise", as required by Article 17.2 of the DSU. Unfortunately, despite the numerous DSB meetings held since February 2017 until now, WTO Members remain unable to reach a consensus to initiate the appointment process for three new Appellate Body members, despite a joint proposal for the purpose by more than 60 Members.

---

1 Appellate Body Reports, *Russia – Pigs (EU); US – Anti-Dumping Methodologies (China); US – Tax Incentives; EU – Fatty Alcohols (Indonesia); Indonesia – Import Licensing Regimes.*

2 *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)* and *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU).*

3 Article 21.3(c) Arbitration Report, *US – Washing Machines.*

4 *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU); EU – Fatty Alcohols (Indonesia); Indonesia – Import Licensing Regimes; Russia – Commercial Vehicles; EU – PET (Pakistan); Indonesia – Iron or Steel Products; Brazil – Taxation; US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II).*

5 *Korea – Radionuclides; US – Countervailing Measures (China) (Article 21.5 – China).*

6 *Australia – Tobacco Plain Packaging.*

The reasons for this impasse are well known and need not be restated here. More interesting – and alarming – are the consequences of the ongoing stalemate. First, the fact that the Appellate Body is now operating at half-capacity, i.e. with only four active Members, is seriously undermining the collegiality of our deliberations, reflected in Rule 4 of the Working Procedures for Appellate Review. Second, the lack of a proper geographical representation threatens to dilute the legitimacy of the Appellate Body. Finally, the decrease in serving Members is likely to cause further delays in appellate proceedings. Unless WTO Members take swift and robust action to remedy this situation, there may soon come a time when Divisions of three Appellate Body members can no longer be formed, thereby effectively paralyzing appellate proceedings.

Such a paralysis would not concern only the Appellate Body, but would have profound implications on *panel* proceedings as well. Indeed, the Appellate Body and panels are part of one dispute settlement mechanism, and one cannot properly function without the other. Imagine, for instance, a scenario where a panel report is appealed, but no Appellate Division can be formed to hear that appeal. Under current DSU rules, the adoption of the panel report has to be suspended pending the appeal, but the Appellate Body itself would not be in a position to complete its proceedings. Such a scenario would entail the *de facto* demise of the negative consensus rule that has characterized the WTO dispute settlement system since 1995. While the negative consensus rule would remain on the DSU books, any losing party could prevent the adoption of the panel report by appealing it to a paralyzed Appellate Body. The consequences of such a scenario working out are obvious. Circumventing the disciplines of the DSU would not automatically time-warp us back to the GATT era: the more likely result is the spread of the paralysis to the panel process.

Likewise, I disagree with suggestions that weakening the WTO's dispute settlement arm would help revitalize its negotiating function. The prospect of agreeing on new multilateral trade rules would lose much of its traction if the negotiating Members were not confident as to the principled and effective enforcement of those rules. Hence, the paralysis of the Appellate Body would cast a long and deep shadow on the continued operation of the multilateral trading system as a whole.

What is to be done? The answer lies firmly in the hands of WTO Members. For over 20 years, trading nations have shown an unfaltering commitment to independent and impartial dispute settlement. Aside from the sheer number of disputes that have been submitted to panels and the Appellate Body, it is worth mentioning the almost total absence of instances where Members have, upon losing a ruling, explicitly chosen not to implement it. While losing parties and sometimes other Members have criticized individual rulings, these critiques have rarely challenged the overall authority or legitimacy of the WTO dispute settlement mechanism. It is, therefore, incumbent on Members to evaluate whether that commitment continues to exist today, in a world that is witnessing the resurgence of sovereigntist tendencies in trade relations.

Engagement and dialogue are also of the essence. As Chair of the Appellate Body, I have been holding consultations with a number of delegations that make frequent use of WTO dispute settlement. The vast majority of my interlocutors, while expressing deep concern about the current situation, reaffirmed their desire to preserve the system in its current configuration. The principles enshrined in the DSU continue to be acceptable to all Members. The present debate is about whether the Dispute Settlement System has been faithful to them. That is a debate certainly worth having.

As far as the Appellate Body is concerned, I am well aware that there remains room for improvement in our proceedings. A number of decisions, for instance, have been criticized for being excessively technical and therefore indecipherable for lay readers. Other rulings were accused of being too broad in scope and addressing issues that were not strictly necessary to provide a positive solution of the dispute at hand. Whatever one thinks of those critiques, they provide useful food for thought and offer guidance as to how to further enhance the functioning of the Appellate Body. In recent years, a number of

initiatives have helped simplify and streamline the content of reports. In particular, the section devoted to conclusions now summarizes the key points of the reasoning for the benefit of readers who do not wish to go through the entire text. Moreover, except in some mammoth disputes such as the *Large Civil Aircraft* cases, the length of reports has been significantly reduced. None of the decisions issued in 2017, for example, exceeds 70 pages in length.

To conclude, it is our shared responsibility to maintain and preserve the trust and credibility that the WTO dispute settlement system in general, and the Appellate Body in particular, have built up over more than 20 years. Only by embracing this responsibility and engaging in constructive dialogue will the WTO Membership succeed in nurturing and sustaining a system that is uniquely effective, but which cannot be taken for granted.

ANNEX 3

THE LEGITIMACY OF THE WTO APPELLATE BODY

BRANDEIS INSTITUTE FOR INTERNATIONAL JUDGES 2018
30 MAY TO 2 JUNE 2018
ADDRESS OF MR UJAL SINGH BHATIA, CHAIR OF THE APPELLATE BODY

As you all know, the authority of the WTO Appellate Body is currently under attack from certain quarters. In particular, over the last year or so, the Dispute Settlement Body has been unable to launch the selection processes for the appointment of new Appellate Body Members. In light of this situation, one would be tempted to speak of a backlash against the Appellate Body and the WTO dispute settlement system as a whole, similar to what we are witnessing with other international courts and tribunals.[1] However, good stories cannot be told from the end. If we wish to fully understand the current crisis, we need first to focus on the pathways through which, over the last 20 years, the Appellate Body has progressively built up its legitimacy and reputation as one of the most effective inter-State courts in existence.

Before I begin, I should caution that the notions of "legitimacy" and "authority" of an international court or tribunal are rather nebulous and have been defined in different ways by different authors. One could say that their use began when international law entered its "post-ontological era"[2], i.e. when the reality and existence of the international legal system ceased to be questioned. I dare say that the multiplication of international courts and tribunals during the 1990s – *including* the creation of the WTO dispute settlement system – has done much to usher in this new era. Finally free from the burden of defending the "lawness" of their discipline, international lawyers turned to questions of fairness, effectiveness, and persuasiveness of legal acts and judicial decisions.

At the risk of oversimplification, the terms "legitimacy" and "authority" refer to an international court's ability to command respect for its rulings and ensure compliance therewith.[3] In particular, a court's "right to rule"[4] depends very much on whether the addressees of that court's decisions are willing to accept the legal authority of those decisions even when they disagree with, or are adversely affected by, them.[5] Several metrics have been proposed to measure the legitimacy and authority of international courts. Some such metrics relate to intrinsic legal factors, such as the delegation of powers to a court by its constituent

---

1 See e.g. M. Waibel et al. (eds.), *The Backlash Against Investment Arbitration: Perceptions and Reality* (Kluwer Law International, 2010); K.J. Alter, J.T. Gathii, and L.R. Helfer, "Backlash against International Courts in West, East and Southern Africa: Causes and Consequences", 27 *European Journal of International Law* 293 (2016).

2 T.M. Franck, *Fairness in International Law and Institutions* (1995), p. 6. See also T.M. Franck, *The Power of Legitimacy among Nations* (1990).

3 See e.g. N. Grossman, H.G. Cohen, A. Follesdal, and G. Ulfstein, "Legitimacy and International Courts: A Framework", in N. Grossman, H. Cohen, A. Follesdal and G. Ulfstein (eds.), *The Legitimacy of International Courts* (Cambridge: Cambridge University Press, 2018), pp. 1-40.

Some commentators have sought to differentiate the notion of "legitimacy" from that of "authority". See e.g. K.J. Alter, L.R. Helfer, and M.R. Madsen, "How Context Shapes the Authority of International Courts", 79 *Law and Contemporary Problems* 1 (2016).

4 D. Bodansky, "Legitimacy in International Law and International Relations", in J.L. Dunoff and M.A. Pollack (eds.), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* 321 (2013), p. 324.

5 On this notion of legitimacy as "diffuse support", see e.g. J.L. Gibson and G.A. Caldeira, "The Legitimacy of Transnational Legal Institutions: Compliance, Support, and the European Court of Justice", 39 *American Journal of Political Science* 459 (1995); D. Bodansky, *supra* note 4, pp. 326-327.

States[6] or the degree of adherence to the principles of impartiality and fair treatment of the parties.[7] Other indicators, by contrast, reside in the perception of judgments by a court's audience. That audience may, for instance, appreciate the extent to which a ruling offers a reasoned interpretation and application of international law, the economy and clarity of the reasoning, the ability to solve the issue at hand and set a viable precedent for future cases, etc.[8] Finally, for purposes of my presentation, I should note that the legitimacy and authority of an international court are not static, but vary over time and across different audiences. Echoing Joseph Weiler, "internal legitimacy" is concerned with the perceptions of insiders to the specific legal regime concerned, while "external legitimacy" reflects the beliefs of outsiders.[9] Albeit fluid, the concepts of legitimacy and authority lend themselves well to describing the trajectory of the Appellate Body from its inception until the present day.

The creation of the Appellate Body was, by all accounts, an afterthought. In the old GATT system, the dispute resolution mechanism saw panel reports being adopted by consensus, i.e. in the absence of opposition from any GATT Member. In that setting, it was sufficient for the losing party to a dispute to object to adoption for the report to lose its binding force. This, in my view, does not necessarily mean that the GATT system was unregulated or purely power-based. Indeed, the international trade community had developed a set of shared practices, customs, and traditions that shaped the behaviour of its participants. These rules may have been non-judicial in nature, but they were rules nonetheless. During the Uruguay Round of negotiations that culminated in the establishment of the WTO, negotiators expressed the will to move towards a more formalized system for the resolution of trade disputes. A significant innovation was the introduction of a reverse-consensus rule for the adoption of panel reports, which would acquire binding force unless *all* WTO Members decided otherwise. Clearly, the winning party to a dispute would always have an interest in seeing a report become binding, thereby making adoption of reports *de facto* automatic. As this paradigm shift caused some anxiety among Members, an Appellate Body was put in place to give them an additional guarantee of review of panel reports.[10] In the negotiators' expectations, few disputes would make it to the appellate stage, and even then, the appeal was supposed to provide a swift remedy to the situation where a panel had made an egregious error on a discrete legal issue. Little did they know that, from the very early years, most panel reports would be appealed on most of their findings.

Given the unusual circumstances surrounding its establishment, the early Appellate Body was in a delicate position vis-à-vis both its internal audience (i.e. the GATT/WTO community) and its external interlocutors (such as non-trade constituencies, civil society, and other international courts and tribunals). From an *internal* standpoint, the main challenge was to initiate the WTO Membership and trade professionals to the virtues of a fully rules-based dispute settlement system. The risk was that the new judicial ethos would be at variance with the well-trodden practices and the deeply ingrained pragmatism that characterized the GATT years. From an *external* perspective, the task was to win over the world's scepticism vis-à-vis the solidity and fairness of the new international trade rules. The early years of the WTO saw fierce contestation from a number of social groups.[11] Some criticisms commonly levied against the nascent Organization included claims that international trade rules were skewed in favour of developed countries[12]; that the trade

---

6 See e.g. K.J. Alter, L.R. Helfer, and M.R. Madsen, *supra* note 3, p. 3; C.P.R. Romano, K.J. Alter and Y. Shany, "Mapping International Adjudicative Bodies, the Issues and Players", in C.P.R. Romano, K.J. Alter and Y. Shany (eds.), *The Oxford Handbook of International Adjudication* 1 (2014), pp. 5-6; A. Buchanan and R.O. Keohane, "The Legitimacy of Global Governance Institutions", 20 *Ethics and International Affairs* 405 (2006), pp. 412-413.

7 See e.g. T.M. Franck, *Fairness in International Law and Institutions*, *supra* note 2, p. 7.

8 See e.g. N. Grossman, H.G. Cohen, A. Follesdal, and G. Ulfstein, *supra* note 3; A. v. Bogdandy and I. Venzke, *In Whose Name? On the Functions, Authority, and Legitimacy of International Courts* (2014); K.J. Alter, L.R. Helfer, and M.R. Madsen, *supra* note 3, p. 4.

9 J.H.H. Weiler, "The Rule of Lawyers and the Ethos of Diplomats: Reflections on the Internal and External Legitimacy of WTO Dispute Settlement", 35 *Journal of World Trade* 191 (2001), p. 193. See also N. Grossman, H.G. Cohen, A. Follesdal, and G. Ulfstein, *supra* note 3.

10 J.H.H. Weiler, *supra* note 9, p. 199.

11 See e.g. S.A. Aaronson, *Taking to the Streets: The Lost History of Public Efforts to Shape Globalization* (2001).

12 See e.g. R. Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary", 27 *European Journal of International Law* 9 (2016), pp. 17-18.

regime did not sufficiently take into account extra-trade norms such as human rights and environmental treaties; and that the expansionist interpretation of trade rules would impinge on the political and economic sovereignty of WTO Member States. Faced with these competing challenges, the Appellate Body resorted to a number of strategies aimed at "creating itself as an independent … judicial branch of the WTO system, operating at a considerable remove from the political and diplomatic institutions of the WTO".[13]

The original Appellate Body, ably assisted by its Secretariat, developed its Working Procedures within the limits set out in the DSU. These procedures, which remain in force today with a few slight retouches[14], are based on two paramount principles. The first such principle is the fair treatment of the parties to an appeal. In terms of internal legitimacy, it became immediately apparent that WTO Members would come to recognize the authority of the Appellate Body only if they felt that their views were properly heard and that they were being treated in accordance with the requirements of due process. According to the Working Procedures, the participants to an appeal are accorded ample opportunity to articulate their claims and arguments through the notice of appeal/other appeal, the appellant's/other appellant's submission, the appellee's submission, and the oral intervention at the hearing. The second principle is collegiality in our decision-making processes. While cases are heard by three-Member Divisions, the so-called exchange of views allows for the Appellate Body Members who are not part of a Division to offer their views and inform their colleagues' understanding of every given dispute.

Another tool to enhance the legitimacy of the Appellate Body resided in its approach to legal interpretation. While GATT panels' reading of the applicable rules was often entrenched in longstanding institutional practices, the Appellate Body immediately showed a more formal, detached, and rigorous approach, in line with the DSU requirement "to clarify the existing provisions … in accordance with customary rules of interpretation of public international law".[15] In its very first decision, the Appellate Body held that those "customary rules of interpretation" were to be found in Articles 31 and 32 of the 1969 Vienna Convention on the Law of Treaties (VCLT).[16] The Appellate Body would typically begin its interpretive exercise from the dictionary definition(s) of the term(s) to be interpreted, continuing with the relevant context in which such terms are embedded, and then considering possible subsequent agreements, subsequent practice, and other applicable rules of international law. Except for a handful of cases[17], the Appellate Body was able to establish the meaning of the relevant rules through recourse to these elements alone, without having to resort to the "supplementary means of interpretation" set forth under Article 32 of the VCLT – in particular, the so-called *travaux préparatoires*. This staunch adherence to codified interpretive techniques led some commentators to accuse the Appellate Body of "textualist fetishism", with the Oxford English Dictionary becoming a *de facto* covered agreement.[18] However, there is little denying that this formalist posture strengthened the authority of the Appellate Body as an impartial and rigorous interpreter of international law. This was particularly important for those developing countries that had qualms about the outcomes of the Uruguay Round. If the rules were stacked against those countries, it was essential that, at least, the interpretation and application of the rules be perceived as balanced, detached, and open to debate.

Unlike GATT panels, the Appellate Body has also placed an emphasis on continuity and consistency in its jurisprudence. For instance, it stated that "the legal interpretation embodied in adopted panel and Appellate Body reports becomes part and parcel of the *acquis* of the WTO dispute settlement system",

---

13 R. Howse, *supra* note 12, p. 25.

14 The most recent version of the Working Procedures for Appellate Review is contained in WT/AB/WP/6 (16 August 2010).

15 Article 3.2 of the DSU.

16 Appellate Body Report, *US – Gasoline*, pp. 16-17.

17 See e.g. Appellate Body Reports, *EC – Computer Equipment*, paras. 86-92; *US – Gambling*, paras. 160 and 197; *China – Publications and Audiovisual Products*, para. 411; *US – Anti-Dumping and Countervailing Duties (China)*, para. 579.

18 See e.g. C. D. Ehlermann, "Six Years on the Bench of the 'World Trade Court': Some Personal Experiences as Member of the Appellate Body of the World Trade Organization", 36 *Journal of World Trade* 605 (2002), p. 616; D.A. Irwin and J.H.H. Weiler, "Measures Affecting the Cross-Border Supply of Gambling and Betting Services (DS 285)" (2008) 7 *World Trade Review* 71-113, 89-95; G. Abi-Saab, "The Appellate Body and Treaty Interpretation", in G. Sacerdoti, A. Yanovich and J. Bohanes, (eds), *The WTO at Ten: The Contribution of the Dispute Settlement System* (2006), pp. 453-64; I. van Damme, *Treaty Interpretation by the WTO Appellate Body* (Oxford: Oxford University Press 2009), pp. 222-35.

and that "absent cogent reasons, an adjudicatory body will resolve the same legal question in the same way in a subsequent case".[19] By so stating, the Appellate Body declared its commitment to predictability in the interpretation and application of the multilateral trade rules – a commitment that, in turn, stabilizes the cognitive expectations of WTO Members and other stakeholders as to the legality or illegality of their regulatory action.[20] Indeed, throughout more than two decades of case law, the Appellate Body has never overtly overruled its prior decisions. This, of course, does not mean that one cannot discern certain shifts in the Appellate Body's orientation and sensibility. A case in point may be the Appellate Body's approach to Article 11 of the DSU, which can be invoked by an appellant to challenge a panel's assessment of the facts under certain conditions. I will not dwell on this point, and would leave it to the more diligent among you to peruse the evolution of our jurisprudence on this issue. An examination of our jurisprudence should convince you that Appellate Body jurisprudence is not always monolithic and, indeed, leaves ample room for the accommodation of future changes of direction. Yet, in my view, change best occurs at a piecemeal pace, rather than through abrupt ruptures of well-established jurisprudential trends. The physiological evolution of case law should, in my view, look more like a slow tectonic shift than a sudden earthquake.

Through these and other jurisprudential moves, the Appellate Body succeeded in commanding respect for its rulings and ensuring a high rate of compliance therewith. Aside from the sheer number of disputes that Members have submitted to judicialized dispute settlement – which is itself a sign of empirical legitimacy – it is worth mentioning the almost total absence of instances where Members have, upon losing a ruling, explicitly chosen not to implement it. While losing parties and sometimes other WTO Members have criticized individual rulings, "these critiques have rarely challenged the overall authority or legitimacy of the WTO judicial mechanism".[21] In other words, through its principled and prudent interpretation and application of the covered agreements, the Appellate Body managed to progressively establish its authority and legitimacy in the eyes of its internal audience, i.e. the WTO community of States and trade professionals.

But what about *external* audiences? In particular, *quid* of the non-trade constituencies that might have looked with concern at the progressive reinforcement of WTO dispute settlement? Here too, the Appellate Body showed a certain sensibility vis-à-vis non-trade concerns, and sought to balance the WTO's trade-liberalizing mission with the need to accord meaningful regulatory space to WTO Members. In *US – Gasoline*, the Appellate Body took the view that a sensible interpretation of the covered agreements should "reflect[]a measure of recognition that [WTO law] is not to be read in clinical isolation from public international law".[22] In line with this statement, the Appellate Body rendered a number of decisions that usefully expanded the scope of its inquiry into extra-trade areas of public international law. However, the Appellate Body has always stressed that non-WTO law is not applicable law, and is referred to only for the purpose of interpreting WTO law. Probably the most famous such decision is the report in *US – Shrimp*, where Appellate Body interpreted the notion of "exhaustible natural resources", which is not further defined in Article XX(g) of the GATT, through recourse to non-WTO legal sources including the Rio de Janeiro Convention on Biological Diversity, the Convention on International Trade in Endangered Species of Wild Fauna and Flora, and the United Nations Convention on the Law of the Sea.[23] While this approach met with initial resistance of some insiders in the community, it was also celebrated by many as a sign of the Appellate Body's epistemic opening to other areas of public international law.[24]

---

19 Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

20 On the stabilizing function of judicial decisions, see e.g. N. Luhmann, *A Sociological Theory of Law* (2nd edn, Routledge 2014), p. 78; O. Kessler, "The Same as It Never Was? Uncertainty and the Changing Contours of International Law", 37 *Review of International Studies* 2163 (2011), pp. 2167, 2173.

21 R. Howse, *supra* note 12, p. 11.

22 Appellate Body Report, *US – Gasoline*, p. 17.

23 Appellate Body Report, *US – Shrimp*, paras. 125-134.

24 See generally R. Howse, *supra* note 12, pp. 37-39.

In other rulings, however, the Appellate Body opted for a more conservative interpretive pathway, and declined to rule on international legal instruments falling outside the scope of its jurisdiction. In *Mexico – Taxes on Soft Drinks*, for instance, the Appellate Body found "no basis in the DSU … to adjudicate non-WTO disputes" and to "determine rights and obligations outside the covered agreements".[25] More recently, in *Peru – Agricultural Products*, the Appellate Body did not attribute interpretive salience to a bilateral free trade agreement between the participants which, according to Peru, expressly contemplated the possibility to maintain the measure at issue in place although it breached a WTO provision.[26] Some may have considered these rulings as close to a turnaround from prior jurisprudence, which was perceived as more "porous" vis-à-vis non-WTO law. However, others saw these rulings as reflecting the jurisdictional limits of the WTO legal system and as a refusal to give non-WTO law priority over WTO law. I believe that the Appellate Body's preoccupation in coming to these decisions was to reassure its internal audience that the focus of WTO dispute settlement would remain centred on the covered agreements.

This delicate balance between internal and external legitimacy witnessed its most difficult phase in the developments concerning the status of *amicus curiae* briefs in appellate proceedings. In a number of early reports, the Appellate Body considered that it had "the legal authority … to accept and consider *amicus curiae* briefs" submitted by academics, NGOs, and other civil society organizations to the extent that it found it "pertinent and useful to do so".[27] In *EC – Asbestos*, the Appellate Body established additional appellate procedures for natural or legal persons to submit such briefs for consideration.[28] By so doing, the Appellate Body strove to enhance the external transparency of WTO proceedings touching on delicate social matters, without impinging on the fundamental principle whereby "access to the dispute settlement process of the WTO is limited to Members of the WTO".[29] This move, however, incurred the wrath of numerous Members, who vehemently criticized the Appellate Body for what they perceived as an encroachment on the diplomatic and political prerogatives of sovereign States.[30] Despite these forms of contestation, the Appellate Body held its ground and restated that it had the authority to accept and consider unsolicited *amicus curiae* briefs. Yet, in a measured display of sensibility vis-à-vis the anxieties of WTO Members, it exercised restraint in considering the merits of such briefs, unless strictly necessary to dispose of an appeal.[31]

In light of all the above, it is safe to say that the Appellate Body has been able to navigate troubled waters in its endless quest for authority and persuasiveness. Despite these successes, there remains much room for improvement in appellate proceedings. A number of decisions, for instance, have been criticized for being excessively technical and therefore indecipherable for lay readers.[32] Other rulings were accused of being too broad in scope and addressing issues that were not strictly necessary to provide a positive solution of the dispute at hand. Whatever one thinks of those critiques, they provide useful food for thought and offer guidance as to how to further enhance the functioning of the Appellate Body. In recent years, a number

[25] Appellate Body Report, *Mexico – Taxes on Soft Drinks*, para. 56.

[26] Appellate Body Report, *Peru – Agricultural Products*, paras. 5.91-5.119.

[27] Appellate Body Report, *US – Lead and Bismuth II*, para. 42. See also e.g. Appellate Body Reports, *EC – Sardines*, para. 160; *US – Shrimp*, para. 104; *US – Carbon Steel*, para. 39.

[28] Appellate Body Report, *EC – Asbestos*, para. 52.

[29] Appellate Body Report, *US – Shrimp*, para. 101.

[30] See S. Charnovitz, "Judicial Independence in the World Trade Organization", in L. Boisson de Chazournes, C.P.R. Romano and R. Mackenzie (eds.), *International Organizations and International Dispute Settlement* 219 (2002).

[31] As examples of restraint, see e.g. Appellate Body Reports, *US – Softwood Lumber IV*, para. 9; *Mexico – Taxes on Soft Drinks*, para. 8; *Brazil – Retreaded Tyres*, para. 7; *China – Auto Parts*, para. 11; *US – Anti-Dumping and Countervailing Duties (China)*, para. 18; *US – Clove Cigarettes*, para. 10; *US – Tuna II (Mexico)*, para. 8; *Canada – Renewable Energy / Canada – Feed-in Tariff Program*, para. 1.30.

[32] See e.g. G. Shaffer and D. Pabian, "Case Note: European Communities – Measures Prohibiting the Importation and Marketing of Seal Products, WT/DS400/AB/R, WT/DS401/AB/R", 109 *American Journal of International Law* 154 (2015).

of initiatives helped simplify and streamline the content of reports. In particular, the section devoted to conclusions now summarizes the key points of the reasoning for the benefit of readers who do not wish to go through the entire text. Moreover, except in some mammoth disputes such as the *Large Civil Aircraft* cases, the length of reports has been significantly reduced. None of the decisions issued in 2017, for example, exceeds 70 pages in length.

Despite these efforts – and here I move to the present – the Appellate Body is currently facing formidable challenges, which may threaten its continued functioning as the crown jewel of the WTO dispute settlement system. Since February 2017, the United States has continuously blocked the launch of appointment processes to fill the vacancies left by Appellate Body Members whose terms of office have expired.

At present, the Appellate Body is working at half-capacity, with only four Members being able to sit on Divisions and dispose of appeals. This situation, coupled with the heavy workload we are currently facing, is stretching our ability to solve disputes to its limits. In particular, the ongoing stalemate threatens to undermine the collegiality of the Appellate Body's deliberative processes, as reflected in Rule 4 of the Working Procedures for Appellate Review. Unless the seven-member composition of the Appellate Body is promptly restored, the number of active Divisions will decrease and the time necessary to dispose of appeals will extend far beyond the 60- and 90-day periods set forth in Article 17.5 of the DSU. Indeed, unless WTO Members take swift and robust action to remedy this situation, there may soon come a time when the Appellate Body will find itself unable to fulfil its mandate. Such a scenario would deal a serious blow to the multilateral trading system.

The institution of a standing judicial body tasked with reviewing panel decisions is widely considered as the crowning achievement of the Uruguay Round of negotiations. Impairing that achievement would deprive the WTO dispute settlement system of its ability to ensure the principled and consistent application of multilateral trade rules. It is our shared responsibility to maintain and preserve the trust, credibility, and legitimacy that the WTO dispute settlement system in general, and the Appellate Body in particular, have built up over more than 20 years. Only by embracing this responsibility and engaging in constructive dialogue will we succeed in nurturing a system that is uniquely effective, but which cannot be taken for granted.

ANNEX 4

LAUNCH OF THE APPELLATE BODY'S ANNUAL REPORT FOR 2017

22 JUNE 2018
ADDRESS OF MR UJAL SINGH BHATIA, CHAIR OF THE APPELLATE BODY

I would like to begin by expressing my gratitude to the DSB Chair, Ambassador Sunanta, for her presence and for her gracious consent to launch the Appellate Body's Annual Report for 2017.

These are extraordinary times. The WTO dispute settlement system confronts two contrasting and yet related challenges that threaten its legitimacy as well as its existence:

- On the one hand, the dispute settlement system, which has for over two decades established its credentials as an efficient and impartial mechanism, faces the burgeoning pressure of increasingly complex disputes at various stages.

- On the other, some recent critiques have raised fundamental questions about the way the DSU should be used to resolve disputes.

These two challenges are clearly beyond the capacity of the dispute settlement system itself to resolve, and they call for determined political dialogue among WTO Members. Left unaddressed, these challenges can cripple, paralyze, or even extinguish the system. If they are properly addressed, the system can continue to discharge its mandate in the coming years with renewed vigour.

In what follows, I will look at the nature, dimensions, and content of these challenges, as well as the policy choices they represent.

An overloaded system

Over the past two decades, the WTO dispute settlement system, including the Appellate Body, has been remarkably active. Since its inception, 551 disputes have been initiated by WTO Members, resulting in 230 circulated panel reports with an average rate of appeal of approximately 70%. More than 65% of WTO Members have engaged in dispute settlement as complainant, respondent, or third party.

The high rate of compliance with DSB decisions testifies to the system's success. Aside from the sheer number of disputes that Members have submitted to dispute settlement – which is a sign of empirical legitimacy – it is worth mentioning the almost total absence of instances where Members have chosen not to implement a ruling upon losing it. While losing parties have criticized individual rulings, "these critiques have rarely challenged the overall authority or legitimacy of the WTO judicial mechanism".[1]

But legitimacy is a fragile virtue, and its longevity cannot be taken for granted. This is a theme I will revert to later.

The expectation of DSU negotiators that only selected issues in key panel reports would be appealed was belied from the very early years. Since the beginning, a majority of panel reports were appealed on most of their findings. This has been a continuing feature of appeal activity in the WTO.

[1] R. Howse, "The World Trade Organization 20 Years On: Global Governance by Judiciary" (2016) *European Journal of International Law* 27(1), p. 11.

Last year was not an exception to this trend. The Appellate Body circulated five reports[2] touching on, among other things, Members' terms of accession to the WTO, the SPS Agreement, the Anti-Dumping Agreement, the SCM Agreement, the Import Licensing Agreement, the GATT 1994, and the DSU. These disputes concerned myriad issues such as animal disease control, domestic tax regimes, and fair trade. The exceptionally large appeals in the Article 21.5 Airbus and Boeing proceedings[3], filed in October 2016 and June 2017, respectively, occupied a significant portion of our resources throughout the year.

Eight new appeals were filed in 2017[4], followed by another three in the first months of 2018.[5] Such a heavy workload, coupled with our chronic resource constraints, caused some of these appeals to be staffed, and hearings to be scheduled, with delays of several months.

More disputes, including the complex Plain Packaging case[6], will likely be appealed soon. By all indicators, the Appellate Body will remain very busy in the foreseeable future.

The workload of the AB over the years calls into question the basic premise of its establishment. Being an Appellate Body Member is no longer a part-time job. It requires full-time commitment to the WTO. Given the number, size, and complexity of appeals, coupled with the resources provided to it, the AB cannot be realistically expected to deliver high-quality reports within the timeframes prescribed in the DSU. Long delays in filling vacancies in the AB obviously do not help either.

Given the daunting mismatch between its workload and resources, the AB has undertaken several initiatives to simplify and streamline the content of its reports and its legal analysis. For instance, we are continuing the practice of annexing to our reports the executive summaries of the arguments submitted by the participants and third participants, instead of summarizing them. We are also providing more complete descriptions of our findings and conclusions, making our central reasoning more quickly accessible. Finally, we are striving for greater clarity and concision in our reasoning, making our reports more "user friendly" and the use of our limited resources more efficient. Except in some mammoth disputes such as the Aircraft cases, report length has been significantly reduced. None of the decisions issued in 2017, for example, exceeds 70 pages.

What the Appellate Body and panels can do to further improve the system, however, is not unlimited. WTO Members are entitled to initiate as many disputes as they wish. They are also entitled to make as many claims and to submit as many pages, arguments, and exhibits as they deem necessary. WTO Members expect – as they should – a modern, efficient, and effective dispute settlement system. But such expectations can be realised only if the resources allocated to it, and the procedures governing WTO dispute settlement, are aligned to the workload that WTO Members bring to the system. Discussions regarding the DSU deadlines, for instance, can be meaningful only if they are adequately contextualised. Discussions on consequences need to take on board the causes as well.

Overall, the growing incongruence between the disputes being referred to the WTO dispute settlement system, the resources allocated to it, and the rules and procedures governing it are together leading to very significant delays. The increase in compliance disputes over the past years is further adding to the problem. For example, the number of compliance panels circulated over the last five years has doubled compared to the previous five-year period.[7]

---

2 Appellate Body Reports, *Russia – Pigs (EU)*; *US – Anti-Dumping Methodologies (China)*; *US – Tax Incentives*; *EU – Fatty Alcohols (Indonesia)*; *Indonesia – Import Licensing Regimes*.

3 *EC and certain member States – Large Civil Aircraft (Article 21.5 – US)*; *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU).*

4 *EU – Fatty Alcohols (Indonesia); Indonesia – Import Licensing Regimes*; *Russia – Commercial Vehicles*; *US – Large Civil Aircraft (2nd complaint) (Article 21.5 – EU)*; *EU – PET (Pakistan)*; *Indonesia – Iron or Steel Products*; *Brazil – Taxation; US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II).*

5 *Korea – Radionuclides*; *US – Countervailing Measures (China) (Article 21.5 – China)*; *Korea – Pneumatic Valves (Japan).*

6 *Australia – Tobacco Plain Packaging.*

7 Number of Appellate Body and panel reports circulated under Article 21.5 of the DSU: (a) period 2013-2018: ten panel reports; four AB reports; and (b) period 2008-2012: four panel reports; four AB reports.

It is also no longer uncommon to see several years pass before a dispute is settled. This situation should ring alarm bells in a system that prides itself on its efficiency and business-like conduct, particularly in light of the prospective nature of WTO remedies. To the extent that delays in dispute resolution involve delays in the assertion of the rule of law, they provide an incentive to those who benefit from those delays. Lasting solutions, however, cannot target the symptoms. Rather, they must take into account the pertinent causes. WTO Members therefore need to engage in a dialogue to address all dimensions of this problem.

The mandate of the DSS

That brings me to the second challenge confronting the WTO dispute settlement system, namely the critiques about the system's adherence to its mandate under the DSU.

Article 3.2 of the DSU envisages the WTO dispute settlement system to be "a central element in providing security and predictability to the multilateral trading system". Article 3.2 further provides that the system "serves to preserve the rights and obligations of Members under the covered agreements, and to clarify the existing provisions of those agreements in accordance with customary rules of interpretation of public international law." It adds for good measure that "[r]ecommendations and rulings of the DSB cannot add to or diminish the rights and obligations provided in the covered agreements".

It is against this backdrop that we need to reflect on the mandate that the WTO dispute settlement system enjoys. In this connection, I would like to offer a few comments and raise a few questions on two issues arising from recent debates:

- how the system should deal with ambiguity while clarifying the provisions of the WTO Agreements; and

- how it should address the issue of consistency of rulings in the context of the mandated need to provide security and predictability to the multilateral trading system.

Dealing with ambiguity

First, a general comment on the issue of ambiguity in international agreements. While many provisions of international treaties are agreed upon in clear and detailed language, certain provisions may be couched in what international lawyers call "constructive ambiguity," where consensus on precise language could not be reached during negotiations. In the WTO context, when a dispute arises in relation to such an unclear or ambiguous provision, adjudicators are to examine that provision in accordance with customary rules of interpretation and to apply them to the particular case. Some argue that where adjudicators encounter such ambiguity or lack of clarity, they should refrain from examining it and instead leave it for WTO Members to deal with. Others support the need for resolving the interpretative issue so as to make sure that disputes are not left unresolved.

Second, existing treaty language that is vague or ambiguous is distinct from lacunae in international law, that is, where no international law obligation exists. For us, the "customary rules of interpretation of public international law" mean those codified in the Vienna Convention on the Law of Treaties. They say we must begin with the plain text of the treaty provision, but it does not end there. Adjudicators have to discern the "ordinary meaning" to be given to treaty terms in their context and in light of the object and purpose of the instrument in which they appear, and they may have recourse to supplementary means. This interpretative exercise is meant to "clarify", within the meaning of Article 3.2, the content, scope, and limits of treaty obligations even if they are somewhat unclear on the face of the text.

When adjudicators, having applied these interpretative tools, conclude that certain conduct is outside the scope of application of the treaty obligation invoked, they should have no hesitation in ending their analysis

there. If an issue is not regulated in WTO law, WTO Members are entitled to act as they please. For instance, the Appellate Body in *US – Section 211 Appropriations Act* noted the absence of explicit provisions and of an implicit definition of trademark "ownership" in the TRIPS Agreement. The Appellate Body agreed with the panel that this definition "has been left to the legislative discretion of individual countries".[8]

Third, the question arises whether there is a legal basis in the DSU for not deciding on claims, when the matter before the DSB would remain unresolved. Article 3.2 provides that the dispute settlement system serves to clarify WTO provisions in accordance with customary rules of interpretation. So how far should the dispute settlement system go in "clarifying" ambiguous provisions, and where are the limits? There appears to be a tension between the minimalistic approaches favoured by some and the requirements under Article 11 of the DSU for panels to make "an objective assessment of … the applicability of and conformity with the relevant covered agreements" and under Article 17.12 for the Appellate Body to "address" each issue of law and legal interpretation covered in the panel report that is raised during an appellate proceeding.

When we sit in judgement of specific cases, these issues are not always easy to resolve. It is true that the requirement to "address each claim" does not necessarily mean that we need to do so at length. But do these DSU provisions provide WTO adjudicators with the discretion to deny clarifying WTO provisions where such clarification is necessary to resolve the dispute? Do they permit adjudicators to deny exercising jurisdiction to resolve the dispute when it has been properly established?

In this connection it is important to note that a decision not to fully address an issue could, in effect, be a decision in favour of one of the participants, possibly altering the rights and obligations of WTO Members.

There are also cases in which Members raise an issue on appeal concerning "legal interpretations developed by the panel", as contemplated by Article 17.6, without challenging the ultimate conclusion that the panel reached. In raising such issues, Members typically state that they are motivated by systemic concerns. Members may also be concerned about the effect that an interpretation by a panel may have on how they implement a different finding against them. And thus, if left unclarified, an ambiguous or incorrect interpretation may affect the rights and obligations of a WTO Member. In each scenario, the Appellate Body carefully decides, on a case-by-case basis, how to "address" the issue raised on appeal, including whether findings concerning the interpretation of WTO provisions are necessary in order to facilitate the prompt settlement and effective resolution of the specific dispute.

Consistency

The issue of consistency of rulings in WTO dispute settlement is closely connected to the mandated requirement for "security and predictability". As is well known, one reason for creating the Appellate Body was to provide greater guarantees to WTO Members that panel reports would be subject to review, in the context of the adoption of the reverse-consensus principle. The Appellate Body has taken the view that ensuring "security and predictability" implies that, absent cogent reasons, an adjudicator will resolve the same legal question in the same way in a subsequent case.[9] At the same time, it needs to be emphasized that the Appellate Body's approach does not call for a mechanistic or rigid application of this principle. Appellate Body interpretations of certain provisions have evolved over time, as evidenced by the number of AB reports interpreting Article XX of the GATT. Each case has to be considered on its own merits, and cases or issues that appear to be similar may be decided differently when they can be distinguished from earlier cases or when factual scenarios are different.

It is possible that there could be other judicial approaches to "security and predictability" that could emerge from reasoned debate among WTO Members. The AB would consider them when raised by participants

[8] Appellate Body Report, *US – Section 211 Appropriations Act*, para. 189.

[9] Appellate Body Report, *US – Stainless Steel (Mexico)*, para. 160.

in a dispute. But surely it is no one's case that a tabula rasa approach, which consciously sweeps aside the past, could meet the requirements of "security and predictability" as outlined in the DSU. Those who are not enamoured of the need for "security and predictability" in the WTO need only to look at international investment arbitration, and the difficulties caused by the lack of consistency in first-instance arbitration rulings, as an immediate counterfactual of a system without a review mechanism for ensuring coherence and predictability.

Preserving the legitimacy of the WTO's dispute settlement system

My point is that a dispute resolution mechanism acquires its legitimacy, or indeed its wisdom, not from the statute that established it, but from the way it continues to meet the changing needs of its users. The global trading system has changed enormously since the WTO's dispute settlement mechanism was designed and operationalised. The dynamics of global trading relationships have also evolved significantly. The rules and procedures of the system have clearly not kept pace with these developments. It is not for adjudicators to make law by their rulings. That is the job of WTO Members. But sustained inactivity on the legislative front puts more pressure on adjudicators, with attendant risks for the legitimacy of their rulings and their institutions.

WTO Members need to think clearly and deeply about the challenges that confront the WTO dispute settlement system. These challenges require reasoned and systemic dialogue that keeps at the forefront the enormous value of an effective system on the one hand, and the consequences of its paralysis on the other. The issues I have mentioned are meant only to provide some substance to such a debate.

Given the urgency for decisions regarding the AB, inaction is no longer an option. The year-long impasse on the process for appointing AB Members is debilitating the Body. Its reduced strength is undermining the collegiality of our deliberations, and the lack of proper geographical representation threatens its legitimacy.

I need not point out that the reduction in our numbers will cause further delays in appellate proceedings. Unless WTO Members take swift and robust action to remedy this situation, there may soon come a time when appellate proceedings are paralyzed if fewer than three AB Members are available.

Such a paralysis would have profound implications on panel proceedings as well. Indeed, the Appellate Body and panels are part of one dispute settlement mechanism, and one cannot properly function without the other. Where a panel report is appealed, but an Appellate Division cannot be formed to hear that appeal, the adoption of the panel report is suspended until the Appellate Body can complete its proceedings. This would lead to the *de facto* demise of the negative consensus rule that has characterized the WTO dispute settlement system since 1995. Any losing party would be able to prevent the adoption of the panel report by appealing it to a paralyzed Appellate Body.

The implications of the paralysis of dispute settlement for the WTO itself are also obvious. If rules cannot be enforced, is there a point to negotiating them?

New challenges to multilateralism

These challenges must also be discussed in the larger context of the recent challenges to multilateralism. We have witnessed significant unilateral trade measures by key WTO Members that have evoked countermeasures from affected Members. A number of disputes involving such measures have already been filed in the WTO. These disputes will test the WTO dispute settlement system to its limits. It is unfortunate that these developments are taking place at a time when the system is already experiencing huge stress. The current events are a sobering reminder of what is at stake and how the erosion of the WTO dispute settlement system could lead to the re-emergence of power orientation in international trade policy.

As noted, while the WTO dispute settlement system has to enforce existing international obligations, it also has to respect the limits of those rules and identify areas where national sovereignty is not constrained. But WTO Members also need to bear in mind the consequences of their actions on the effectiveness of the international system. In an interdependent world, global problems demand global solutions, and even national problems often require international cooperation.

I would like to conclude by stating the obvious – the institution of a standing body tasked with reviewing panel decisions is widely considered as the crowning achievement of the Uruguay Round of negotiations. Impairing that achievement would deprive the WTO of ensuring the principled and consistent application of multilateral trade rules.

It is our shared responsibility to maintain and preserve the trust, credibility, and legitimacy that the WTO dispute settlement system in general and the Appellate Body in particular have built over more than 20 years. WTO Members must embrace this responsibility and engage in constructive dialogue to ensure the continued good health of a system that is uniquely effective, but which cannot be taken for granted.

ANNEX 5

MEMBERS OF THE APPELLATE BODY (1 JANUARY TO 31 DECEMBER 2018)

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.

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, a visiting professor of law, and the executive assistant to the president 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 an adjunct professor at the Georgetown Law Center and a visiting professor at the University of North Carolina Law School. He has edited books on international trade policy and on international trade and environment, and he has written many articles and monographs on international trade law and policy as a Guest Scholar at the Brookings Institution. He also is the coauthor, 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.

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. Mr 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 organizations 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, Viet Nam (2009 and 2011); the Universidad San Francisco de Quito, Ecuador (2013); and 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.

Hong Zhao (China) (2016-2020)

Madame Zhao received her bachelor's and master's degrees and a Ph.D. in Law from the Law School of Peking University in China. Currently she is a professor at several universities including the Universities of Peking, Fudan, and International Business and Economics. She is also a Council Member of Shenzhen International Arbitration Court. 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). Madame 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, negotiations on the expansion of the Information Technology Agreement, and the China-Australia Free Trade Agreement.

Madame 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, and Shanghai; and the Geneva Graduate Institute. From 1987 to 1989, he worked for governmental and nongovernmental 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 6

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
Hyun Chong Kim	Korea, Republic of	2016-2017
Ricardo Ramírez-Hernández	Mexico	2009-2013 2013-2017

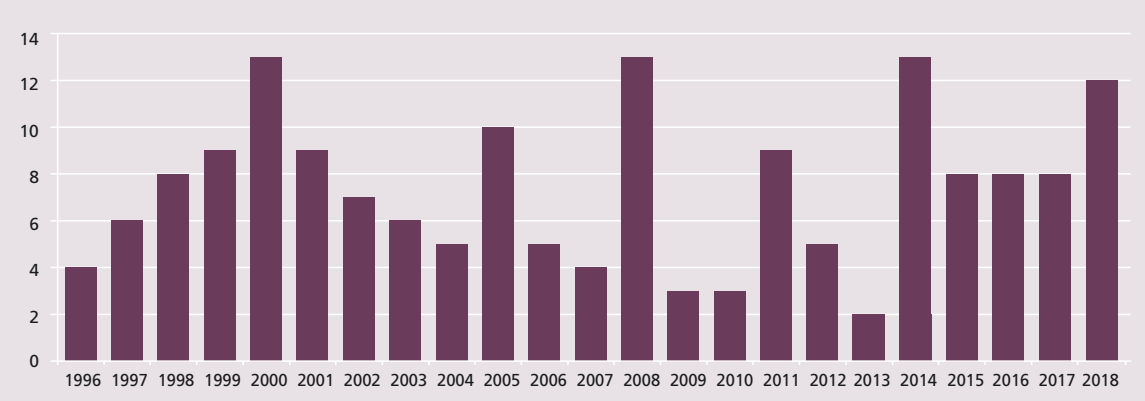
II. FORMER CHAIRPERSONS OF THE APPELLATE BODY

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
Ujal Singh Bhatia	India	1 January 2017-31 December 2017 1 January 2018-31 December 2018

ANNEX 7

APPEALS FILED: 1996-2018[a]

TOTAL NUMBER OF APPEALS: 1996-2018



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

APPEALS FILED: 1996-2018

Year	Notices of Appeal filed	Notices of Appeal in original proceedings	Notices of Appeal in Article 21.5 proceedings
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
2013	2	2	0
2014	13	11	2

Year	Notices of Appeal filed	Notices of Appeal in original proceedings	Notices of Appeal in Article 21.5 proceedings
2015	8[h]	6	2
2016	8	7	1
2017	8	6	2
2018	12	10	2
Total	**170**	**143**	**28**

[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 – HP-SSST (Japan)* and *China – HP-SSST (EU).*

ANNEX 8

PERCENTAGE OF PANEL REPORTS[a] APPEALED BY YEAR OF CIRCULATION[b]: 1996–2018[c]

	All panel reports			Panel reports other than Article 21.5 reports			Article 21.5 panel reports[d]		
Year of adoption	Panel reports circulated	Panel reports appealed	Percentage appealed[f]	Panel reports circulated	Panel reports appealed	Percentage appealed[f]	Panel reports circulated	Panel reports appealed	Percentage appealed[f]
1996	9	6	67%	9	6	67%	0	0	–
1997	7	6	86%	7	6	86%	0	0	–
1998	16	11	69%	16	11	69%	0	0	–
1999	18	11	61%	16	11	69%	2	0	0%
2000	26	15	58%	22	13	59%	4	2	50%
2001	14	11	79%	9	6	67%	5	5	100%
2002	14	10	71%	12	8	67%	2	2	100%
2003	16	13	81%	16	12	75%	0	1	100%[e]
2004	11	5	45%	11	5	45%	0	0	–
2005	18	13	72%	13	11	85%	5	2	40%
2006	9	5	56%	6	3	50%	3	2	67%
2007	10	4	40%	7	2	29%	3	2	67%
2008	13	13	100%	10	10	100%	3	3	100%
2009	4	3	75%	3	1	33%	1	2	100%[e]
2010	11	3	27%	11	3	27%	0	0	–
2011	14	9	64%	14	9	64%	0	0	–
2012	10	5	50%	10	5	50%	0	0	–
2013	5	2	40%	4	2	50%	1	0	0%

	All panel reports			Panel reports other than Article 21.5 reports			Article 21.5 panel reports[d]		
Year of adoption	Panel reports circulated	Panel reports appealed	Percentage appealed[f]	Panel reports circulated	Panel reports appealed	Percentage appealed[f]	Panel reports circulated	Panel reports appealed	Percentage appealed[f]
2014	15	13	87%	13	11	85%	2	2	100%
2015	9	8	89%	6	6	100%	3	2	67%
2016	12	8	67%	11	7	64%	1	1	100%
2017	13	11	85%	11	9	82%	2	2	100%
2018	18	12	67%	14	10	71%	4	2	50%
Total	**292**	**197**	**67%**	**252**	**167**	**67%**	**41**	**30**	**73%**

[a] For ease of comparison, each DS number is counted as corresponding to a separate report, even where the panels issued a single report addressing multiple complaints. The only exceptions to this methodology are with respect to: (i) the total number of panel reports circulated in 1999 which count the panel reports in *EC – Bananas III (Article 21.5 – EC)*, and *EC – Bananas III (Article 21.5 – Ecuador)* as two separate reports; and (ii) the total number of panel reports circulated in 2008 which count the panel reports in *EC – Bananas III (Article 21.5 – Ecuador II)*, and *EC – Bananas III (Article 21.5 – US)* as two separate reports.

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

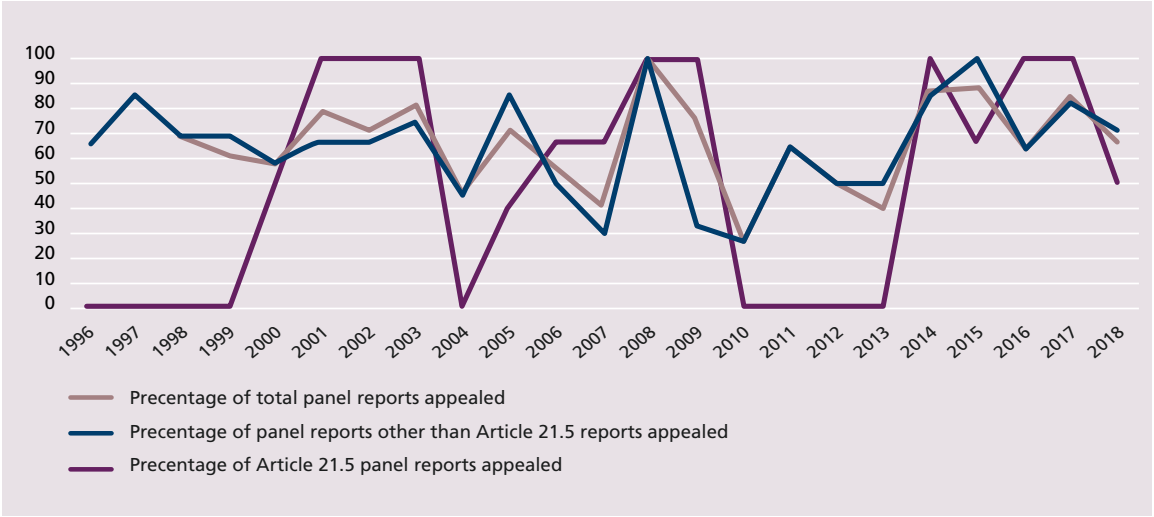
[c] No panel reports were circulated in 1995.

[d] 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.

[e] The panel report in *EC – Bed Linen (Article 21.5 – India),* which was circulated in 2002, was appealed in 2003. Similarly, the panel report in *US – Zeroing (EC) (Article 21.5 – EC),* which was circulated in 2008, was appealed in 2009.

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

PERCENTAGE OF PANEL REPORTS APPEALED BY YEAR OF CIRCULATION: 1996–2018[a]

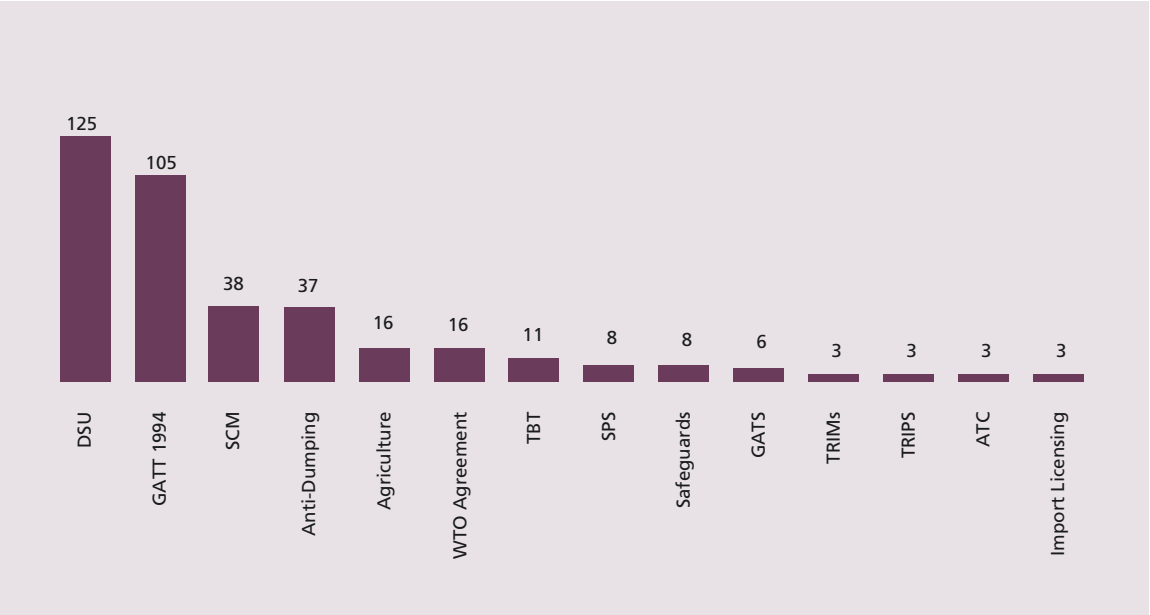


[a] No appeals were filed and no Appellate Body reports were circulated in 1995, the year the Appellate Body was established.

ANNEX 9

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: 1996-2018

The chart below shows the number of times specific WTO agreements have been addressed in the Appellate Body reports circulated from 1996 to 2018.[1]



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

WTO AGREEMENTS ADDRESSED IN APPELLATE BODY REPORTS CIRCULATED: 1996-2018[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
2017	6	0	2	2	1	0	0	0	2	0	1	0	0	0
2018	6	0	6	0	0	0	1	1	1	0	3	1	0	0
Total	**125**	**16**	**105**	**16**	**8**	**3**	**11**	**3**	**37**	**3**	**38**	**8**	**6**	**3**

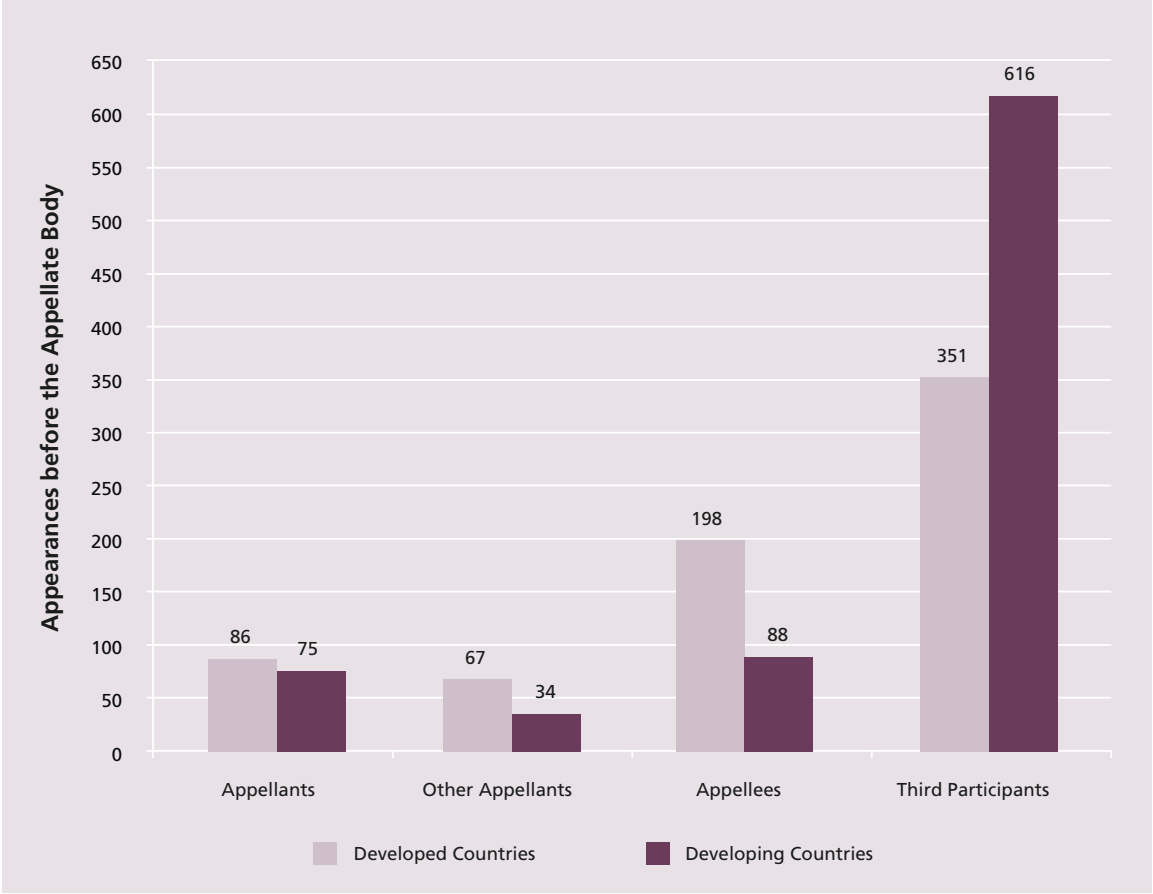
[a] No appeals were filed and no Appellate Body reports were circulated in 1995, the year the Appellate Body was established.

ANNEX 10

PARTICIPANTS AND THIRD PARTICIPANTS IN APPEALS: 1996-2018

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 2018.[1]

WTO MEMBER PARTICIPATION IN APPEALS 1996-2018



[1] No appeals were filed and no Appellate Body reports were circulated in 1995, the year that 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	23	39
Australia	2	2	6	53	63
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	6	7	12	46	71
Cameroon	0	0	0	3	3
Canada	14	10	23	39	86
Chad	0	0	0	2	2
Chile	3	0	2	13	18
China	16	5	11	60	92
Colombia	1	0	0	24	25
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	20	24
Egypt	0	0	0	2	2
El Salvador	0	0	0	6	6
European Union	24	24	55	77	180
Fiji	0	0	0	1	1
Ghana	0	0	0	2	2
Grenada	0	0	0	1	1
Guatemala	1	2	2	14	19
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	50	69
Indonesia	4	1	2	5	12
Israel	0	0	0	2	2
Jamaica	0	0	0	5	5
Japan	7	7	16	75	105
Kenya	0	0	0	1	1
Korea	3	5	7	46	61
Kuwait, the State of	0	0	0	1	1
Madagascar	0	0	0	1	1

WTO Member	Appellant	Other appellant	Appellee	Third participant	Total
Malaysia	1	0	1	1	3
Malawi	0	0	0	1	1
Mauritius	0	0	0	2	2
Mexico	6	6	9	36	57
Namibia	0	0	0	1	1
New Zealand	0	3	8	15	26
Nicaragua	0	0	0	4	4
Nigeria	0	0	0	1	1
Norway	2	1	3	36	42
Oman	0	0	0	4	4
Pakistan	0	1	3	3	7
Panama	1	0	2	3	6
Paraguay	0	0	0	7	7
Peru	1	1	1	7	10
Philippines	3	0	3	2	8
Poland	0	0	1	0	1
Russian Federation	2	0	2	14	18
Saint Lucia	0	0	0	4	4
Saudi Arabia, Kingdom of	0	0	0	18	18
Senegal	0	0	0	1	1
Singapore	0	0	0	3	3
South Africa	0	0	0	2	2
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	1	1	45	47
Tanzania	0	0	0	1	1
Thailand	3	2	5	23	33
Trinidad & Tobago	0	0	0	1	1
Turkey	1	0	0	22	23
Ukraine	0	0	0	4	4
United States	38	25	87	48	198
Venezuela, Bolivarian Republic of	0	0	1	6	7
Viet Nam	1	1	1	9	12
Total	**154**	**117**	**287**	**946**	**1,507**

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

2011 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
EC – Fasteners (China) WT/DS397/AB/R	European Union	China	China European Union	Brazil Canada Chile Colombia India Japan Norway Chinese Taipei Thailand Turkey United States
US – Tyres (China) WT/DS399/AB/R	China	---	United States	European Union Japan Chinese Taipei Turkey Viet Nam
Philippines – Distilled Spirits (European Union) WT/DS396/AB/R	Philippines	European Union	European Union Philippines	Australia China India Mexico Chinese Taipei Thailand
Philippines – Distilled Spirits (United States) WT/DS403/AB/R	Philippines	---	United States	Australia China Colombia India Mexico Chinese Taipei Thailand

2012

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
China – Raw Materials (United States) WT/DS394/AB/R	China	United States	China United States	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey
China – Raw Materials (European Union) WT/DS395/AB/R	China	European Union	China European Union	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey
China – Raw Materials (Mexico) WT/DS398/AB/R	China	Mexico	China Mexico	Argentina Brazil Canada Chile Colombia Ecuador India Japan Korea Norway Saudi Arabia Chinese Taipei Turkey

2012 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Large Civil Aircraft (2nd complaint) WT/DS353/AB/R	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea
US – Clove Cigarettes WT/DS406/AB/R	United States	---	Indonesia	Brazil Colombia Dominican Republic European Union Guatemala Mexico Norway Turkey
US – Tuna II (Mexico) WT/DS381/AB/R	United States	Mexico	Mexico United States	Argentina Australia Brazil Canada China Ecuador Guatemala Japan Korea New Zealand Chinese Taipei Thailand Turkey Venezuela
US – COOL (Canada) WT/DS384/AB/R	United States	Canada	Canada United States	Argentina Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand Peru Chinese Taipei

2012 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – COOL (Mexico) WT/DS386/AB/R	United States	Mexico	Mexico United States	Argentina Australia Brazil China Colombia European Union Guatemala India Japan Korea New Zealand Peru Chinese Taipei
China – GOES WT/DS414/AB/R	China	---	United States	Argentina European Union Honduras India Japan Korea Saudi Arabia Viet Nam

2013

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

2014 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
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 II (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) (Article 21.5 – 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

2017

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Russia – Pigs (EU) WT/DS475/AB/R	Russia	European Union	European Union Russia	Australia Brazil China India Japan Korea Norway Chinese Taipei South Africa United States
US – Anti-Dumping Methodologies (China) WT/DS471/AB/R	China	---	United States	Brazil Canada European Union India Japan Korea Norway Russia Saudi Arabia Chinese Taipei Turkey Ukraine Viet Nam
US – Tax Incentives WT/DS487/AB/R	United States	---	European Union	Australia Brazil Canada China Japan Korea Russia
EU – Fatty Alcohols (Indonesia) WT/DS442/AB/R	Indonesia	European Union	European Union Indonesia	Korea United States
Indonesia – Import Licensing Regimes WT/DS477/AB/R	Indonesia	---	New Zealand United States	Argentina Australia Brazil Canada China European Union Japan Korea Norway Paraguay Singapore Chinese Taipei

2017 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Indonesia – Import Licensing Regimes WT/DS478/AB/R	Indonesia	---	New Zealand United States	Argentina Australia Brazil Canada China European Union Japan Korea Norway Paraguay Singapore Chinese Taipei

2018

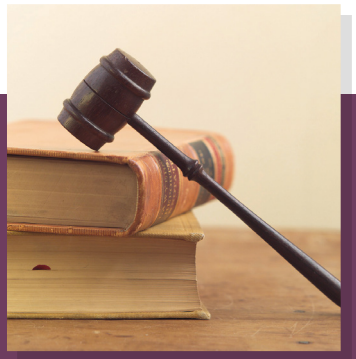
Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Russia – Commercial Vehicles WT/DS479/AB/R	Russia	European Union	European Union Russia	Brazil China Japan Korea Turkey Ukraine United States
EC and certain member States – Large Civil Aircraft (Article 21.5 – US) WT/DS316/AB/RW	European Union	United States	United States European Union	Australia Brazil Canada China Japan Korea
EU – PET (Pakistan) WT/DS486/AB/R	European Union	Pakistan	Pakistan European Union	China United States
Indonesia – Iron or Steel Products WT/DS490/AB/R	Indonesia	Chinese Taipei Viet Nam	Chinese Taipei Viet Nam Indonesia	Australia Chile China European Union India Japan Korea Russia Ukraine United States
Indonesia – Iron or Steel Products WT/DS496/AB/R	Indonesia	Chinese Taipei Viet Nam	Chinese Taipei Viet Nam Indonesia	Australia Chile China European Union India Japan Korea Russia Ukraine United States

2018 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
Brazil – Taxation WT/DS472/AB/R	Brazil	European Union	European Union Brazil	Argentina Australia Canada China Colombia India Japan Korea Russia South Africa Chinese Taipei Turkey United States
Brazil – Taxation WT/DS497/AB/R	Brazil	Japan	Japan Brazil	Argentina Australia Canada China Colombia European Union India Korea Russia Singapore Turkey Ukraine United States
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II) WT/DS381/AB/RW/USA	Mexico	---	United States	Australia Brazil Canada China Ecuador European Union Guatemala India Japan Korea New Zealand Norway

2018 (CONT'D)

Case	Appellant	Other appellant(s)	Appellee(s)	Third participant(s)
US – Tuna II (Mexico) (Article 21.5 – US) / US – Tuna II (Mexico) (Article 21.5 – Mexico II) WT/DS381/AB/RW/2	Mexico	---	United States	Australia Brazil Canada China Ecuador European Union Guatemala India Japan Korea New Zealand Norway



2018